35TH ROUND TABLE ON CURRENT ISSUES IN INTERNATIONAL HUMANITARIAN LAW: "PRIVATE MILITARY AND SECURITY COMPANIES"

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Background on South African Position on International Efforts relating to the Control of Private Military and Security Companies

South Africa's constitutional and foreign policy imperatives derived from a long national liberation struggle that required the Mandela Government, elected in 1994, to act in order to prohibit mercenary activities and regulate the actions of South African companies and nationals in areas of armed conflict. Of special concern was the undermining of the stability, growth and democracy of the African continent by military companies operating from South Africa and using the service of South African nationals as mercenaries.

The most effective method of regulation was through domestic legislation: South Africa became one of the first countries in the world to adopt legislation to prohibit mercenarism and to control the activities of companies providing military-related services.

South Africa remains concerned about the use of mercenaries in conflicts, especially Africa, and is of the view that more effective international control mechanisms should be put in place.

While South Africa has participated in the negotiation of the Montreaux Document on pertinent legal obligations and good practices for States related to operations of private military and security companies during armed conflict. South Africa welcomes its reconfirmation of the applicability of the norms of International Humanitarian Law to all actors in armed conflicts, but considers it only as a starting point for the elaboration of a binding international instrument for the control and regulation of the actions of PMSCs, and to hold them accountable for violations of International Humanitarian Law and human rights law.

South Africa has noted the work of the UN Working Group on Mercenaries in this respect and its adoption of the draft UN Convention on the Regulation, Oversight and

Monitoring of Private Military and Security Companies. This represents a starting point for the development of an effective legally-binding international instrument.

South Africa urges the International Humanitarian Law community to strengthen the application and implementation of International Humanitarian Law by focusing their efforts on the development of such an instrument.

South Africa is currently at the forefront in this respect and we are chairing the Human Rights Council's Open-ended Inter-governmental Working Group with the mandate "to consider the possibility of elaborating an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by 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". The Working Group had a successful meeting in Geneva in August 2012.

The Current Regional and International Frameworks:

The following international instruments are relevant to the control of mercenaries:

OAU Convention for the Elimination of Mercenarism in Africa, 1977:

- Only 30 ratifications, entered into force in 1985, South Africa did not ratify as the definition of mercenaries contained in the Convention is more limited than the definition contained in its national legislation. However, the South African liberation movements supported this Convention in principle.
- Limited scope: the crime of mercenarism covers only activities committed "with the aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another State" (Art 2(a)).

*Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2012) (*not in force):

- Criminalises mercenarism and places this crime under the expanded criminal jurisdiction of the Court.

International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 1989:

- 32 ratifications, entered into force in 2001, South Africa did not ratify.

Legislative and policy steps taken in South Africa to ensure compliance by PMSCs with standards of conduct derived from IHL and human rights law:

***Regulation of Foreign Military Assistance Act,* (Act No 15 of 1998):**

- The Constitution provides in Section 198(b), in one of the principles guiding national security, that the resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally and internationally, except as provided in terms of the Constitution or national legislation.
- The new democratic Government elected in 1994 declared its intent to base its foreign policy on the principles of human rights and to strive to enhance international peace and security.
- Besides these Constitutional and policy imperatives, the activities of South African PMSCs (e.g. Executive Outcomes) in especially African but also other countries, and the trade in arms between South African companies and countries in conflict necessitated action by Government. In this respect, South Africa's decades-long military actions in neighbouring states resulted in a highly-trained cadre of military operatives, who then morphed into private military companies, operating from South African territory and recruiting South African nationals, creating permanent organisations that could enter into contracts with foreign entities for the provision of a wide range of mercenary-related services. The actions of these entities in especially Africa, often linked to destabilising conflicts on the continent, required the South African Government to take effective action to establish an integrated and transparent system to address the issues of mercenaries, PMSCs and the conventional arms trade. While it was always the South African position that a legally-binding international instrument should be negotiated, the immediate concerns about the actions by South-African registered companies and nationals required effective national control, and the *Regulation of Foreign Military Assistance Act* was enacted, which:

    (a) prohibits mercenary activity (defined as the direct participation as a combatant in armed conflict for private gain) as well as related activities: the recruitment, use, training or financing of mercenaries, or engagement in mercenary activities (Section 2);

    (b) regulates the rendering of, or the offer to render, foreign military assistance to any state, organ of state, group of persons or other entity or persons, by requiring that authorisation must have been obtained from the NCACC (Section 3).

