

Regulation of Private Military Companies

Alexander Kees*

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* Dr. Alexander Kees, *Maître en Droit international et européen*, is Judge at the Regional Court in Stuttgart. Prior to the Second State Examination in 2009 he passed, *inter alia*, an internship at the German Federal Constitutional Court (department BVR Professor Di Fabio). He worked at the Institute of Public and International Law at the University of Tübingen (Professor Graf Vitzthum). He released several publications in the field of German public law, European and international law.

Abstract

The increasing use of private military companies by states in armed conflict raises questions regarding the regulation of those non-state actors. However, even though the privatization of core state functions might be an emerging phenomenon with respect to its extent and quality, there is no legal vacuum for the activities of private military contractors. According to international humanitarian law, states must ensure respect for the *ius in bello* and enforce applicable international law also with respect to private contractor personnel if they are charged with functions governed by international law. Against this background, the challenge for future regulation is on the national and administrative level. States must intensify their efforts to implement existing standards.

A. Introduction

The employment of private military companies in the context of armed conflicts raises manifold concerns with respect to the legality and legitimacy of the transfer of state functions to private actors. The conflicts in Afghanistan and Iraq brought privatization within the scope of peace, war, and security to the fore. Indeed, private contractors had already been used before in African or South American states in internal conflicts or in the fight against drug trafficking.¹ Today, however, the focus has shifted from a mercenary-like deployment of military companies by warlords or rebel groups towards a long-term policy of outsourcing sovereign functions by highly industrialized, often western states. This systematic extension of privatization into spheres where the monopoly on the use of force and the laws of war are concerned provokes calls for a strong international regulation of activities of private military companies.²

What is the international legal framework for the use of private military companies in the context of armed conflicts? To what extent is this use internationally regulated and what is the perspective for further

¹ For a survey of the applications of private military companies see A. Kees, *Privatisierung im Völkerrecht – Zur Verantwortlichkeit der Staaten bei der Privatisierung von Staatsaufgaben* (2008), 51-69.

² See e. g. the statements of the UN Working Group on the use of mercenaries, 'Guns for hire' (29 April 2010) available at <http://www.ohchr.org/EN/NewsEvents/Pages/Gunsforhire.aspx> (last visited 4 May 2011).

regulation? After having briefly clarified the role international law can play in this respect (B), the most important aspects and their regulative influence on the deployment of private military companies will be highlighted (C). Finally, attempts towards specific instruments of regulation will be summarized (D).

B. Levels of Regulation

Obviously, there is no specific international legal regime for the regulation of private military companies. In fact, states usually are very reluctant to commit to new regulations that will restrict their scope of sovereign decisions. The failure of important international treaty projects in various fields in the last few years – like environmental law, criminal law, and the restriction of certain weapons – is only one result of this reluctance. Thus, when considering existing standards and the perspective of regulation from an international point of view, the following distinction should be drawn. On the one hand, it has to be taken into account to what extent the current international legal regime contains principles and rules that may directly or indirectly affect the use of private military companies in certain cases. Only then, on the other hand, after having ascertained existing standards, can the development and enhancement of this legal regime be tackled successfully, not only on the international level, but also by incorporating general international legal standards into more detailed national legislation.

In default of a specific legal regime, limits and guidelines for the use of contractors have to be deduced from the rules of general international law that govern the deployment of non-state actors. Such rules are not only those that reserve certain functions explicitly for state organs. In other cases, states may have to exercise due diligence in a way that the private contractor must be supervised by state organs. To a certain degree, this general framework restricts and regulates the use of private military companies. It is up to states and their national administration to implement this general framework by adopting effective legislative and administrative measures that govern the use of private military companies in detail.

C. Regulative Standards in International Law

International law regulates some basic aspects with respect to the employment of private military companies. Certain functions are excluded from being transferred to non-state actors or must at least be exercised under the control of state organs. In other cases, states are subject to more or less severe obligations of due diligence in relation to private entities in their service or to other restrictions with respect to the composition of their forces. While there are few special provisions dealing directly with these issues, regulative effects are usually indirect consequences of a more general rule of international law. As a result of those standards, states are not entirely free in the use of private military companies.

