

Regulating and Monitoring Private Military and Security Companies in United Nations Peacekeeping Operations

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Introduction

The nature of United Nations (UN) peace operations means that UN operations will often be deployed in areas where there are serious security concerns, not only for local populations, but also for the UN operations themselves. Attacks on UN operations are becoming more and more common. Over the last ten years, there have been significant attacks on UN operations in Iraq, Afghanistan, Nigeria and Algeria. While in the past, the UN symbol provided a measure of protection, increasingly, it is becoming a target. This disturbing trend underlines the need for effective security wherever the UN is deployed, and has led to an increased use of armed private security companies.

The topic for my presentation is “regulating and monitoring private military and security companies in UN peacekeeping operations”. At the outset, I should note that the UN does not use private security companies for the purpose of providing personnel to serve in UN operations as “UN peacekeepers”. Members of military contingents, i.e., the “blue helmets”, are always provided by Member States. That said, the UN has a long history of using private security companies. Almost all UN operations use private security companies for some purpose. For the most part, these are unarmed local contractors who provide static access control at UN premises and at the residences of staff in field locations. However, over the last 10 years, the use of private security companies has expanded in a few cases to include mobile security to

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relief and humanitarian convoys. Today, the use of armed private security companies is becoming more common, though is strictly limited to high-risk duty stations and as a matter of “last resort”.

Regulatory framework

One of the questions that I have been asked to address is “what policies, or instruments, if any, have been developed to ensure compliance of private security companies with standards of conduct derived from international humanitarian law and human rights law in the context of UN operations?” This question is very timely as the UN has very recently developed a policy with respect to its use of armed private security companies, which includes mechanisms to encourage respect for international human rights and humanitarian law.

Before I describe the policy, I will briefly outline the legal framework of peace operations, so as to provide some context against which the policy can be understood. UN peace operations are usually established pursuant to a mandate from the Security Council and with the consent of the host State. While the host State agrees to cooperate with the UN operation and provides it with certain privileges and immunities so that it can function in the host State, the operation and its members are also required to respect local laws and regulations. In addition, the host State agrees to provide security for the UN operation, its members and associated personnel, and to apply the provisions of the Convention on the Safety of UN and Associated Personnel. This legal framework is set out in the status-of-forces/mission agreement (SOFA/SOMA)² entered into with the host State. Members of UN peace operations comprise persons with whom the Organization has a direct contractual relationship³

² See “Model status-of-forces agreement for peacekeeping operations” (SOFA), UN document A/45/594 of 9 October 1990. As per paragraph 2, the model, *mutatis mutandis*, may also serve as the basis for an agreement with the host country in operations where no United Nations military personnel are deployed, and will be referred to as the “status-of-mission agreement” (SOMA).

³ Members of the operation with whom the Organization has a direct contractual relationship include “UN officials” and “experts on mission”, such as staff officers, military observers, and individually recruited police officers.

and personnel provided *en bloc* by governments, such as members of military contingents and members of formed police units. These personnel are accorded certain privileges and immunities under the SOFA/SOMA.

The UN regularly engages contractors to provide a range of goods and services to its peace operations⁴. Depending on the needs of the particular operation, these may include armed private security companies. Contractors are not considered “members” of the peacekeeping operation, but as independent third-parties who provide goods or services to the UN operation under the terms of a commercial contract. Although the model SOFA/SOMA of 1990 does not include third-party contractors in any of its provisions, more recent SOFAs and SOMAs concluded with host governments routinely set forth certain facilities for them. These include, for example, facilities with respect to obtaining visas, exemption from taxes and duties on goods which are for the exclusive use of the UN operation, and freedom of movement. However, contractors are not accorded any immunity from local jurisdiction. As such, when contractors provide services for UN operations, they and their personnel are subject to the laws of the host State, and to its jurisdiction in the event of any wrongdoing.

As such, in basic terms, the regulatory framework for the use of private security companies derives from the commercial contract between the UN and the company, and the laws of the host State.

