

# **PRIVATE MILITARY AND SECURITY COMPANIES: SECURITY ACTORS WITHOUT ACCOUNTABILITY**

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## **A Introduction**

Weak and failing states are a common marketplace for the private security and military industry, which has grown significantly in size and scope over the last decades. Despite the fact that the number of armed conflicts has dropped after the end of the Cold War, many states have faced increasingly frequent international engagements, particularly peace operations.<sup>1</sup> The disappearance of proxy wars forces the former block parties to get directly involved in conflicts with their own militaries, which now threatens to overstretch many a state's military capabilities. At the same time military personnel was greatly reduced in the developed world after the elimination of the block contrasts, which since then is on the free market. In this context private contractors promise demand-oriented and cost-effective solutions.

The private sector supplies a broad spectrum of military and security services to governments that transfer more and more tasks to them. The services range from combat support and training for military units to logistics and the protection of property. Following this example, International Organizations (IOs), Nongovernmental Organizations (NGOs), Transnational Corporations and individuals increasingly rely on private security services, creating a demand that is happily supplied by the market.

The paper will examine the relationship between the use of private military and security services and the effectiveness of government as a prerequisite for a functioning state. It will be argued that a lack of accountability for private security actors erodes the state's monopoly on violence and that their employment in weak states drags these further towards failure. To this end, the rules that govern the behavior of private security actors will be reviewed first (B). Afterwards it will be established who can be held accountable, if violations of these norms occur (C). Finally the enforcement mechanisms at hand of victims of unlawful conduct will be scrutinized (D) and a final conclusion drawn (E).

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<sup>1</sup> Human Security Centre. *Human Security Report 2005: War and Peace in the 21st Century*. New York: Oxford University Press, 2005, pp. 150.

## I.) Terminology

Taking a closer look at the private security sector, it quickly becomes clear that the terms “private military company” and “private security company” are not easily amenable for a definitive definition. The manifold individual designs of corporations and the even more numerous fields of activities render a precise definition close to impossible. A picture commonly associated with these companies is that of the mercenary. As the term “mercenary” is well defined,<sup>2</sup> it would also from a legal point of view be desirable to use it. Unfortunate for the clarity of nomenclature, this definition is far too narrow for the security sector actors now under scrutiny. Hence, there have been many attempts to sketch out the nature of these companies. The *Geneva Centre for the Democratic Control of Armed Forces* (DCAF) for example tries to identify them by the nature of their services, putting emphasis on a distinction between military corporations as offensive and security companies as defensive service providers.<sup>3</sup> Another approach of classification is the so called “tip of the spear” typology, according to which units are distinguished by their distance to combat.<sup>4</sup> The picture is still quite clear cut where the delivery of armed services is concerned, but it gets blurred when it comes to logistics and technical support. Both approaches are hence more description than definition, but considering the erratic nature of the security sector, they must suffice as an outline of the nature of private military and security companies (PMSCs) for the coming analysis. In practice it will have to be assessed on a case by case basis if the corporation in question qualifies as a PMSC. The difficulties in defining PMSCs give a presentiment of the problems to assess PMSCs from a legal point of view.

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<sup>2</sup>According to Article 47 of the *Additional Protocol I to the Geneva Conventions*, Article 1 of the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries* and Article 1 of the *Convention of the OAU for the Elimination of Mercenarism in Africa* a mercenary is any person who:

- is specially recruited locally or abroad in order to fight in an armed conflict;
- does, in fact, take a direct part in the hostilities;
- is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- is not a member of the armed forces of a Party to the conflict; *and*
- has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

<sup>3</sup>SCHREIER/CAPARINI, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, Geneva (March 2005), pp. 19-36.

<sup>4</sup>SINGER, *Corporate Warriors: The Rise of the Privatized Military Industry*, *International Security*, Vol. 26, No. 3 (Winter, 2001/02), pp. 186-220, 200.

States can play different roles in relation to PMSCs, which makes a differentiated nomenclature necessary. In this paper they will be dubbed with reference to the *Montreux Document*<sup>5</sup>: States that directly contract for the services of PMSCs - including, as appropriate, where such a PMSC subcontracts with another PMSC - will be called “contracting states”, whereas states on whose territory PMSCs operate will be referred to as “territorial states”. “Home states” are States of nationality of the PMSC, i.e. where the PMSC is registered or incorporated.

## II.) The State’s Monopoly on Violence

A very important fact to bear in mind when dealing with PMSCs is rather abstract in nature. Intrinsic to their business in the security sector, PMSCs operate in a domain legally attributed to governments: The state’s monopoly on violence. The fact that PMSCs and their employees are nothing more than private actors, but operate in a fundamentally public sphere raises some questions concerning the intricate relationship between the state and citizens that use force.