I. Internment Camps

Certain functions must be exercised by state organs or under their effective control. According to the Fourth Geneva Convention, for example, places of internment shall be put under the authority of a responsible officer who must be chosen from the regular military forces or civil administration (Art. 99). Under the Third Geneva Convention, prisoner of war camps and labor detachments must be under the immediate authority of a responsible commissioned officer belonging to the regular armed forces (Art 39). The staff of the institution must be instructed and supervised (see Arts 56 and 57 Third Geneva Convention, Art. 99 (1) 3 Fourth Geneva Convention). This means that states must have officials on-site. They may not hand over these facilities totally to private organizations without adequate monitoring systems that enable the official or commissioned officer to supervise the staff in control of detainees, to give binding instructions, and to enforce them effectively.³

³ For a closer analysis see Kees, *supra* note 1, 269-274.

II. Piracy

With respect to conflict-related activities on the sea, the United Nations Convention on the Law of the Sea (UNCLOS) can be of relevance. In fighting piracy along the coasts of Somalia, western governments are considering the employment of a “private navy” in order to support international military forces.⁴ While support by security contractors to enable merchant vessels to repel immediate pirate attacks should be comprised by the right of self-defense, the assignment of private military companies by states to fulfill pre-emptive functions normally carried out by the military or the police is subject to certain restrictions. Those functions are in particular the right to visit and board a ship if there is ground for suspecting that the ship is engaged in illegal activities like piracy, as well as the right to seize a ship (Arts 105, 110 UNCLOS). Those functions may be carried out by warships (Arts 107, 110 (1) UNCLOS), which are defined as ships belonging to the armed forces and being under the command of an officer (Art. 29 UNCLOS). Governments may also authorize other ships to carry out those functions if those ships are clearly marked and identifiable as being on government service (Arts 107, 110 (5) UNCLOS). In both cases, however, states are liable for any loss or damage caused by an arbitrary visit and examination or an illegal seizure of a ship (Arts 106, 110 (3) UNCLOS). This strict liability regime should lead states to a cautious use of private companies in this context.

III. Direct Participation in Hostilities

Restrictions also exist for the employment of private military companies in order to carry out armed activities directed against another party to a conflict. By virtue of the imposition of a strict disciplinary regime, international humanitarian law indirectly regulates the use of private contractors.

Employees of a company are considered civilians as long as they are not incorporated into the armed forces. This incorporation requires that the

⁴ See C. Milmo, ‘Insurance firms plan private navy to take on Somali pirates’ (28 September 2010) available at <http://www.independent.co.uk/news/world/africa/insurance-firms-plan-private-navy-to-take-on-somali-pirates-2091298.html> (last visited 4 May 2011); S. Utler, ‘Mit Söldnern gegen die Piraten’ (28 September 2010), <http://www.spiegel.de/panorama/0,1518,720136,00.html> (last visited 4 May 2011).

employee is under the command of a military commander and subject to a disciplinary system. In contrast, military companies are usually bound to the state only through contracts between the contracting entities⁵, meaning that “[c]ommanders do not have direct control over contractors or their employees [...]; only contractors manage, supervise, and give directions to their employees”⁶. Thus, as the case may be, military commanders cannot give binding instructions to employees of contractors. In principle, however, states are allowed to conduct hostilities only through their armed forces, but they may not charge entities with combat operations that act independently from the armed forces and whose members are not subject to a disciplinary system that enables states to enforce compliance with international humanitarian law in terms of Art. 43 Protocol I to the Geneva Conventions.

The consequence of a direct participation in hostilities by members of private military companies in their capacity as civilians is not only the loss of their protection against dangers arising from military operations (Art. 51 Protocol I to the Geneva Conventions). States will also come into conflict with their duty to ensure that all their personnel taking part in hostilities on their behalf is subject to an effective disciplinary system. The constitution of such a disciplinary system is a legal obligation imposed by Art. 43 Protocol I to the Geneva Conventions.⁷ Failure to enforce compliance with the rules of international humanitarian law accordingly can constitute a breach of Arts 43, 86 and 87 Protocol I to the Geneva Conventions and thus entail the international responsibility of the state (Art. 91 Protocol I to the Geneva

⁵ For rare cases of a real incorporation of private persons into the armed forces see Congress of the United States, Congressional Budget Office, *Logistics Support for Deployed Military Forces* (2005), 60. For a description of the usual (contractual) relationship between the armed forces and employees of private military companies see United States Headquarters Department of the Army, *Contractors on the Battlefield, Field Manual 3-100.21 (200-21)* (2003).