UN policy

Until recently, the UN did not have a common policy concerning the use of private armed security services and the conditions under which such services should be engaged. Instead, companies were engaged on an “ad hoc” basis, whenever other options were either unavailable or insufficient to meet the UN’s needs. The lack of a

⁴ Such goods and services may include, for example, the supply of equipment, provisions, fuel, spare parts and means of transport for the UN operation.

policy was noted by a working group of the Human Rights Council, which in August 2010 reported to the General Assembly that the “UN lacks a firm system-wide policy governing the hiring of private military and security companies, including issues related to the vetting and monitoring of the companies and their personnel”. It advised the Organization to “take precautionary measures to ensure that when it outsources its security and protection functions, it does so in accordance with the Charter of the United Nations and with international human rights standards and ... with proper management and oversight”⁵. In May 2011, following broad consultations, the Secretary-General decided on a policy for the use of armed private security companies which requires that the use of such companies be governed by a clear accountability framework. The policy is limited to the UN engaging security and protective services provided by armed private security companies.

The policy, which remains in the process of implementation, requires that the UN only engage armed private security companies when all other options are unavailable. In this connection, I should note that not all UN peace operations include military components. Primary responsibility for the security and protection of UN personnel, premises and property rests with the host government. In situations in which the operation does not have a military component and the host government is unable to provide security protection, security services may be provided by an alternate member State. A current example of an alternate State providing security for a UN operation is that of the “International Security Forces”, led by Australia, which provides security support for UNMIT, the UN’s peacekeeping operation in Timor-Leste. However, where that is not possible, armed private security companies may be engaged by the Organization on an exceptional basis in high-risk environments when the threat conditions and programme-need warrant it. The policy specifies that the UN may only use services provided by armed private security companies for the following two purposes: (i) to protect UN personnel, premises and property; and (ii) to provide mobile protection for UN personnel and property.

⁵ “Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.” UN document A/65/325, paragraph 31.

The UN recognizes that there are significant risks associated with the use of private armed security companies, particularly in insecure environments, in which local law and order may have broken down. Unlike members of military contingents who participate in UN operations as “blue helmets”, personnel who provide security services are not subject to a military chain of command and national accountability mechanisms. In order to mitigate such risks, which include not only risks to the local population, but also to the image and credibility of the UN, the UN’s policy requires that certain measures of due diligence are undertaken to ensure that the companies to which it outsources security and protection functions, are reputable, regulated, and may be held accountable. In this connection, detailed mandatory selection requirements have been developed for engaging an armed private security company, as well as a model contract which sets out the obligations of such companies, including standards of conduct for their personnel.

In preparing the policy, the UN has benefitted from the excellent work that the Swiss Government, in cooperation with the ICRC, has done to develop best practices and guidelines to be followed by States and private security companies. 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”* and the *“International Code of Conduct for Private Security Service Providers”* which emerged from these efforts, serve as a very useful aid for the UN in the selection of an armed private security company. Based on these documents, as well as on the various inputs received from within the UN system of organizations, the policy sets forth certain requirements which must be met in order for companies to be considered eligible to provide services for the UN.

As a pre-condition for being considered a “qualified vendor” and thus able to bid for the provision of services to the UN, a prospective company must meet the following criteria:

- It has subscribed to the “International Code of Conduct for Private Security Service Providers of 9 November 2010”;
- It has been in the business of providing such services for at least 5 years;
- It is currently licensed to provide its services in its “home state”, that is the place of registration/incorporation;
- It is currently licensed to operate as a private security company in the territory where the UN requires its services, including licenses to import, carry and use firearms;
- It screens personnel for criminal convictions, including for any breach of international criminal or humanitarian law, and confirms that the personnel employed by the private security company to deliver services to the UN have been subject to such screening;
- It provides regular relevant training to its personnel, for example with respect to the International Code of Conduct, the Use of Force Policy, Weapons training and management, human rights law and application, as well as on preventing sexual harassment.