- "Foreign military assistance" widely defined as: "military services or military-related services, or any attempt, encouragement, incitement or solicitation to render such services, in the form of:

    A. military assistance to a party to an armed conflict by means of:

        (i) advice or training;

        (ii) personnel, financial, logistical, intelligence or operational support;

        (iii) personnel recruitment;

        (iv) medical or para-medical services;

        (v) procurement of equipment.

    B. security services for the protection of individuals involved in armed conflict or their property;

    C. any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state;

    D any other action that has the result of furthering the military interests of a party to the armed conflict, but not humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict".

- Except in cases of actions aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a State, the trigger for applicability is the existence of an armed conflict.

- Extraterritorial application: jurisdiction by South African courts over acts committed outside the Republic, as long as there is a link to South Africa.

Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006 **(Act No. 27 of 2006):**

- Intended to replace the *Foreign Military Assistance Act,* not yet in force.
- Provides for a State to be proclaimed as a regulated country by the NCACC: where an armed conflict exists or is imminent: assistance regulated in both regulated and other countries in armed conflict.
- Enlistment of South African citizens/ permanent residents in armed forces other than the South African National Defence Force prohibited, unless authorised by NCACC.
- Regulations aimed at preventing the recruitment of South African nationals by PMSC's abroad must still be drafted and has delayed its entry into force: this is at

present a major concern as the South African authorities do not know enough of how they are being recruited.

Implementation of Geneva Conventions Act, 2012 **(Act No. 8 of 2012):**

- Incorporates the Geneva Conventions and Additional Protocols into South African domestic law.
- Criminalise contraventions of the Conventions inside the Republic and contraventions by citizens of the Republic outside the Republic (extraterritorial jurisdiction).

Usefulness of the Montreaux Document in this endeavour:

The South African legislation was adopted before the Montreaux Convention was finalised.

Difficulties faced in developing law and policy in this area:

- South Africa was one of the first countries to develop legislation, and as there were few international precedents, had to develop a new system of control, and new definitions in its legislation.
- Investigations and prosecutions done by a specialised unit of the National Prosecuting Authority (NPA).
- Practical problems faced by the NPA:

  - Witnesses: operators in this industry form a band of brothers who act in solidarity do not split on one another, getting an insider as a witness is almost impossible;
  - Violations of the prohibitions often take place in countries in conflict: difficult and dangerous to investigate;
  - Recruitment often takes place abroad which complicates investigations;
  - Proving the existence of an armed conflict (trigger in both the Acts): to proclaim a country a regulated country in terms of the new act is diplomatically sensitive, in a situation where there has not been such a proclamation, the existence of an armed conflict must be proved in court, expert witnesses must be called;
  - Inadequate international cooperation: States themselves use PMSCs and are often not willing to cooperate in investigations;
  - Government often in a difficult position: must often provide consular assistance to families of PMSC personnel under investigation if they get problems in countries where they operate!
  - PMSCs are big business: many companies just do not apply in order not to run risk of losing lucrative contracts;

Impact of those measures:

- Some companies (like EO) did disband after the 1998 legislation or started to operate from other countries;
- The disastrous "Wonga Coup" where a 2004 plot to overthrow the government of Equatorial Guinea and in which former British Prime Minister Thatcher's son, Mark, was involved, went wrong and the mercenaries were arrested in Zimbabwe and Equatorial Guinea, and subsequent prosecutions appears to have had the effect to at least stop these type of mercenary activities from being planned and organised from South African territory.

Besides the Montreaux Document, what other tools could help States implement their international obligations and what other recommendations could be made in this respect?

- While the effective implementation of national legislation may face obstacles, more domestic control in more States will close some of the regulatory gaps that presently exist.
- Effective mutual legal assistance is imperative for successful investigation and prosecution of crimes (international cooperation on drugs an example of an effective system).
- A distinction should be drawn between the activities of Private Security and Private Military Companies, also as concerns the legal regulation thereof: this is the case in South Africa.
- Self-regulatory systems are not enough: for effective regulation, a binding international instrument must be developed, which must also provide for the rights of victims, reparations and the obtaining of justice.
- Foreign states and companies must respect the South African law and refrain from recruiting South African nationals. The fact that many South Africans have double citizenship, make it easier for foreign companies to recruit them and turn a blind eye to the South African legislation. The disrespect for national law strengthens the case for a binding international convention.