⁶ Field Manual, *supra* note 5, para. 1-22. The field manual stresses further that “[m]anagement of contractor activities is accomplished through the responsible contracting organization, not the chain of command” (para. 1-22). “It is important to understand that the terms and conditions of the contract establish the relationship between the military (US Government) and the contractor; this relationship does not extend through the contractor supervisor to his employees. Only the contractor can directly supervise its employees. The military chain of command exercises management control through the contract” (para. 1-25). “Maintaining discipline of contractor employees is the responsibility of the contractor’s management structure, not the military chain of command” (para. 4-45).

⁷ W. A. Solf, ‘Commentary to Art. 43 Protocol I’, in M. Bothe *et al.* (eds), *New Rules for Victims of Armed Conflicts* (1982), para. 2.3.2.

Conventions).⁸ Consequently, states are not allowed to charge individuals or entities with the exercise of functions that amount to a direct participation in hostilities as long as the state does not exercise effective control.⁹

The definition of the term “direct participation in hostilities” thus constitutes a limitation for the use of private military companies in armed conflicts. While this fact seems to be widely accepted,¹⁰ this definition itself is far less clear. Generally, the decisive factor is whether the conduct in question directly causes harm to the enemy. In practice, however, the line between security or support functions and combat operations often blurs. Civil military providers are, for example, contracted to use deadly force in order to protect assets and persons.¹¹ During the occupation of Iraq, private military contractors were, while bearing military arms, even allowed to exercise pre-emptive functions like to stop, search, disarm, and detain civilian persons if required for the safety of the former or if specified in the contract, regardless of the private or public nature of the contracting entity.¹² According to US Army regulations, such security services do not constitute the exercise of inherently governmental functions that may lead to a direct participation in hostilities.¹³

⁸ Solf, *supra* note 7, para. 2.3.2; K. Ipsen, ‘Kombattanten und Nichtkombattanten’, in D. Fleck (ed.), *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten* (1994), 61.

⁹ H. Krieger, ‘Der privatisierte Krieg: Private Militärunternehmen im bewaffneten Konflikt’, 44 *Archiv des Völkerrechts* (2006) 2, 159, 184.

¹⁰ See the opinion of the US Department of Defense, ‘Policy and Procedures for Determining Workforce Mix, Instruction 1100.22’ (12 April 2010) available at www.dtic.mil/whs/directives/corres/pdf/110022p.pdf (last visited 25 March 2011), 17, 52; for the German government see Deutscher Bundestag, ‘Antwort der Bundesregierung, BT-Drs. 16/1296’ (26 April 2006) available at http://www.bundeswehr-monitoring.de/fileadmin/user_upload/media/BT1601296.pdf (last visited 25 March 2011), 12.

¹¹ For the United States see e. g. Defense Federal Acquisition Regulation Supplement, ‘Contractor Personnel Authorized to Accompany U.S. Armed Forces’ (DFARS Case 2005-D013) (16 June 2006) available at <http://edocket.access.gpo.gov/2006/pdf/E6-9499.pdf> (last visited 4 May 2011).

¹² Coalition Provisional Authority, ‘Memorandum 17: Registration Requirements for Private Security Companies (PSC)’ (26 June 2004) available at http://www.iraq-coalition.org/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf (last visited 4 May 2011), Annex A, para. 5 b.

¹³ See DFARS Case 2005-D013, *supra* note 11; for the British government the use of firearms by private contractors could play a “legitimate role” and should accordingly not generally be considered as the conduct of combat operations that is reserved for

IV. The Duty to Exercise Due Diligence

During armed conflicts, as well as being occupying powers, states are subject to certain restrictions in exercising their rights and duties. Under international humanitarian law, as well as by virtue of their human rights obligations, states must obey certain standards as to the organization of their forces. Those organization-related standards prevent states not from outsourcing auxiliary or supply functions, but from an uncontrolled and uncontrollable deployment of private actors in the most sensitive functions of the exercise of governmental authority.

