



A NEW WAVE?

ADDRESSING THE CONTEMPORARY USE OF PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT AND COMPLEX ENVIRONMENTS



EXECUTIVE SUMMARY

INTRODUCTION

Is there a new wave of Private Military and Security Companies (PMSCs)? Are international and national regulatory efforts sufficient to ensure appropriate regulation? What are the most promising opportunities to address existing governance gaps?

In October 2021, DCAF launched a series of webinars that aim to illustrate the main shifts in recent years in the private military and security industry, discuss the current regulatory landscape, and show potential solutions to address existing regulatory challenges regarding PMSCs. This document summarizes the interventions and conclusions of the kick-off event. During the event, participants addressed the contemporary activities of two types of actors: On the one hand, “PMSCs”, namely “private business 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.”¹ On the other hand, the panelists refer to “mercenaries”, which are different actors that must fulfill the following cumulative conditions: i. is specially recruited in order to fight in an armed conflict; ii. in fact takes a direct part in hostilities; iii. is motivated essentially by the desire of private gain; iv. is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; v. is not a member of the armed forces of a party to the conflict; vi. has not been sent by a State which is not a party to the armed conflict on official duty as a member of its armed forces.² Most PMSC employees who are not employed to participate in military activities are not considered mercenaries under this criteria. Many of them are also citizens of one of the parties in conflict. Furthermore, it is challenging to demonstrate the motivation for personal gain. Finally, even if it is said that certain private contractors are extremely well paid, it would be exceedingly challenging to confirm whether their pay is significantly higher than that of the military.³

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 conflict (“Montreux Document”), p. 7.

2. Article 47 of Protocol I additional to the 1949 Geneva Conventions.

3. Montreux Document, p. 40.

OVERVIEW OF CONTEMPORARY USE OF PMSCs IN ARMED CONFLICTS

Mr. Jean-Michel Rousseau, Deputy Head of the Business & Security division at DCAF - Geneva Centre for Security Sector Governance, provided an overview of the contemporary use and diversification of PSMCs, based on DCAF's experience in supporting the national-level implementation of norms and good practices in PMSC regulation.

In the 2000s, the increased visibility of PMSCs in situations of armed conflict sparked public interest in the industry. Nowadays, more PSMCs are operating than fifteen years ago, and they are active in more States and with a wider variety of clients. A decline in the use of PMSCs by western governments in Iraq and Afghanistan, and geographical diversification of PMSC contracting in armed conflicts altered the geographic zones where the industry operates. This also translated into a notable shift in offered services by PMSCs in armed conflict. In the last decades, and with the development of new territorial States,⁴ there has been the emergence of a new set of home States⁵ for PMSCs. There has also been a diversification of the place where the PMSCs are operating and a new variety of contracting States.⁶ These developments raise the question of whether we find ourselves in a new 'wave' of PMSCs in armed conflicts and fragile contexts, and whether existing international initiatives and norms to regulate the industry remain adequate.

The 2000s sparked the development of international norms, such as the Montreux Document and the International Code of Conduct (ICoC), in response to the legal and humanitarian issues arising from the increasing use of PMSCs in armed conflict. These initiatives made clear that PMSCs do not operate in a legal vacuum. In addition, the norms and good practices that were developed by soft law have proven their relevance in strengthening private security regulation. Today, the key challenges are the lack of political will and capacities to implement existing norms at the national level.

In the last five years, DCAF has worked with more than 25 countries on reform processes to strengthen their national frameworks. Next to a clear legal framework, international efforts

4. "Territorial States" are States on whose territory PMSCs operate (Montreux Document, Preface, 9(d)).

5. "Home States" are States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the "Home State" (Montreux Document, Preface, 9(e)).

6. "Contracting States" are States that directly contract for the services of PMSCs, including, as appropriate, where such a PMSC subcontracts with another PMSC (Montreux Document, Preface, 9(c)).

should also support the strengthening of the regulatory capacities of States, as well as the oversight capacities of national stakeholders (i.e., civil society, media, and national human rights institutions) to ensure that the PMSC sector is held accountable.

INTERNATIONAL EFFORTS TO ADDRESS THE REGULATORY GAPS REGARDING PMSCs : THE UN WORKING GROUP ON MERCENARIES

Dr. Sorcha MacLeod presented in her capacity as an expert in the United Nations Working Group on the use of mercenaries (hereafter, the Working Group). The Working Group has an explicit and specific mandate to address not only the use of mercenaries, but also other mercenary-related actors and PMSCs. The Working Group has a definition of PMSCs that encompasses the broad nature of these companies by focusing on the services that they provide, regardless of what they are called or how they self-identify. This better captures the human rights risks caused by PMSCs.

In 2020, the Working Group had published and presented a report to the UN General Assembly on the evolving form of mercenaries and the impacts of these actors and PMSCs in contemporary armed conflicts. In this paper, the authors identified five key trends:

- There is an increase in demand and recruitment for mercenaries and other related actors, such as PMSCs.
- There is a particular increase in demand in non-international armed conflicts compared to international armed conflicts.
- There is a proliferation of armed non-state actors who do not necessarily meet the definition of mercenary under international law but certainly can overlap in certain circumstances with PMSCs and mercenaries.
- There is an increasing amount of “proxy wars” characterized by the involvement or intervention of third-party countries in armed conflict situations without being parties to such conflict.
- There is an asymmetry in terms of military capabilities and strategies between the parties to a conflict.