As a core component of the government, the exercise of the monopoly on violence is part of the generally acknowledged legal criteria of statehood. The source most often cited as a textual basis for statehood is the Montevideo Convention of 1933.<sup>6</sup> It proposes four criteria for statehood that reflect – next to a number of other criteria - customary international law.<sup>7</sup> The entity aspiring to be regarded as a state must possess a permanent population; it must occupy a defined territory; it must operate an effective government over the extent of its territory; and it must display capacity to engage in international relations.<sup>8</sup> The prerequisite of an effective government implies the existence of internal sovereignty, which comprises the maintenance of security through the effective exercise of law making and law enforcement

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<sup>5</sup>*Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict*, Montreux, 17 September 2008.

<sup>6</sup>Montevideo Convention on the Rights and Duties of States, 26 December 1933.

<sup>7</sup>BROWNLIE, *Principles of Public International Law*, 7<sup>th</sup> Edition, Oxford 2008, p. 70.

<sup>8</sup> Article 1 of the Montevideo Convention reads: “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”.

procedures by the state.<sup>9</sup> To this end the state needs absolute control over the application of force on its territory. The concept of the monopoly on violence creates the basis for such control, assigning the legitimate use of physical force to the state and the state only. Conversely it creates a ban on the use of force for the citizen.

On this backdrop, it becomes clear that private actors using force have the potential to affect the legal foundations of statehood by eroding the state's monopoly on violence: If private actors use violence without public control, there is no more monopoly on violence for the state; if there is no monopoly on violence, there is no government in the legal sense. And if there is no government, there is by definition no state. Consequently, an effective exercise of the monopoly of violence is necessary for a state to maintain its statehood under international law.<sup>10</sup> With private security actors in mind, the requirement of the state's absolute control over the use of force does not mean that there must be no other entities that apply it. The decisive question is, if the state is able to effectively control the use of force on its territory through its legislation and law enforcement. In other words the state's power must be superior to that of other users of force and thus bind these to the state's rules. Only then can one argue that the monopoly on violence is untarnished and can serve as a basis for an effective government.

To assess the impact that the use of PMSCs has an on the state's monopoly on violence, the rules that govern their behavior will be reviewed next (B). Afterwards it will be established who can be held accountable, if violations of these norms occur (C). Finally the enforcement mechanisms at hand of victims of unlawful PMSC conduct will be scrutinized (D) and a final conclusion drawn (E).

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<sup>9</sup>MALANCZUK, *Akehurst's Modern Introduction to International Law*, 7th Edition, London/New York 1997, p. 77.

<sup>10</sup> To put this serious consequence into perspective, it has to be noted that until today there is no state which is considered to have lost its statehood in this way. Instead, states that lack control over their territory and cease to exercise their monopoly on violence are commonly labeled as failed states. Somalia is a good example, which is - even after more than twenty years of a largely ineffective government - still considered to be a state.

## **B Rules Governing the Behavior of PMSCs**

As private actors in the realm of public services, PMSCs pose a difficult case in terms of identifying the law applicable to them. However, international humanitarian law (IHL), various human rights agreements and certain norms of customary international law cover the conduct of PMSCs and will be reviewed hereinafter. National legislation on PMSCs is rare and existing self-regulatory frameworks are not legally binding.

### **I.) International Law**

To this date there are no international norms that explicitly address PMSCs. As general international law is public international law - governing the relationships between states - PMSCs are only indirectly affected by it. The most important principles to mention in this context are the prohibition of force in international relations, enshrined in Article 2 (4) of the Charter of the United Nations<sup>11</sup> and the *UN Friendly Relations Declaration* from 1970.<sup>12</sup> Both provisions constitute customary international law, but concern PMSCs only insofar as they may not be used by states to violate their corresponding obligations. Also, international private law does not affect the control of PMSCs, as it concerns contractual relations between private persons or other legal entities across different legal jurisdictions.

### **II.) International Humanitarian Law**

There have always been customary practices in war, but only in the last 150 years have states made international rules to limit the effects of armed conflict for humanitarian reasons. The Geneva Conventions and the Hague Conventions are the main examples. Usually called international humanitarian law (IHL), IHL is also known as the law of war or the law of armed conflict. That is why it is also known as *jus in bello* – the law in war. It does not address the lawfulness of resorting to armed force but instead regulates how hostilities are conducted. It does not address the legitimacy of organized armed groups but regulates how they must fight. The status of PMSC personnel in an armed conflict is determined by IHL, in

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<sup>11</sup>Article 2 (4) of the Charter of the United Nations reads: „All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.“

<sup>12</sup> GA/Res. 2625 [XXV], 25<sup>th</sup> plenary meeting, 24 October 1970, containing the provision: “Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.“

particular according to the nature and circumstances of the functions in which they are involved. IHL is applicable to PMSCs in armed conflicts, if they qualify as a party to the conflict. It regulates the behavior of such companies if they are operating in situations of armed conflict, but is not concerned with the lawfulness or legitimacy of PMSCs as such.