1. International Humanitarian Law

According to the Geneva Conventions, states and their military commanders are obliged to ensure respect for the Conventions by any person under their authority. Besides the duty of states to effectively control all persons directly taking part in hostilities on their behalf,¹⁴ in and after armed conflicts, general obligations to exercise due diligence with respect to the forces and units used by states apply. To ensure respect for humanitarian law, to prevent violations of the Geneva Conventions (see common Art. 1 of the Geneva Conventions), and to repress grave breaches of the laws of war and to initiate disciplinary and penal action (Arts 86 and 87 Protocol I to the Geneva Conventions), it will generally require, for example, that states, when charging private entities with functions that are governed by international humanitarian law, have access to information, that commanders are able to direct operations, and that they can, where necessary, give binding orders. In contrast, those obligations will probably not be achievable if the commanders on-site do not have any possibility to direct the exercise of a function by contractor employees or at least to order its immediate cessation.

By virtue of the Hague Regulations, states have to take all measures to restore and ensure public order and safety in an occupied area (Art. 43 Hague Regulations with Respect to the Laws and Customs of War on Land), i. e. to guarantee, as far as possible, the security and welfare of the civilian

army forces; see Ninth Report of the Foreign Affairs Committee, 'Private Military Companies, Session 2001-02, Response of the Secretary of State for Foreign and Commonwealth Affairs' (October 2002) available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmcaff/922/response.pdf> (last visited 4 May 2011), 4, para. k.

¹⁴ *Supra* chapter C. III.

population.¹⁵ An occupying power that uses non-state actors to, for example, guard certain facilities or to fulfill police functions in certain quarters must ensure the respect for those international law obligations the occupying power is subject to. The use of private military companies must at least not lead to the contrary result that the safety of the civilian population is threatened due to problems of control and discipline with regard to private employees. It would be inconsistent with international humanitarian law if the use of private military companies brought a “Wild West mentality to the streets”¹⁶ of occupied areas as might have been the case in Iraq where excessive use of force and the lack of legal accountability made private military contractors “especially feared and unpopular with the Iraqi population”¹⁷.

As a result of those obligations, states must guarantee an organization that enables them to effectively and permanently supervise all their personnel including employees of private military companies. Not only does the status of combatants require the incorporation into the armed forces of any person participating directly in hostilities. As shown above, such incorporation means the submission of the person under an internal, state-run disciplinary system that enforces compliance with international law (Art. 43 Protocol I to the Geneva Conventions). Also in the scope of functions which do not constitute a direct participation in hostilities, but where international law also imposes specific duties with respect to their implementation, the transfer of these functions with the subsequent total withdrawal of public organs can violate international humanitarian law. States must, even in employing private military companies be able at any time to fulfill their duty to ensure respect for international humanitarian law. This implies that, despite the transfer of certain tasks, states must guarantee their capability to effectively control the implementation of the privatized function. Absence of disciplinary procedures, lack of monitoring systems, and insufficient law enforcement can bring states into conflict with their obligation to ensure respect for international humanitarian law.¹⁸

¹⁵ See M. Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, 16 *European Journal of International Law* (2005) 4, 661, 663.

¹⁶ ‘Outsourcing the War’, *Time* of 26 March 2007, 36, 38.

¹⁷ UNHCR, *Country of Origin Information – Iraq* (3 October 2005) available at <http://www.unhcr.org/refworld/docid/435637914.html> (last visited 4 May 2011), 45.

¹⁸ See Swiss Federal Council, *Report by the Swiss Federal Council on Private Security and Military Companies* (2 December 2005) available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0021.File.tmp/PMSCs%20Bericht%20Bundesrat%20en.pdf> (last visited 4 May 2011), paras 2.5, 5.2-5.4.