Legally, it is very difficult to define actors as mercenaries. Unlike for PMSCs, there is an international definition of mercenary in the Geneva Conventions Additional Protocol 1. Given its complex and cumulative nature, it is especially hard to prove that someone is a mercenary. For

instance, subjective intent needs to be evident - a notoriously hard task to prove - and the person must be paid considerably more than a soldier in the regular military forces. Recently, the Working Group has noted that in several armed conflicts it can be extremely difficult to distinguish between mercenaries and PMSCs.

Under its mandate, the Working Group can send allegation letters to governments about their obligations to monitor and sanction non-state groups under suspicion of human rights abuses. The authorities can respond to these allegations and explain what they have done to investigate and remedy potential violations. Dr. MacLeod also named three examples of this procedure, namely: the Armenia – Azerbaijan conflict in Nagorno-Karabakh (international armed conflict), and the non-international armed conflict in Libya and the Central African Republic (CAR). Abuses of human rights law and international humanitarian law (IHL), such as forced disappearances and attacks on civilian facilities, have been witnessed in these conflicts. These three cases illustrate very clearly the importance of having proper and effective international regulatory frameworks in place, as well as national frameworks. Moreover, it is crucial to remind States that they have an obligation under international human rights law to protect against abuses carried out by third parties, and that would include private actors, whether they are mercenaries or PMSCs.

There are currently 37 States party to the UN Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN convention on mercenaries) to date. According to Dr. McLeod, there should be a wider international adherence to promote accountability of these actors and build sanctioning and grievance mechanisms for situations of human rights abuse.

INDUSTRY PERSPECTIVE ON THE USE OF PMSCs AND MERCENARIES

Professor Sean McFate of Georgetown University and National Defense University provided an overview of the use of PMSCs and mercenaries from an industry perspective. According to Prof. McFate, mercenary groups are organized by command languages; the most common ones nowadays are English, Spanish and Russian. The team's language also influences the way they fight. The new wave of mercenaries is due to the emergence of a free market within the field.

Back in the early 2000s, most mercenaries operated under Anglo-Saxon companies' mandates. However, there is an increased offer, diversification and multiplication of these groups operating nowadays for various clients. The reason behind this evolution may reside in the way warfare

has evolved. For instance, the developments of cyber-enabled activities and the fast flow of information through the internet make it harder for parties to a conflict to operate anonymously. Therefore, using mercenaries allows them to plausibly deny any involvement in armed conflict scenarios. In the case of Nigeria, a country with a strong military, the use of mercenaries against Boko Haram aims to avoid having national institutions violating international human rights and humanitarian law. Another example would be the civil war in Libya, which according to Prof. McFate can be defined to a certain extent as a proxy war fought by mercenaries.

Thus, the resurgence of mercenaries is a multilayer problem:

- First, the more they operate in conflict areas or complex environments, the more there is a demand for them in such circumstances. In the future, their clientele could even go beyond state authorities. For instance, oil companies could request their services to protect oil fields. This could lead to skirmishes with rival companies' armed guards, worsening the spiral of violence.
- Second, mercenaries may be involved in criminal functions.
- Finally, the lack of transparency in the sector can result in the artificial creation of more demand for these services.

If the status quo continues, there will be a phenomenon of the commodification of conflict. The more mercenaries will enter the market, the more they will look out for clients, increasing, therefore, the perception of a securitized environment. This will increase the demand for mercenaries both from States and the private sector. This process leads to various risks such as the impossibility of contract enforcement leading to treachery; an increase of elongated wars for profit; lowers barriers of entry to conflict; more criminality and lack of safety or changes in warfare. Hence, shall the commodification and privatization of such services continue to grow, there will also be an increase in the number of mercenaries as a result. In turn, the distribution of power in international relations will also change.

REGULATORY MECHANISMS AND THEIR POTENTIAL FOR DEVELOPMENT

According to Mr. Rousseau, what is required is not necessarily additional international regulation, but first and foremost, the political will to apply the existing norms and build the capacity of national mechanisms to oversee the sector.

Dr. McLeod considers the small number of States party to the UN convention on mercenaries (37 States) and the ambivalence of the international community on this topic as signs of the dysfunctionality of the current regulatory system, and are impacting the development and effectiveness of the regulatory system.

Even after fifteen years of debate, the discussions still revolve around definitions rather than concrete measures on how to integrate more States in the existing mechanisms. Mercenary involvement allows for plausible deniability, which is a challenge for accountability of parties to an armed conflict. Consequently, one solution to overcoming its allure could be to create more transparency and to raise awareness of the public by supporting civil society in their monitoring activities, and journalists or researchers in their investigations of mercenaries.

CONCLUSION

As the private military security industry is growing on a global scale and other mercenary-like actors continue to operate in armed conflicts and complex environments, the necessity for effective regulation has also shifted. As a conclusion, several recommendations by the various speakers can be highlighted:

- To promote accountability of the PMSC industry, it is crucial to build the capacity of national authorities to effectively implement existing international norms and good practices.
- Besides strengthening national regulation of PMSCs, States should engage and support the existing international initiatives like the Montreux Document and the International Code of Conduct.
- Governments should be diligent when contracting PMSCs through public procurement, which would build economic pressure on companies and nudge them to respect the law.
- Building capacity and empowering civil society, media, and researchers to monitor PMSCs and mercenary groups is one solution in combatting violations and promoting transparency of the sector.
- It is necessary for States to ban the mercenary activity.

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