The personnel of PMSCs are civilians, unless they are incorporated in the armed forces of a state or have combat functions for an organized armed group belonging to a party to the conflict. The majority of PMSCs will not enjoy the combatant privileges of IHL because states purposefully refrain from incorporating them into their armed forces. Accordingly, as civilians, PMSCs are protected against attack unless and for such time as they take a direct part in hostilities.<sup>13</sup> If, however, the personnel of PMSCs carry out acts that amount to taking a direct part in hostilities, they lose protection from attack during such participation. The International Criminal Tribunal for the former Yugoslavia (ICTY), when faced with the problem of defining “direct participation” in the Tadic case, noted that “it is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time”.<sup>14</sup> This finding also applies in the context of PMSCs.

### **III.) Human Rights Law**

While IHL applies both to states and non-state actors and therefore personnel of PMSCs can commit violations of IHL, the question of the application of human rights to PMSCs and their staff is far more controversial. Uncontested though is the applicability of human rights in their vertical protection function: The traditional concept of human rights considers them as personal rights of the individual vis-à-vis the state. As mentioned above with regard to IHL, PMSCs would have to be incorporated into public structures to be directly obliged to act in conformity with human rights. This will most of the time not be the case.

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<sup>13</sup>Article 51 (3) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977 (AP I); Article 13 (3) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977 (AP II).

<sup>14</sup> ICTY, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, 7 May 1997, para 616.

More interesting and not yet conclusively answered is the question, if human rights also provide protection between private persons or entities. It has to be kept in mind that human rights treaties are signed by states as persons of international law and hence the respective obligations are binding for the state parties only. Contracts at the expense of third parties are generally unacknowledged. Human rights treaties therefore do not, as such, have a direct horizontal effect as a matter of international law.<sup>15</sup> The discussion on this controversial legal matter is still in progress. However, in a number of states, private actors are indirectly bound by human rights through their respective national law; States have adopted legislative, judicial and administrative measures in order to fulfill legal obligations they bear under the various human rights treaties, transforming them into rules of conduct applicable to private persons.<sup>16</sup>

International criminal law does also provide regulations that apply to individuals – accordingly also to employees of PMSCs - and sanctions the most grave breaches of human rights. The Rome Statute of the International Criminal Court (ICC) (Rome Statute) and its effect on PMSCs will be discussed below.

#### **IV.) National Legislation**

With few exceptions national laws ignore the existence of the private security industry. The USA and South Africa - as two of the biggest home states for PMSCs - have come the farthest in regulating the sector.<sup>17</sup> The motives of governments to address PMSCs are as manifold as the histories of the countries. So are the approaches of implementation: While the US relies on principles of export regulation, South Africa has passed a *Foreign Military Assistance Act*.<sup>18</sup> Sierra Leone is another of very few countries that particularly addresses PMSCs.<sup>19</sup> These sporadic efforts to regulate the private security sector can even hardly be called a patchwork. Other than that, national laws in general are applicable to personnel of PMSCs operating in the respective country, including penal codes that apply to individuals.

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<sup>15</sup> Human Rights Committee, *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 29 March 2004, para 8.

<sup>16</sup> *Ibid.* para 7.

<sup>17</sup> HOLMQVIST, *Private Security Companies – The Case for Regulation*, SIPRI Policy Paper No. 9, Stockholm International Peace Research Institute, 2005, p. 50.

<sup>18</sup> Act 15 of 1998.

<sup>19</sup> Article 19 of The National Intelligence and Security Act, 2002.

## **V.) Self-Regulation**

Governments, NGOs, and industry groups have worked to develop national and international standards for PMSCs and codes of conduct for their operations. These initiatives attempt to establish common principles of operation but do not create binding obligations for PMSCs or their clients. They are hence futile in the legal sense. At best they can be considered to be soft law, but as a declaration of intent having no legal relevance for the time being. The most prominent results of such initiatives are the *Montreux Document*<sup>20</sup> and the *International Code of Conduct for Private Security Service Providers (ICOC)*.<sup>21</sup> Even PMSCs that signed these standards cannot be forced to adhere to them. The worst sanction amounts to being removed from the list of signatories.

## **C Responsibility for Violations of Legal Obligations**

After identifying the rules that govern PMSC behavior, the next step - in assessing the impact of PMSCs on the state's monopoly on violence - is to verify the entities or individuals who can be held responsible for a breach of these legal obligations. Linking the violation of a legal interest to a responsible party is necessary to provide the injured person with a legally enforceable right. As a rule, this link is established by factual causation; the conduct of the person to be held responsible must have been a necessary condition of the occurrence of the harm. In some cases it may be necessary to adjust the result by altering the scope of liability: It has to be appropriate to extend the scope of the acting person's liability to the caused harm, sometimes even if no factual causation can be determined.

An act of infringement carried out by a PMSC might either be attributed to its contracting partner, the company itself or to its employees. Again it has to be emphasized that the conduct of PMSCs is private. Under international law it can only under certain circumstances be attributed to a contracting state and at no time to a private employer (I.). In any case, the

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<sup>20</sup>*Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict*, Montreux, 17 September 2008.