2. Human Rights

These examples show that international obligations to obtain a certain degree of organization in the exercise of a governmental function can constitute important guidelines for the selection and supervision of the personnel entrusted with this function. Indeed, in the last few decades, international law has developed more and more influence on the internal organization of states:

“[L]a norme suivant laquelle, pour le droit international, l’organisation de l’Etat est un domaine réservé par excellence souffre d’exceptions dont le nombre a tendance à croître au fur et à mesure qu’augmentent les règles requérant des Etats des résultats dont l’obtention dépend de la manière d’être de leur droit interne.”¹⁹

Besides the general humanitarian law obligations, human rights are playing a considerable role in this respect. International human rights treaties establish the duty to monitor the exercise of certain functions by private entities in order to guarantee the respect for, and to prevent violations of, human rights. The UN Convention against Torture, for example, requires the education and instruction of all persons that are involved in the custody, interrogation or treatment of any individual subjected to any form of arrest (Art. 10) as well as the systematic review of all arrangements for the custody and treatment of persons subjected to any form of arrest (Art. 11) in order to prevent any cases of a violation of the convention. To achieve these objectives, states must establish effective “ongoing monitoring systems”²⁰ if they entrust private security providers

¹⁹ L. Condorelli, ‘L’imputation à l’État d’un fait internationalement illicite: solutions classiques et nouvelles tendances’, 189 *Recueil des Cours* (1984), 19, 30. See also ICJ, *Military and Paramilitary Activities in and against Nicaragua (Merits)* (*Nicaragua v. United States of America*), ICJ Reports 1986, 14, 313; G. Ress, ‘Supranationaler Menschenrechtsschutz und der Wandel der Staatlichkeit’, 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) 11, 621, 626.

²⁰ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CPT/Inf(2002)6 (2001) available at <http://www.cpt.coe.int/documents/gbr/2002-06-inf-eng.pdf> (last visited 4 May 2011), 46, para. 134 (emphasis deleted), with respect to

with the treatment of persons under arrest or internment.²¹ This requires the exercise of “full supervisory authority”²² over private security companies. With respect to Art. 10 ICCPR (treatment of persons deprived of their liberty), the Human Rights Committee stressed that states must, in order to meet their obligations under the Covenant, establish an “effective mechanism of day-to-day monitoring”²³ if functions falling within the scope of Art. 10 are contracted out to private institutions.

D. The Perspective of Regulation

As this short outline illustrates, international law provides a (rough) framework for the employment of private military companies.²⁴ However, there is no detailed regime that could answer problems of oversight, transparency, implementation, and law enforcement. What is the prospect of the development of specific regulatory instruments? From an international perspective, there is no consistent development towards a more specific regulation. While the position of UN institutions is rather reluctant with respect to the use of private military companies, and thus supports a stronger regulation, there are interstate as well as privately-run processes that focus on non-binding instruments, which essentially refer further means of regulation to the national level.

I. The United Nations: Institutionalized Regulation?

Inside the United Nations, the use of private military companies is discussed against the same background as the problem of mercenarism. The

the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

²¹ For problems with private contractors that have been charged with interrogation and translation services in US prisons in Iraq see ‘AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade (Fay Report)’ (2004) available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> (last visited 4 May 2011); ‘Article 15-6 Investigation of the 800th Military Brigade (Taguba Report)’ (2004) available at <http://www.fas.org/irp/agency/dod/taguba.pdf> (last visited 4 May 2011).

²² Committee Against Torture, Summary record of the first part of the 424th meeting: United States of America, UN Doc. CAT/C/SR.424, 9 February 2001, para. 34.

²³ Human Rights Committee, Concluding observations of the Human Rights Committee: New Zealand, UN Doc. CCPR/CO/75/NZL, 7 August 2002, para. 13.

²⁴ For a thorough analysis see Kees, *supra* note 1.

transfer of core state functions to non-state entities is considered as illegitimate and even illegal.