With respect to the use of force, the UN requires the armed private security company to develop a “use of force policy” appropriate for the conditions where it is required to operate. The policy must be consistent with the applicable local laws and to the extent possible, consistent with the “use of force policy” of the Organization. In this regard, the private security company’s use of force policy must be at least as restrictive (and more restrictive if required by local law) as the Organization’s use of force policy. The UN’s use of force policy is quite restrictive. Any use of force by a UN security officer must be reasonable and proportional to the threat and the minimum required to negate that threat. The officer must also determine that the force is necessary, under the circumstances known at that time, to negate the threat and that there is no other reasonable alternative available. Use of deadly force may only be used for self defence or to protect other persons against imminent threat of harm. Deadly force cannot be used to protect property.

These requirements are set forth and further elaborated in the model contract that has been developed to engage private security companies. The model contract also contains provisions requiring the private security company to prevent sexual exploitation or abuse by its personnel; to warrant that it is not engaged in any practice inconsistent with the Convention on the Rights of the Child; and that it is not engaged in the sale or manufacture of anti-personnel mines or components utilized in the manufacture of such mines. The contract also provides that a breach of any of these requirements entitles the UN to terminate the contract without liability for termination, or any other liability.

Monitoring and accountability

With respect to monitoring and accountability, the policy requires that any armed private security company contracted by the UN will come under the authority and direction of the appropriate UN entity. This means that once engaged by the UN, armed private security companies are subject to regular oversight and review by the applicable UN staff in the duty station where the services are provided. Such oversight includes UN review of the company's performance and contract implementation. Such review would encompass compliance with the terms of the contract, including the conduct of the contractor's personnel and their compliance with the applicable standards of conduct as set out in the contract. As mentioned earlier, these include applicable local, national and international laws, the International Code of Conduct, the provisions concerning child labour and the sale/manufacture of anti-personnel mines, and the measures to prevent sexual exploitation and abuse by the employees or persons engaged by the contractor. As noted, if the contractor fails to meet the conditions specified under the contract, the UN has the right to terminate the contract.

There are also other forms of accountability. Personnel employed by such companies will be subject to the laws and jurisdiction of the host State. In the event that the States of nationality of such personnel have extended the jurisdictional reach

of their laws, such personnel may also be subject to the criminal jurisdictions of their States of nationality. The companies themselves might also be subject to legal action in the States in which they are incorporated. Any failures by such companies to comply with the terms of their licenses may also result in the loss of their licenses.

Implementation

Finally, I have been asked to address how successful have these steps been in preventing non-compliance, and whether there is a need for additional instruments / tools / support in this area. As I mentioned earlier, this is a very new policy, which remains in the process of being implemented. As such, it still has to be put to the test. However, I am confident that close attention will be paid to the implementation of the policy, both within the Organization and within the larger international community.

As noted earlier, the UN's use of armed private security companies is strictly limited to high-risk duty stations and as a matter of last resort. The UN would of course prefer to use personnel contributed by member States to address its security needs. However, in circumstances where this is not possible and the UN is required to use private companies, the policy which I have outlined brings together a number of important elements, which if implemented effectively, may make a significant contribution towards preventing misconduct and in ensuring accountability. If prospective companies are subject to rigorous screening with respect to their previous conduct prior to their engagement by the UN, are held to the International Code of Conduct, including training requirements, and their conduct is closely monitored when they perform their services, the scope for misconduct and any breaches of international human rights and humanitarian law is greatly reduced.

Concerning criminal accountability, the UN is not, of course, generally in a position to be able to exercise criminal jurisdiction itself in respect of breaches of the law. The exercise of criminal jurisdiction is a matter for the host State, or the State of nationality of a contractor, if such State has extended the jurisdictional reach of its

laws. However, the Organization would cooperate with national authorities to ensure criminal accountability, and may, depending on the circumstances in a given case, terminate its contract with the company in the event that a company fails to cooperate with national authorities. In this connection, it is important that the broader international community work together with the UN to ensure that contractors may be held accountable.