<sup>21</sup>Schweizerische Eidgenossenschaft, *International Code of Conduct for Private Security Service Providers*, 9 November 2010.

violation of a norm may however trigger the responsibility of the private actor himself under national or international law (II.).

### **I.) Responsibility of the State**

If a state contracts a private entity or individual to exercise certain tasks, the private contract creates a membrane that shields the state from being directly attributed the behavior of the contractor. Through this sleight of hand the state could “source out” all risks of being held responsible for misconduct during the exercise of public functions. This unsatisfying result is bridged by concepts of indirect attribution, establishing decisive elements to make the act attributable to the employer. On the international level the most important rules concerning the responsibility of states for private conduct are reflected by the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* of the International Law Commission (ILC) of the United Nations (ILC Draft Articles),<sup>22</sup> whose provisions codify in most parts prevailing customary international law. They are secondary rules, that is to say, the general conditions under international law for the state to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. They do not concern the nature of the wrongful act itself. Besides these international norms, national legislations usually feature attribution concepts that produce similar results.

Decisive for the establishment of the responsibility of a state for a wrongful act is the identification of a link between the private actor and the state,<sup>23</sup> as the conduct of private persons or entities is - as a general principle - not attributable to the State under international law.<sup>24</sup> To establish that link, the relationship between private actor and state can be scrutinized in two ways: through a *de jure* test and a *de facto* test.

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<sup>22</sup>*Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission of the United Nations (ILC) at its fifty-third session, 2001.

<sup>23</sup>*Yeager v. Islamic Republic of Iran*, (1987), (17) Iran-U.S.C.T.R., p. 101.

<sup>24</sup> Commentaries to the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* adopted by the International Law Commission at its fifty-third session (2001), (extract from the Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2), November 2001, Art. 8, para. 1.

The *de jure* test looks for a legal link between the actor and the State and derives from Articles 4 and 5 ILC Draft Articles. Due to their high formal and structural requirements,<sup>25</sup> these norms will hardly ever apply in the case of PMSCs: They would have to be qualified as an organ of the state or be empowered by the law of that state to exercise elements of the governmental authority. The state's intent in the use of PMSCs is, however, to not incorporate them into public structures, but to be linked to them only by a private contract.

The *de facto* test attributes acts to the state when the *de jure* test fails but a factual link exists between the actor and the state. It is enshrined in Article 8 ILC Draft Articles. It provides that “[t]he conduct of a person [...] shall be considered an act of a State [...] if the person [...] is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”. In most cases the conduct of PMSCs employed by a state will be attributable through this norm. Between state and PMSC the contractual relationship establishes either a situation of “instruction” or at least “direction or control”, as the state dominantly defines content and scope of the contract.<sup>26</sup> If a responsibility can be established, the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act (Art. 31 (1) ILC Draft Articles).

It has to be emphasized, that the ILC Draft Articles apply in relation to states only. The conduct of PMSCs hired by IOs is explicitly not covered by them (Art. 57 ILC Draft Articles). As a result, under international law, UN, AU, EU or NATO cannot be held responsible for misconduct of PMSCs contracted by them. Even less do the ILC Draft Articles apply to private clients of PMSCs like NGOs, corporations or individuals. There are no rules for the attribution of individual private action to other private entities on the international level.

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<sup>25</sup>Commentaries to the ILC Draft Articles, Art.4 and 5.

<sup>26</sup>For details on the requirements cf. extensive case law, in particular: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p.14; Case IT-94-1, *Prosecutor v. Tadic*, (1999) I.L.M., vol. 38, p. 1518.

## II.) Responsibility of Private Actors

Even if a PMSC contracted by a state commits an unlawful act and the state is held responsible, the ILC Draft Articles are still “without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a state” (Art. 58 ILC Draft Articles). In other words, the individual responsibility for a wrongdoing persists even if the victim can obtain compensation for damages from the state. Also with regard to private persons, establishing responsibility means to identify a link between a certain behavior – i.e. an infringement - and a person. The conduct of the person to be held responsible must have been a necessary condition of the occurrence of the harm.

### 1.) Individuals

The most important individual responsibility in the context of PMSCs is the personal criminal responsibility for breaches of international and national norms. Criminal offenses of international law that can be committed by the employees of PMSCs comprise war crimes<sup>27</sup> and crimes against humanity<sup>28</sup> as well as single statutory offenses like torture<sup>29</sup> or the forced disappearance of persons.<sup>30</sup> The jurisprudence of the ICTY and International Criminal Tribunal for Rwanda (ICTR) has shown that war crimes and crimes against humanity can be committed by civilians as well as by state organs: „The laws of war must apply equally to civilians as to combatants in the traditional sense.”<sup>31</sup> The statutes of international criminal courts also contain rules on the establishment of individual criminal responsibility to link the wrongdoing to a person.<sup>32</sup> Moreover, the concept of superior responsibility is recognized by the international courts, which is largely uncommon in national legislations: Commanders can be personally held responsible for their subordinates’ behavior.<sup>33</sup>

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<sup>27</sup>War crimes are the violation of IHL.