In 1987, the former Human Rights Commission installed a Special Rapporteur that was concerned with the question of the use of mercenaries. The increasing use of private military companies came to the fore in the 1990s. The Special Rapporteur at that time was of the opinion that the exercise of essential sovereign functions by private companies constituted an infringement of the state's sovereignty as well as of international human rights and humanitarian law.²⁵ In 2005, the (new) Special Rapporteur acknowledged certain - fiscal and economic - needs for states to reorganize their forces and to resort to support by private armed units.²⁶ However, this was no fundamental paradigm shift. A 2010 draft convention on private military and security companies²⁷ is still based on the conviction that "inherent state functions" must not be fulfilled by private actors (Art. 4 (3)). The convention assumes a broad understanding of what should be considered as an inherent state function. This includes, *inter alia*, "direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees" (Art. 2 (i)). But the convention also bans the outsourcing of some further functions (Arts 9-11) and establishes a principle according to which "[e]ach state party bears responsibility for the military and security activities of PMSCs registered or operating in their jurisdiction, whether or not these entities are contracted by the state" (Art. 4 (1)). Finally, the draft proposes obligations of states to

²⁵ See E. Bernales Ballesteros, Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self determination, UN Doc. E/CN.4/1997/24, 20 February 1997, UN Doc. E/CN.4/1998/31, 27 January 1998, UN Doc. E/CN.4/1999/11 13 January 1999, UN Doc. E/CN.4/2001/19, 21 December 1999 and UN Doc. E/CN.4/2003/15, 16 December 2002.

²⁶ S. Shameen, Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self determination, UN Doc. A/60/263, 17 August 2005.

²⁷ Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council, Annex to the 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 Doc. A/HRC/15/25, 5 July 2010.

establish licensing and monitoring systems as well as effective national legislative measures, in order to guarantee the legal accountability of private persons and legal entities (parts III and IV).

Thus, the draft convention contains very far-reaching obligations and restrictions for states that exceed current standards under international law. It seeks to extend existing legal obligations and to increase restrictions. As far as it restricts the use of private contractors, this approach seems to be in conflict with the actual practice and the evident opinion of a large number of states that the employment of contractors is generally a sovereign decision of the state. With regard to the wide range of possible functions private contractors may be used for - e. g. the contracting of private companies by local quasi-governmental warlords in order to secure diamond trafficking on the one hand and the mandate to guard facilities of an occupying power on the other - it is doubtful whether all forms of the use of private contractors may be treated indistinctively.

While it is widely accepted that some basic forms of monitoring are needed in order to ensure civil and criminal accountability, and to enhance transparency in contracting and employing private companies, states do not seem willing to expand the scope of functions that are considered to be “inherently governmental” and therefore reserved to state organs as proposed. This is true, for instance, with regard to “police powers”, like “arrest of detention including the interrogation of detainees” (Art. 2 (i) of the draft convention). These are functions in the scope of which private contractors “respond to some real needs and are already part of reality”²⁸ and thus seem to be widely accepted. While the Parliamentary Assembly of the Council of Europe, for example, indeed recommends establishing an international legally-binding instrument for the regulation of private military and security companies,²⁹ the governments of the member states of the Council of Europe emphasize at the same time their opinion that they are allowed to use private contractors also in the scope of core state functions, such as the detention of prisoners³⁰ and forced return.³¹ Regulation does not necessarily mean prohibition.

²⁸ Council of Europe, Parliamentary Assembly, Recommendation 1858 (2009): Private military and security firms and erosion of the state monopoly on the use of force, 29 January 2009, para. 6.

²⁹ See Recommendation 1858 (2009), *supra* note 28.

³⁰ Council of Europe, Committee of Ministers, *Recommendation Rec (2006) 2 of the Committee of Ministers to member states on the European Prison Rules*, 11 January 2006, and the commentary thereto CM Document CM(2005)163 Addendum,

Thus, the position of the human rights bodies of the United Nations seems to be an “extreme point of view”³². It is the result of an opposition to the privatization of public functions by states mainly of the southern hemisphere. These countries have witnessed the widespread use of private military companies (with sometimes negative consequences) by foreign contracting entities, which are often western states or corporations. Given this antagonism of interests, attempts to enforce unilateral and extensive perceptions may impede the general acceptance of legally binding international instruments.

