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Involvement of Private Military and Security Companies in the Armed Conflict in Ukraine

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Abstract: This article examines the legal challenges regarding the interpretation of the applicable national legislation on military operations in Ukraine, as well as the legal concerns and discrepancies regarding the classification of the activity of private military and security companies in international armed conflicts or internal tensions. An important element of this article is the analysis of the previous Alexander Alexandrov and Yevgeny Yerofeyev in 2016 both for the entire Ukrainian judiciary in general and for the prosecution of foreign nationals who are directly involved in hostilities in particular.

Keywords: Ukraine; armed conflict; direct participation; private military and security companies; national legislation

From February to March 2014, private companies from the USA, Poland and the United Kingdom operated in the country on the basis of contracts concluded with the government from Kiev. They perform a number of functions such as: operational and strategic planning, command and personnel training, protection of individuals and private buildings. There is no reliable information on the direct participation of employees of these private military and security companies in hostilities.

Ukraine has traditionally been attractive to such companies. Odessa, due to its favorable geographical position and regional characteristics, has become one of the largest transshipment points for people wishing to take part in armed conflicts around the world³.

Analyzing the place and role of private military and security companies (PMSC) in Ukraine, it should be noted that in 1995, Galeotti estimated that there were about one million Kazakhs in Ukraine with an ambiguous relationship with both Russia and Ukraine. He also said that while Ukraine had tried to pacify them, they were “a potential problem for Ukrainians” because some, especially the Kazakhs from Lugansk, had encouraged Russian Kazakhs to claim parts of Ukraine, especially of densely populated areas by Russians. To support such loyalty, the Ukrainian authorities also used Kazakh units to protect their borders (Galeotti, 1995, p. 58).

They had limited success in this regard, as several reports revealed that both Russian and Ukrainian Kazakhs played a significant role in the Russian occupation of Crimea, as well as in the war that followed in the Eastern Ukraine. Paramilitary groups of Ukrainian Kazakhs occupied checkpoints on

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³ Неёлов В.М. Частные военные компании и война на Юго-Востоке Украины [on-line]. [accessed 10.11.2021]. Available on Internet: <URL: <http://conjuncture.ru/mpc-ukraine/>>.

highways, guarded the separatist government headquarters, patrolled the streets and helped build and defend fortifications on the de facto border with Crimea and Ukraine. However, they received extensive help from the professional forces of the Russian Kazakh forces, who came to defend what they call Russian historical lands¹.

Following the completion of the annexation, there were reports that many Kazakhs took part in the war in the Eastern territories of Ukraine. An example includes the so-called “Kazakh National Guard”, an association of unregistered Kazakh groups formed in 2014 to support the Russian war against Ukraine in the Donbas (Darczewska, 2017, p. 21).

The international humanitarian law is applicable to international armed conflicts, and the article 2 of the Geneva Conventions provides that the Convention shall apply in all cases of declared war, even if one of the States does not recognize the state of war². In other words, an internal incident can become international if the army of a foreign state takes part in armed hostilities without the consent of the host country (Stewart, 2003, p. 313).

Looking back on the Crimean conflict of 2014, until February 2014, these were simple internal tensions and unrest characterized by conflict between pro-Russian separatists and Ukrainian government forces. However, Russia’s involvement could have internationalized the conflict. There are solid sources and evidence that there were Russian militaries, units and vehicles with no distinctive signs that caused the conflict to escalate. The results of the Russian citizens action can be implicitly attributed to the Russian Federation (Henckaerts, p. 530). This responsibility is enshrined in the article 3 of the Hague Convention (IV) of 1907³, which states that a state is responsible for the acts committed by persons who are part of its armed forces.

However, the international community faces a degree of uncertainty as to the definition of combatant. None of the treaties of international humanitarian law properly defines this term, but focuses on regulating the specific characteristics and results of combatant status.⁴

According to international provisions, the status of combatant is based on objective criteria, by affiliating a person to a certain group, which belongs to a state participating in the conflict.