<sup>28</sup> Crimes against humanity are violations of human rights committed as part of a widespread or systematic attack directed against a civilian population.

<sup>29</sup>*Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, GA RES 39/46 of 10 December 1984.

<sup>30</sup>*International Convention for the Protection of all Persons from Enforced Disappearance*, E/CN.4/2005/WG.22/WP.1/REV.4, 23 September 2005.

<sup>31</sup>*Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 634.

<sup>32</sup> Articles 25-33 Rome Statute of the International Criminal Court; Article 6 Statute of the ICTR; Article 7 Statute of the ICTY.

<sup>33</sup> Article 28 Rome Statute of the International Criminal Court; Article 6(3) Statute of the ICTR; Article 7(3) Statute of the ICTY.

Next to the international rules of criminal responsibility, most states provide some sort of penal jurisdiction that protects individual rights. These laws – of whatever kind they may be – usually include rules for the attribution of acts to the individual and are thus also applicable for the employees of PMSCs. Particularly when PMSCs are hired for tasks in the realm of inner security, it is mainly the national legal order that is relevant for their conduct.

## 2.) Corporations

In contrast to the individual criminal responsibility sometimes the concept of corporate criminal responsibility is put forward to address misbehavior of private entities. This matter is heavily and controversially discussed though. Without going into detail, it is safe to say that at present and under international law PMSCs - as corporations - cannot be held directly responsible for infringements.<sup>34</sup> Private corporations are not subjects of international law. They are incorporated in a state and thus subjected to that national jurisdiction. In some national jurisdictions it is possible to hold corporations accountable for infringements.<sup>35</sup> However, in penal law this possibility is subsidiary to the criminal responsibility of the acting individual and in private law exists independent from the behavior of the individual. Below the level of law, the *OECD Guidelines for Multinational Enterprises*, signed by 45 – mostly developed – states, formulate obligations for multinational corporations (MNCs) that include the adherence with human rights. PMSCs will in most cases qualify as MNCs,<sup>36</sup> but the guidelines have no legally binding effect. They are hence not helpful in exercising control over PMSCs. The existing rules on corporate responsibility are in the overall picture far too few and too little coherent, as to effectively address the global phenomenon of PMSCs.

## D Enforcement Mechanisms and their Effectiveness

Depending on the nature of the violated obligation vis-à-vis another subject of international law or an individual, the possibilities of legal remedy vary. In the struggle to realize claims of

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<sup>34</sup>MCDONALD, *The Legal Status of Military and Security Contractors*, In: *International Humanitarian Law and the 21<sup>st</sup> Century's Conflicts*, edited by Roberta Arnold and Pierre-Antoine Hildebrand, Editions Interuniversitaires Suisses, Lausanne, Bern, Lugano, 2005, pp. 215, (224).

<sup>35</sup>E.g. United States Code, Title 28, § 1350 (Alien Torts Claims Act); Article 102 Swiss Penal Code.

<sup>36</sup>OECD Guidelines for Multinational Enterprise, 2011 Edition, Part I, Chapter I, Paragraph (4) reads: “[The term multinational company] usually comprise[s] companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways.”

compensation for damages, different constellations of parties can appear: states can sue states, individuals can sue states and individuals can sue individuals. Besides that, criminal courts deal with breaches of penal provisions, if the respective court can establish jurisdiction over the case.

To make clear the context in which these external enforcement mechanisms will be discussed, it has to be stated in advance that the system in which PMSCs work does not provide direct enforcement mechanisms for the beneficiary of their services to assure PMSCs' conformity with the law. Unlike states in relation to their organs, employers of PMSCs - public as well as private - have no actual control or disciplinary power over them. The only link between employer and contractor is a private contract which is concluded between the parties on an eye-to-eye-level. If a state contracts with a private actor, it steps out of the superior-subordinate relationship and in this contractual relation becomes itself a subject of its own civil law. In the contractual relationship the state has no power to enforce even the provisions of the contract. It has to resort to the judicial system and sue the PMSC to fulfill the contract. Having said this it becomes clear that the incentive for PMSCs to abide by the law is not disciplinary correction by its employer. The prospect to lose the contract may cause a PMSC to voluntarily stick to the rules, but an economic incentive is not a coercive means to control its conduct. This option has no legal significance.