II. Informal Processes: The ICRC, Non-Binding Instruments and Codes of Conduct

A more practical process was launched by the Swiss government and the International Committee of the Red Cross (ICRC) in 2006. The participating states of several governmental meetings finalized 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”³³. It is a non-binding instrument that does not seek to develop legal standards but to ascertain the existing “pertinent international legal obligations” (part I) and to provide states with voluntary “good practices” relating to the selection, contracting and monitoring of private military and security companies (part II). The document is open to states and international organizations. By February 2011, it was signed by 36 states.³⁴

2 November 2005, rule 78; both documents have been adopted by Decision CM/Del/Dec(2006)952/10.2E, 13 January 2006.

³¹ See guideline 18 of the Twenty Guidelines of the Committee of Ministers of Europe on Forced Return, CM(2005)40 Addendum final, 20 May 2005, and the commentary thereto by the Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons, CM/Del/Dec(2005)925, 10 May 2005.

³² United Kingdom, Foreign and Commonwealth Office, ‘Private Military Companies: Options for Regulation’, HC 577 (2002) available at <http://www.official-documents.gov.uk/document/hc0102/hc05/0577/0577.pdf> (last visited 4 May 2011), 15, para. 37.

³³ Annex to the Letter dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary General, UN Doc. A/63/467-S/2008/636, 6 October 2008.

³⁴ States which have “communicate[d] their support for this document” (last paragraph of the preface of the document) are: Afghanistan, Albania, Angola, Australia, Austria, Bosnia and Herzegovina, Canada, Chile, China, Cyprus, Denmark, Ecuador, France, Georgia, Germany, Greece, Hungary, Iraq, Italy, Jordan, Liechtenstein, Macedonia, Netherlands, Poland, Portugal, Qatar, Sierra Leone, South Africa, Spain, Sweden,

Part one of the document recalls the obligations under international humanitarian law, human rights, and international criminal law that may apply to non-state entities³⁵ and defines legislative and administrative ways to implement those international standards in the national legal order. With respect to functions that should not be contracted out, chapter A. (2.) refers to such activities that international law “explicitly assigns to a state agent or authority”. As shown above, those cases are rare. This perception differs clearly from the wide definition of exclusive state functions proposed by the 2010 UN draft convention.³⁶ The same is true for the extent to which states may be held responsible for misconduct of employees of private military companies. The document confines responsibility to those cases in which private conduct is attributable according to the existing rules in the law of state responsibility (chapter A. (8.)).

In its second part, the document compiles suggested standards of good practices.³⁷ The main aspects are the selection of companies and their personnel in order to ascertain their qualifications and background. Secondly, the terms of the contract should ensure respect for all applicable national and international law and entail a concrete definition of the mandate. Finally, there should be effective monitoring systems while executing the contract. Those systems should also provide for criminal and civil accountability.

In the light of the duty of states to ensure respect for humanitarian law and human rights and the practical problems that exist so far, rule 21 seems to be of considerable importance because it suggests specific conditions for the implementation of these international obligations of a state within its domestic legal order. To provide for “appropriate administrative and other monitoring mechanisms” contracting states should, *inter alia*,

Switzerland, Uganda, Ukraine, United Kingdom, United States of America, Uruguay, see also Federal Department of Foreign Affairs, ‘Participating States of the Montreux Document’ (16 February 2011) available at <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html> (last visited 4 May 2011).

³⁵ *Supra* chapter C.

³⁶ *Supra* chapter D. I.

³⁷ It is remarkable that the document only deals with “good” practices while on the international plane it is common to refer to “best” practices in order to assign a certain desired standard that should be achieved. The language chosen here seems to be another indication for the reluctance of governments to engage even in any further political commitment in this respect.

- “a) ensure that those mechanisms are adequately resourced and have independent audit and investigation capacity;
- b) provide Contracting State government personnel on-site with the capacity and authority to oversee proper execution of the contract by the PMSC [private military and security company] and the PMSC’s subcontractors;
- c) train relevant government personnel, such as military personnel, for foreseeable interactions with PMSC personnel;
- d) collect information concerning PMSCs and personnel contracted and deployed, and on violations and investigations concerning their alleged improper and unlawful conduct;
- e) establish control arrangements, allowing it to veto or remove particular PMSC personnel during contractual performance;
- f) engage PMSCs, Territorial States, Home States, trade associations, civil society and other relevant actors to foster information sharing and develop such mechanisms”.