Despite this, by associating the combatant with the State party, no treaty or customary rule provides for the legal obligation to disclose the nationality of the combatant in comparison with the opposing party. The reasoning is in the understanding that the main purpose of these rules is the protection of persons against the effects of war, exempting them from being the target of hostilities⁵. Russia’s strategy is the same as in the 2012 and 2014 conflicts, in which unidentified troops instigated and developed armed hostilities.

¹ Schuster S., Armed Cossacks Flock to Crimea to Help Russian Annexation Bid, TIME, 12 March, 2014. [on-line]. [accessed 10.11.2021]. Available on Internet: <URL: <http://time.com/22125/ukraine-crimea-cossacks-russia/>>.

² Geneva Convention I for the Improvement of the Condition of the Wounded and Sick in Armed Forces, 12.08.1949, art. 2 [on-line]. [accessed 10.11.2021]. Available on Internet: <URL:<https://www.un.org/ruleoflaw/files/Geneva%20Convention%20I.pdf>>.

³ Convention (III) relative to the Opening of Hostilities. The Hague, 18 October 1907, art. 3, [on-line]. [accessed 10.11.2021]. Available on Internet: <URL: <https://ihl-databases.icrc.org/ihl/INTRO/190?OpenDocument>>.

⁴ Geneva Convention I for the Improvement of the Condition of the Wounded and Sick in Armed Forces, 12.08.1949, art. 3 [on-line]. [accessed 10.11.2021]. Available on Internet: <URL:<https://www.un.org/ruleoflaw/files/Geneva%20Convention%20I.pdf>>.

⁵ Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), 8 June 1977, art. 57 (1) [on-line]. [accessed 10.11.2021]. Available on Internet: <URL: https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf>.

During the armed conflict in Ukraine, the Kiev government and individuals entered into contracts with the PMSC, mainly from the United States and Poland. As the armed confrontation developed, the PMSC were involved in carrying out actions such as: protection of objects and people, operational and strategic planning, training of personnel at all levels, escorting people, etc. There was no direct involvement of these companies in the Donbass hostilities, which is due to the presence of a sufficient number of motivated National Guard volunteers and volunteers in need of training¹.

In the light of the abovementioned, it should be noted that since 2014 the PMSC has played a key role in the invasion of Ukraine by the Russian Federation, both in direct combat and in the training and surveillance of various rebel forces. Most of their staff seem to have been highly qualified and well trained. Russia's military intelligence agency appears to have monitored their actions, and there are allegations that it has assassinated rebel leaders whom Russia has deemed problematic. The analysts cite Ukraine as the first appearance of the Wagner Group².

On the other hand, due to the lack of legal grounds for providing direct assistance to Ukraine and the provision of lethal weapons by the United States, a non-state instrument was used – private military and security companies. With the help of these organizations, the widest range of services is provided for the improvement of the Armed Forces of Ukraine, the National Guard and other power structures in Ukraine. Considering the experience of the wars in the former Yugoslavia, when, with the help of PMSC MPRI instructors, the Croatian part managed to conduct a successful offensive operation against the Serbs, due to the fact that foreign companies performed tasks at the highest level of training³.

The legal consequences of the involvement of private military and security companies in Ukrainian hostilities cannot be analyzed without mentioning the case of *Alexandrov and Yerofeyev*, in which criminal charges were removed from long-term rest in the respect of the international criminal law. In this case, charges were made, among others, of instigating and developing a war of aggression. This case took place between 2015 and 2016 (Sayapin, 2014, pp. 180-190).

In 2016, the Golosyvski Court of Kiev issued a verdict in a criminal process against two former Russian military servicemen, Alexander Alexandrov and Yevgeny Yerofeyev. From the perspective of national criminal law, both soldiers were charged with a number of crimes, including under the article 437 (2)⁴ and were sentenced to fourteen years' imprisonment. Alexandrov and Yerofeyev were also charged with committing an act of terrorism under the article 258, the illegal use of weapons, ammunition and/or explosives under the article 263 and the illegal crossing of the Ukraine's border under the article 332⁵.