Hence successful lawsuits of victims or proper criminal proceedings are the indicator for functioning state institutions and the exercise of effective control of force on the state's territory when facing PMSCs. The judiciary is part of the system to control the use of force and plays its distinctive role in keeping up the state's monopoly on violence. This role has to be looked at in the light of the concept of separation of powers. The courts decisions are supposed to be impartial and independent from governmental policies and thus act as a catalyst for public force: Their neutral decisions are again subject of public execution, replacing the necessity for individuals to enforce their claims through private violence. But only if the judiciary works, that is to say it is accessible to plaintiffs, predictable, effective and acts in a manner of equity, it can fulfill this function. Only then it can legitimize a state's monopoly on violence because due process and appropriate judicial review allow people to

enforce their rights vis-à-vis the state or other private actors, without resorting to violence themselves. Only then it can uphold the state's monopoly on violence by subjecting users of – illicit - private force to the law.

However, in reality the existing fora for judicial review do not provide sufficient legal protection for victims of PMSC misconduct. In many cases the jurisdiction of international courts will not cover infringements of PMSCs and national judiciary systems can often not be relied on. In the environment PMSCs operate in, it is unlikely that victims will have access to a judiciary system that allows them to put their claims into effect. In weak and failing states there is either no functioning judiciary system in place and where there is, the individual's economic background will most probably prove insufficient to walk all the way to adjudication. Moreover a lack of knowledge on claims and procedures hampers the exercise of existing rights, while public support for victims will be minimal.

### **I.) State vs. State**

Legal actions of states against states have traditionally been dealt with by the International Court of Justice (ICJ) in The Hague. The jurisdiction of the ICJ is limited to states and it is the only international court of its kind. Only states may be party to cases before the court, even IOs are not subject to its jurisdiction (Article 34 ICJ-Statute). Hence only PMSCs contracted by states can cause a reason for proceedings before the ICJ. If PMSCs are contracted by a state to operate in its own realm of inner security there is hence no way of access to the ICJ: It lacks an eligible applicant state. The only way to become part of a case at the ICJ as a private person is that a state claims (applicant state) that a violation of individual rights by the other state (respondent state) has violated an international obligation owed to the applicant state. A victim of PMSC misconduct hence needed the patronage of a state to realize claims against another state before the ICJ. Looking at the potential victims of PMSC misconduct – the local population - in the territorial states in which PMSCs operate – essentially weak or failing states -, it seems very unlikely that these will enter a lawsuit against the home or contracting state of a PMSC. If a state could be held responsible for PMSC misconduct, its activity will in most cases be part of some sort of international support that the territorial state will be eager not to lose.

Very much the same situation is to be found with regard to another international court: The Court of Justice of the AU (CJAU). Similar to the structure of the ICJ, but tailored to fit regional disputes, the CJAU also provides eligibility to submit cases for states only (Article 19 of the Protocol in combination with Article 18 of the Constitutive Act of AU). Hence this regional court does not provide advanced legal protection for individuals either. Individual actions by injured persons who seek to enforce their rights against States are therefore brought before other courts.

## **II.) Individual vs. State**

On the level of the UN there is no institution with authority to decide on individual complaints, as the mutual blockade during the Cold War made it impossible to create mechanisms to enforce human rights. As a result regional courts developed and some of them have proven to provide quite effective legal protection for individuals. This patchwork of jurisdictions is very heterogeneous though in terms of accessibility, predictability, equity and effectiveness. And again, when taking a closer look on the mechanisms at hand, they turn out to be of little relevance in controlling PMSC behavior.

The European Court of Human Rights (ECtHR) provides a forum for individual complaints where a EU citizen feels that he has been deprived of rights enshrined in the European Charter of Human Rights (ECHR) (Article 34 ECHR). An important limitation is though that the “Contracting Parties shall secure to everyone *within their jurisdiction* (emphasis added) the rights and freedoms defined in Section I of this Convention” (Art 1 ECHR). Violations committed outside of the parties national jurisdictions – even by nationals of the contracting parties - are hence not subject to the jurisdiction of the ECtHR. Similar institutions with comparable underlying human rights instruments are the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights. All have in common, that their jurisdiction is subsidiary to national jurisdictions: These international courts can only be addressed, if there is no legal protection to be found in the domestic system.

Of the three mentioned international human rights courts, unfortunately the region with the most need for such an institution has the least functioning one: The African Court on Human and Peoples' Rights only allows charges against states that choose this possibility as an extra option, which only a hand full of states have done so far. Hence the jurisdiction of this court is considerably limited by its own state parties. At the same time the court is operationally largely ineffective. Citizens of the AU have hence no forum where they can realize the rights they are granted by the African Charter on Human and Peoples' Rights.

Where there is no international human rights court, a citizen's claim for damages against his own state is limited to his domestic jurisdiction. In a weak or failing state the probability for an average citizen to succeed in such a venture may be estimated as little. Even assumed that a fairly functioning judicial system was in place, the individual's economic background will most probably prove insufficient to walk all the way to adjudication. A lack of knowledge on claims and procedures additionally hampers the exercise of existing rights.