Similar mechanisms are proposed for the states where private military companies operate (rules 46-52) and the states where a company is registered, incorporated, or where it has its principal place of management (rules 68-73).

Based on the Montreux Document, another initiative that was also launched by the Swiss government finalized a code of conduct for private security companies in late 2010.³⁸ This code is intended to be committed to by the private military industry. The (private) signatories “endorse the principles of the Montreux Document” (paragraph 3) and commit to respect applicable law and certain basic principles (paragraphs 3 and 6), e. g. to refrain from contracting with entities “in a manner that would be contrary to United Nations Security Council sanctions” and from committing crimes (paragraph 22). The code further enumerates specific principles regarding

³⁸ Swiss Confederation, ‘International Code of Conduct for Private Security Service Providers’ (9 November 2010), available at <http://www.news.admin.ch/NSBSubscriber/message/attachments/21143.pdf> (last visited 4 May 2011).

the conduct of personnel, management, and governance (paragraphs 28-69). By November 2010, 70 companies have agreed to the document.³⁹

Finally, there are a number of privately-run initiatives. Especially associations of the private security industry have a strong interest in anticipating national legislative measures by adopting voluntary codes of conduct. Such codes of conduct exist, e. g., in the United Kingdom, where the British Association of Private Security Companies (BAPSC) pronounced a “Charter” that contains some basic principle to which member corporations shall adhere.⁴⁰ Similar documents are published by the International Stability Operations Association (ISOA) whose code of conduct provides member companies with ethical standards⁴¹, and by the Australian Security Industry Association Limited (ASIAL).⁴²

In the United Kingdom, the government began to consider possible options for regulations in a “Green Paper”⁴³ in 2002. In April 2010, the Foreign and Commonwealth Office, in coordination with the private security industry and non-governmental organizations, announced that it favored drawing up a (voluntary) code of conduct instead of implementing legislative measures.⁴⁴ This code of conduct should be based, *inter alia*, on the Montreux Document as well as the document finalized by the BAPSC. The implementation of the code should be secured by a “commercial incentive” as well as by independent auditing and monitoring procedures the results of which should be made public to some extent. Whether these mechanisms allow to regulate the use of private military companies effectively remains to be seen.

³⁹ Among them companies like Xe (formerly Blackwater), Aegis Group, Control Risks Group, DynCorp International.

⁴⁰ The Charter is available at http://www.bapsc.org.uk/key_documents-charter.asp (last visited 4 May 2011).

⁴¹ ISOA, ‘Code of Conduct 12 – English’ (11 February 2009) available at <http://ipoaworld.org/eng/codeofconduct/87codecodeofconductv12enghtml.html> (last visited 4 May 2011).

⁴² ASIAL, ‘ASIAL Code of Professional Conduct’ (24 February 2011) available at <http://www.asial.com.au/Codeofconduct> (last visited 4 May 2011).

⁴³ United Kingdom, Foreign and Commonwealth Office, *supra* note 32.

⁴⁴ Foreign and Commonwealth Office, ‘Private Military and Security Companies (PMSCs): Summary of Public Consultation Working Group’ (April 2010) available at <http://www.fco.gov.uk/resources/en/pdf/about-us/our-publications/pmsc-working-group-summary-060410> (last visited 4 May 2011).

E. Conclusion

International law provides a regulative framework for the employment of private military companies in and after armed conflicts. In accordance with the nature of the international legal order, this framework contains only basic principles and general parameters. In the foreseeable future the establishment of an international binding instrument that regulates the use of private military companies in detail is unlikely. It is furthermore doubtful whether it would be desirable, given the nature of international law and the complexity of international relations. The implementation and further specification of requirements imposed by international law are generally best achievable within the national administrative, civil, and criminal legal systems. It is this implementation that has to be pursued more consistently because there is no lack of rules but rather a failure to enforce international law. The coordination of an international process that identifies the basic elements of a more effective national regulation of private military companies seems to be a sustainable basis to achieve these ends.