According to the sentence, the defendants joined a group of insurgents called the "Peoples' Republic of Lugansk" and took part in violent conflicts in Eastern Ukraine. They were conducting a military operation near Vesela Gora when they were captured by the Ukrainian armed forces and transported to the nearest medical center. The involvement of these two participants in the Ukrainian conflict was certainly of great public interest.

¹ Неёлов В.М. Частные военные компании и война на Юго-Востоке Украины [on-line]. [accessed 10.11.2021]. Available on Internet: <URL: <http://conjuncture.ru/mpc-ukraine/>>.

² Russian Private Military Companies (PMCs) Congressional Research Service, September 16, 2020 [on-line]. [accessed 10.11.2021]. Available on Internet: <URL: <https://crsreports.congress.gov/product/pdf/IF/IF11650>>.

³ Неёлов В.М. Частные военные компании и война на Юго-Востоке Украины [on-line]. [accessed 10.11.2021]. Available on Internet: <URL: <http://conjuncture.ru/mpc-ukraine/>>.

⁴ Уголовный кодекс Украины, (БВР), 2001, № 25-26, art. 437 (2) [on-line]. [accessed 10.11.2021]. Available on Internet: <URL: https://yurist-online.org/laws/codes/crime/ru/ugolovnyj_kodeks_ukrainy.pdf>.

⁵ Уголовный кодекс Украины, (БВР), 2001, № 25-26, art. 332 [on-line]. [accessed 10.11.2021]. Available on Internet: <URL: https://yurist-online.org/laws/codes/crime/ru/ugolovnyj_kodeks_ukrainy.pdf>.

In the sense of legally regulating the status of military and private security companies in Ukraine, the initiative of the deputy Olga Vasilevskaya-Smaglyuk should be mentioned. In her opinion, the main purpose of the draft law no. 3005 “On military consultancy activities” is to legalize this type of economic activity by legalizing private military companies. There are already private military companies in Ukraine, but they have legal addresses abroad, in Bulgaria, although the employees are from and work in Ukraine, providing military services to those who can pay for it and then are recruited to serve outside Ukraine. At the same time, she noted that the draft law will ban the Ukrainian PMSC from participating in hostilities outside Ukraine.

The deputy Secretary of the National Security and Defense Council, Sergei Krivonos, mentioned that specialists from private companies could train soldiers of the Armed Forces and other force structures, as it is not profitable for the state to maintain training centers for specialists in specific fields, due to their low workload. In turn, the Foreign Intelligence Representative, Oleksandr Prikhodko, noted that a number of laws need to be amended, giving PMSC members the opportunity to conduct counterintelligence activities in favor of Ukraine¹.

In 2018, the plans to legalize the PMSC in Ukraine were announced by the member of parliament Yevgeny Deydey, former commander of the “Kiev-1” special battalion within the Ministry of Internal Affairs. Another provision which the member intends to prescribe is that 49% of the shares of each such company must be owned by the State. In his view, this will become an additional element of control over the activity of such formations².

Despite all the legal challenges resulted from the increased use of private military participants in Ukraine, the government should be more willing to better train its legal advisers in the armed forces, law enforcement officers, and judges in terms of their competences in the field of international law, international human rights law and international humanitarian law. In addition, Ukrainian judges should fully implement the provisions of international criminal law in domestic criminal law.

While international humanitarian law is a concept underestimated by military and legal practitioners, the implementation of its rules in the national criminal law of a state could have a major preventive effect on the direct involvement of employees of military and private security companies in hostilities.

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² Шрамович В. Солдаты удачи: можно ли легализовать украинские "частные армии"? [on-line]. [accessed 10.11.2021]. Available on Internet: URL:<https://www.bbc.com/ukrainian/features-russian-43652084>.

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