Beyond the international human rights courts, there are a number of different commissions that protect certain rights and provide channels for complaint. The Human Rights Committee, for example, guards the International Covenant on Civil and Political Rights (ICCPR) while the Human Rights Council is mainly involved in questions about the Universal Declaration of Human Rights. However, opinions of these commissions do not have the same quality as decisions of a court. They cannot be enforced and the commissions have no other means to enforce compliance with the law either. They are hence interesting for the development of international law but have no relevance for the daily routine of disputes.

### **III.) Individual vs. Individual**

Victims of PMSCs misconduct can try to sue them before national civil courts and claim compensation for damages. However, due to inexistent or malfunctioning judiciaries in weak and failing states this option has no mentionable significance for the citizens of most territorial states. But also lawsuits in home or foreign contracting states pose a high hurdle for victims and offer not much prospect of success. A good example of the difficulties in transnational lawsuits is the *Al Shimari v. CACI et al.* case. It is a federal lawsuit in the USA

brought by four Iraqi torture victims against private US-based contractor CACI International Inc., and CACI Premier Technology, Inc. It asserts that CACI participated directly and through a conspiracy in war crimes, including torture, and other illegal conduct while it was providing interrogation services at the Abu Ghraib prison in Iraq.<sup>37</sup> Even ten years after the incidents, the victims have not yet been able to obtain a final decision on their claim. With decision of 26 June 2013 the court has dismissed the claim though. The plaintiffs appealed and now wait for a decision of the appellate court.

#### **IV.) Criminal Proceedings**

While civil cases are typically disputes between legally equal individuals regarding the legal duties and responsibilities they owe one another and are focused on the dispute solution, criminal law is a matter between public authorities and the individual. In a legal system of a country criminal law includes those legal norms that prohibit specific behaviors and associate them with a penalty as a legal consequence. The objective of criminal law is in particular the protection of legal assets, such as life, property and the safety and integrity of the state as well as elemental values of community life.

##### **1.) National Criminal Courts**

Where there is a criminal judiciary system in place in the territorial state, employees of PMSCs normally are subjected to these rules and can be tried for violations of penal provisions. Also the home state of the corporation may have criminal jurisdiction. As already seen in the context of state responsibility, the difficulties in prosecuting employees of PSMCs are less due to a lack of legal basis for individual responsibility, but rather the practical application of the law. As regards national law enforcement, this may be insufficient in many ways. During an international armed conflict, one party is unlikely to leave its contractors to criminal sentencing by the opposing side. Also contracting or home states can have an interest not to exercise their personal sovereignty over certain groups of people, including employees of PSMCs. As an example the incidents in the military prison of Abu Ghraib in Iraq in 2003 should be mentioned again: Although some US military personnel have been tried and sentenced in courts-martial for their actions at Abu Ghraib, none of the private

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<sup>37</sup><http://ccrjustice.org/ourcases/current-cases/al-shimari-v-caci-et-al>, last retrieved on 3 December 2013.

contractors allegedly involved has been brought to court on criminal charges.<sup>38</sup> In the case of internal conflict and the use of PSMCs in weak and failed states, it may turn out that the court system does either not work or the government itself hired the contractor and is not interested in pursuing infringements. Also large companies may simply oppose attempts of law enforcement by a weak state that just as of a matter of fact has not the means to overcome such resistance.

## 2.) International Criminal Court

Complementing the national criminal judiciaries, international criminal law has considerably developed during the last decades. However, up to now still no case has been brought before an international criminal court against an employee of a PMSC, so that in this respect no citable case law exists. Relevant for the prosecution of employees of PMSCs that violate international law would be the ICC in The Hague. According to Article 17 (1) of the Rome Statute, the jurisdiction of the ICC is subsidiary to national law. The ICC will therefore only act if the competent state is not willing or able to carry out the investigation and prosecution. In addition the ICC is only competent to prosecute a person, when the crime was committed on the territory of a contracting state or by one of its nationals (Article 12 (2) Rome Statute). Nevertheless, employees of PSMCs generally - like any other natural person referred to in Article 25 (1) of the Rome Statute - fall under the jurisdiction of the ICC. With the entry into force of the Statute in July 2002 and the establishment of the Court, a permanent forum for the direct enforcement of international criminal law stands now ready in addition to the enforcement mechanisms before national courts and the Security Council's ad hoc tribunals.

Next to its subsidiary jurisdiction and limited scope of criminal offenses, another problem in controlling the conduct of PMSCs through international criminal law is the limited geographical outreach of the ICC. As of 1 May 2013 the Rome Statute - as the foundation treaty for the ICC - has been ratified by 122 countries and is binding for these only. The USA for example, as one of the biggest emitters of PMSCs has not ratified the statute, as well as a

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<sup>38</sup>CAMERON, *Private military companies: their status under international humanitarian law and its impact on their regulation*, International Review of the Red Cross, Volume 88, Number 863, September 2006, p. 573 (574), with further references; BBC News, 9 January 2013, Ex-Abu Ghraib inmates get 5\$m settlement from US firm, <http://www.bbc.co.uk/news/world-us-canada-20953889>, last retrieved at 4 December 2013.

number of states that attract the interest of the private security industry; in Somalia, Cambodia and Iraq international criminal law, as laid out by the Rome Statute, is not applicable.

