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Private military and security firms and the erosion of the state monopoly on the use of force

Committee Opinion¹

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Kimmo SASI, Finland, Group of the European People's Party

A. Conclusions of the committee

The Committee on Legal Affairs and Human Rights warmly welcomes the report by Wolfgang Wodarg on private military and security firms and the erosion of the state monopoly on the use of force. It is timely and covers in a pertinent way many important political issues, such as the erosion of the authority of states, loss of democratic oversight and accountability, impunity and the “conflict of interest” situation in which such companies operate. The amendments submitted by the Committee on Legal Affairs and Human Rights support and further strengthen the critical approach adopted by the Political Affairs Committee and aim at clarifying and completing some provisions of the draft recommendation from a legal point of view.

B. Amendments proposed to the draft recommendation

Amendment A (to the draft recommendation)

In paragraph 6 of the draft recommendation, replace the second part of the first sentence and the beginning of the second (“... it seems difficult to prohibit them. However, it ...”) by the following text:

“States should make every effort to retain and regain full control over the activities of PMSCs, which should be limited as much as possible in order to avoid and, as the case may be, reverse the erosion of the states’ monopoly on the exercise of force. It ...”.

Amendment B (to the draft recommendation)

In paragraph 6 of the draft recommendation, add the following new sentence at the end:

“The legal framework shall take adequate account of the important differences between private military firms on the one hand and private security firms on the other.”

Amendment C (to the draft recommendation)

In paragraph 8 of the draft recommendation, first sentence, replace the words “are bound by general provisions of international humanitarian law” by the words “are bound first and foremost by the law of the land of the country in which they operate, as well as by general provisions of international humanitarian law.”

1. See [Doc. 11787](#) tabled by the Political Affairs Committee.



Amendment D (to the draft recommendation)

At the end of paragraph 13.15 of the draft recommendation, add the following sentence:

“It is understood that any such self-regulation merely complements and does not replace the control of legality exercised by the competent state law enforcement bodies, which shall be seized automatically of any violations encountered by the proposed self-regulation mechanisms”.

C. Explanatory memorandum, by Mr Kimmo Sasi

1. The Committee on Legal Affairs and Human Rights warmly welcomes the report by Wolfgang Wodarg on private military and security firms and the erosion of the state monopoly on the use of force. It is timely and covers in a pertinent way many important political issues, such as the erosion of the authority of states, loss of democratic oversight and accountability, impunity and the “conflict of interest” situation in which such companies operate: their future profits depend on the prolongation of conflicts.
2. The subject of the report also touches on a large number of legal issues pertaining to international human rights and humanitarian law, constitutional law, and national and international criminal law, as well as several areas of national and international private law (contracts and torts, corporate and employment law, as well as conflicts). I should like to stress from the outset that neither the report of the Political Affairs Committee nor the present opinion can adequately cover all these issues, and I therefore fully support the proposal in the draft recommendation that the Committee of Ministers should address this issue and prepare a comprehensive legal instrument aimed at regulating the relations of its member states with PMSCs. As to the legal nature of such an instrument, I do consider it necessary that the objective should be a binding legal instrument, such as a framework convention, which should also be open for signature by countries which are not members of the Council of Europe. A clear distinction should be made between firms dealing with military-style services on the one hand and (domestic) security tasks on the other.
3. Whilst I share, with regret, Wolfgang Wodarg’s point of view that it is probably too late for an outright prohibition of private military and security companies (PMSCs), some rolling back or reconquering of terrain already lost by the states – if I may indulge in using some military-style language – should still be possible. Let us not be defeatist! Every state has the duty to guarantee the security of its citizens, as a matter of human rights. The proper fulfilment of this duty is also the best way to make PMSCs superfluous.
4. I cannot agree with the statement in the explanatory report² that the development of PMSCs can be explained by “the general trend – in line with the neo-liberal concept of reducing state activity to its core tasks and leaving the rest to the market, including internal as well as external security needs”. While it is indeed disputed by some neo-liberals that the state should continue to be responsible for basic infrastructures, education and social protection, the provision of internal and external security belongs to the very core of state activity, even in the classical liberal concept of the “night-watchman state”, along with providing justice through the court system and ensuring good relations with foreign states through diplomacy.
5. I also disagree with the rapporteur’s main premise that the use of PMSCs helps “to increase the limited means available to governments under downsized defence budgets”.³ When military and private security services are “outsourced” by the state to private contractors, in the end the taxpayer has to shoulder not only the actual cost of paying and equipping the private “soldiers” (or mercenaries) deployed under the contract, but also the contractor’s and other intermediaries’ considerable profit margins. Whilst some of these expenses may be reduced by “low-cost” employment conditions and/or compromises on equipment and the qualifications of staff, any such compromises on quality also come at a cost, namely in terms of the quality of the services provided and possible glitches which can cause much damage in terms of human lives as well as in the destruction of property.
6. The Assembly should therefore have the courage to send a clear political signal in the sense that the explosive growth of PMSCs, which are encroaching on classical state functions and are not in line with all three core values the Council of Europe defends – democracy, the rule of law and human rights – shall be reigned in and brought under the effective control of states.

2. Paragraph 22.3.

3. Paragraph 22.2.

7. In order to devise appropriate regulations and limitations concerning the activities of PMSCs, it is helpful to distinguish between “military-type” and “police-type” services, the former often being provided abroad (outside the company’s home state), and the latter being provided domestically. The report of the Political Affairs Committee mainly covers the “military-type” services, or, let us call a spade a spade, the activities of mercenaries. The police-type services of PMSCs tend to raise different legal issues, although certain grey zones and overlaps exist. They deserve the same level of attention from the Council of Europe, but they must be addressed distinctly. In fact, whilst the activities of mercenaries are a worldwide problem that has been taken on, for better or for worse, by the United Nations, the outsourcing of classic police functions to private security firms falls very much within the remit of individual European countries, all of which are bound by the same standards of human rights and the rule of law. Privatisation of police-type services is therefore a particularly suitable subject for co-ordination and harmonisation in the framework of the Council of Europe.

8. The Committee on Legal Affairs and Human Rights wishes to stress the risk of impunity raised in paragraph 7 of the draft recommendation. PMSC personnel have indeed committed serious human rights violations,⁴ and the complicated contractual and diplomatic relations involved (between the staff member and the PMSC, between the PMSC and its home state, often via intermediaries, and between the home state and the state of deployment) make it very difficult, if not impossible, to bring perpetrators to justice. Most importantly, any contractual clauses excluding liability are null and void, as they are in fact contracts to the detriment of third parties (the victims of any violations). The committee intends to address the issue of impunity of PMSC personnel in its report on impunity in Europe, which it intends to submit during the Assembly part-session in June 2009 in the framework of the periodic debate on the state of human rights in Europe.

Reporting committee: Political Affairs Committee.

Committee for opinion: Committee on Legal Affairs and Human Rights.

Reference to committee: Reference No. 3370 of 1 October 2007.

Opinion approved by the committee on 26 January 2009.

Secretariat of the committee: Mr Drzemczewski, Mr Schirmer, Ms Maffucci-Hugel, Ms Heurtin.

4. See Amnesty International, Comments on the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to the Operations of Private Military and Security Companies during Armed Conflict, 14 October 2008, AI Index IOR 30/010/2008.