## **E Conclusion**

The findings of this review of the legal situation in the context of the use of PMSCs in weak or failing states suggest some implications for contracting decisions.

### **I.) Findings**

There are rules that govern the behavior of private security actors. As private actors in the realm of public services international humanitarian law (IHL), various human rights agreements and certain norms of customary international law cover the conduct of PMSCs. However, national legislation on PMSCs is rare and existing self-regulatory frameworks are not legally binding.

An act of infringement carried out by a PMSC might either be attributed to its contracting partner, the company itself or to its employees. Under international law it can only under certain circumstances be attributed to a contracting state and at no time to a private employer. The violation of a norm may however trigger the responsibility of the private actor himself under national or international law.

The enforcement mechanisms at hand of victims of unlawful PMSC conduct do not provide sufficient legal protection for them. In many cases the jurisdiction of international courts will not cover infringements of PMSCs and national judiciary systems can often not be relied on. In the environment PMSCs operate in, it is unlikely that victims will have access to a judiciary system that allows them to put their claims into effect. In weak and failing states there is either no functioning judiciary system in place and where there is, the individual's economic background will most probably prove insufficient to walk all the way to adjudication. Moreover a lack of knowledge on claims and procedures hampers the exercise of existing rights, while public support for victims will be minimal. In practice misconduct of

PMSCs will hence have no legal consequences. This factual unaccountability poses a serious threat to the state whose citizens are exposed to such infringements without consequences.

## **II.) Implications for the Use of PMSCs**

The relationship between the use of private military and security services and the effectiveness of government as a prerequisite for a functioning state is a delicate matter. The lack of accountability for private security actors erodes the state's monopoly on violence and their employment in weak states drags these further towards failure. Weak states that allow PMSCs to operate on their territory surrender parts of the exercise of effective government: The nonexistent or deficient structures to hold them accountable for misconduct lead to a loss of control over the use of force on their territory. Ultimately this loss of control over the use of force to private security actors puts the statehood of every state at peril that relies on PMSCs on its territory.

Strong states that are coherent and capable are able to manage the risks of privatization and control the use of private force by their superior state institutions. Nevertheless these states also have the most to lose if private security actors do undermine the capacities of public forces or development efforts in foreign policy. Weak states with ineffective and corrupt public institutions potentially have the most to gain – and at the same time the least to lose – from privatization of security, but are least able to actually bridle private security actors for a public benefit. Efforts to harness the private sector for state building in weak states are often desperate gambles.<sup>39</sup>

Thinking in an allegory about the use of PMSCs in weak states, it could be that of first aid for a wounded man. To stop the bleeding, there has to be a pressure bandage applied. Though, instead of using a sterile cotton compress to put pressure on the wound, a dead rat is wrapped in. The bleeding will stop and the bandage will look white and proper for a while. But eventually the wound will fester and the man might lose the limb or die.

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<sup>39</sup> See also BRANOVIĆ, *The Privatisation of Security in Failing States - A Quantitative Assessment*, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper No. 24, Geneva 2011, p. 6.

In many cases where PMSCs are contracted it can be assumed that this happens with the best of intents; In particular where development efforts of states, IOs, NGOs and individuals are concerned. But everyone who entrusts the provision of security or military services to a private actor should bear in mind that he introduces a player to the stage which he can ultimately not direct. Neither the territorial state that is supposed to benefit from the services can or wants to exercise control over private security actors nor are there international mechanisms that would sufficiently fill the gap. Compliance with the law will remain purely voluntary on the part of PMSCs as long as there are no reliable enforcement mechanisms in place.

States should therefore carefully weigh the advantages and disadvantages of the use of PMSCs in weak or failing states. States that want to support these countries have to consider that despite possible short term benefits, the contracting of PMSCs will do more harm on the long run by foiling efforts to reach important development goals: A stable and effective government can – for now - not be established with involvement of the private security industry. In an environment of impunity external security actors must be linked to a disciplinary power to ensure compliance with the law. Hence, if a situation makes the deployment of foreign security forces necessary, these should be made up of public personnel like military and police. Accordingly weak governments should refrain from using PMSCs in their country if there is a chance of unaccountability for them. PMSCs will weaken their control over their territory on the long run. PMSCs don't offer any service that could not be provided by public agencies. To develop effective and accountable public security services should therefore be a paramount development goal for every weak state. The same considerations should be made by IOs, NGOs and individuals that act in weak or failing states. Their decisions on how to acquire necessary security profoundly affects the state they operate in. Until there are no mechanisms in place to hold private security actors accountable for their conduct, the effort to establish state institutions with their help remains a pyrrhic venture.



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