San Remo – Panel 2, 6 September 2012
Presentation by Marc Schinzel

I. What legislative and policy steps have been taken in your country to ensure compliance of PMSC with standards of conduct derived from international humanitarian law and human rights law?

How was the Montreux Document useful in this endeavour?

First, it is important to know that in Switzerland, as a federal state, most of the competences in the field of internal security and police matters reside with the 26 Cantons, except for matters with international implications. The Cantons have different regulations with regard to Private Security Companies, but these regulations are always limited to companies active on their own (small) territories. Companies operating beyond the Swiss borders are not affected by these Cantonal regulations.

Due to its deeply rooted federal system, eight years ago Switzerland did not have any substantial and reliable information about the number and the significance of PMSCs operating on its territory. Even much less information existed on internationally active PMSCs residing in Switzerland. On could even talk of a "black hole". Therefore, the first step Switzerland took 2005 on a *national* level was an effort to get a comprehensive survey on the situation.

In December 2005, based on an intervention in the Swiss Parliament (Stähelin Postulate of 1 June 2004), the Federal Council adopted an initial report on private military and security companies. Based on the conclusions of this well received report, the Federal Council decided to go forward with **three follow-up actions:**

- Firstly, a Federal ordinance on Private Security Companies executing protection tasks for Federal authorities was elaborated.
- Secondly, the Federal Council appointed the Federal Department of Justice and Police to examine the advisability of subjecting military or security service providers operating in crisis or conflict zones to an authorization or registration obligation.
- Thirdly, the Federal Council explicitly welcomed and supported the joint efforts of the Federal Department of Foreign Affairs and the International Committee of the Red Cross to recall and strengthen the international regulations on PMSCs.

In May 2008, the Federal Office of Justice issued a report on the examination of a compulsory registration System for private security companies operating in crisis or conflict zones. Based on this report, the Federal Council decided to provisionally waive a regulation. He justified his decision on Switzerland‘s low attraction, as a market, and by the disproportion of controls to be introduced, bearing in mind the marginal nature of the phenomenon.

The factual situation changed, however, considerably in 2010. Media reports made public that in spring 2010, the company AEGIS Group Holdings SA was entered in the Register of Commerce of the Canton of Basel City. This provoked strong reactions from the media and reopened the political debate on the challenges of regulating PMSCs. The political and public debate particularly focused on the mercenary question.

In December 2010, the Federal Department of Justice and Police issued a report concerning a possible regulation on security companies operating from Switzerland in crisis or conflict zones. According to the research of the Federal Office of Justice, at the end of 2010 around 20 security companies operating or likely to operate in crisis or conflict zones were established in eight different Cantons. The establishment of AEGIS Group Holdings SA in the Canton of Basel City also shows that foreign companies, including very large international companies, may be interested in having a company in Switzerland. Within the scope of its inquiries, the Federal Office of Justice also noted a considerable development of the security market at international level, a development of the international regulation instruments and the existence of a legal void in Swiss law with regard to companies providing private security services abroad from Switzerland.

The Federal Office of Justice reached the conclusion that there were now sufficient grounds for justifying the adoption of a Federal regulation on the provision of private security services abroad. The Federal Council approved these conclusions and charged the Federal Office of Justice with the elaboration of a Federal Law on the provision of private security services abroad. From January to March 2012, a preliminary draft was sent to the constitutionally required public consultation. Political parties, companies and associations concerned with the matter and any other interested circles could express themselves on the proposed regulations. The Federal Council took note of the results of the public consultation at the end of August 2012. A revised version of the draft law should be ready to be submitted to the Federal Council at the end of this year.

The Montreux document adopted in autumn 2008 was and still is an essential reference point for the elaboration of the Swiss draft law. Not least for this reason the drafters in the Federal Office of Justice are in a close exchange with the specialists in the Federal Department of Foreign Affairs.

I shall now have a look at some of the essential provisions of the Swiss draft law, with special focus on the relevant regulations of the Montreux Document.

Essential Aspects of the Swiss draft law on the provision of private security services abroad with special focus on the Montreux Document

The Montreux Document addresses itself to contracting states, territorial states as well as home states of PMSCs, and – within their power to ensure respect for international humanitarian law – to all other states as well. The Swiss draft law deals with Switzerland as **a Contracting State and a Home State of private security providers**. The draft law does not embrace the territorial aspect insofar as private security companies operating within Switzerland are not subjet to it, but fall under the regulation power of the Cantons. The application scope of the Swiss draft law covers

only activities of security providers linked to the offering of services abroad, i.e. beyond our borders.

Much more than the aspect of Switzerland as a Contracting State, **the potential status of our country as a host state of PMSCs is the main focus of the draft law**. The governmental Ordinance of 2007 already sets up the necessary regulations for Federal authorities mandating private security companies. Due to the small size of our country, Switzerland's relevance as a contracting state of Private Security Companies is rather limited. With the apparently increasing attractiveness of our country for the establishment or the registration of globally operating PMSCs in our country however, the necessity to draft specific regulations became eminent.

Scope of application

The draft law applies to natural persons, legal persons and partnerships (persons and companies) which provide private security services for other countries from Switzerland. Under the scope of the draft law fall also related services such as the recruitment, the training or the provision of security personnel for operations abroad. Further, the draft law regulates activities such as the establishment, the operation or the management of companies in Switzerland which provide private security services abroad. An important point is the application to companies which do control, from Switzerland, private security service providers abroad.

System of preliminary information combined with specific prohibitions

The Swiss draft law provides for a **system of preliminary information combined with specific prohibitions, partially based on the law itself, partially pronounced by a Federal authority**. In our view, the proposed information and prohibition system is a fully equivalent solution to the authorization system promoted by the Montreux Document. Since the share of sensitive private security services provided from Swiss-based companies abroad is still very modest, Switzerland is interested in establishing an efficient control mechanism with the least possible bureaucratic obstacles.

The draft law provides that private security service providers **have to declare all their services designed for clients abroad** to the competent federal authority **in advance**. The declaration procedure must be kept simple, since the vast bulk of these trans-border activities should not at all be problematic for our country (e.g. security guards for real estate active in the close border area of Switzerland).

The prohibitions proposed in the draft law are intrinsically tied to the aims of the law. The first article of the draft law defining its aims is therefore of particular importance for the whole regulation system. The following four aims are laid down:

- preservation of the internal and external security of Switzerland;
- implementation of the objects of Switzerland’s foreign policy;
- preservation of the Swiss neutrality;
- observance of international law, particularly of human rights and humanitarian international law.

The last-mentioned aim corresponds with the obligation set forth in paragraphs 3, 9 and 14 of the Montreux document for Contracting States, Territorial States and Home States to ensure respect for international humanitarian law.

The draft law stipulates two sorts of prohibitions:

- **legal prohibitions** and
- **prohibitions pronounced by the Federal authority** which gathers and examines the declarations on security service provisions abroad.

Legal Prohibitions

Prohibited by the law shall be activities deemed to be completely irreconcilable with one of the aims of the law. In these cases, there will be no need for further examination. The following two legal prohibitions are proposed:

- *Firstly*: **Prohibition of a direct participation of private security personnel** in hostilities abroad. Hostilities are defined in the sense of the Geneva Conventions. It shall also be prohibited to set up, establish, operate, manage or control a company in Switzerland which makes available security personnel for direct participation in hostilities abroad.
- *Secondly*: **Prohibition to provide, from Switzerland, private security services associated with serious violations of human rights**.

These two categories of prohibitions can be considered as *irrefutable legal presumptions* for an infringement of the aims of the law, i.e. for a violation of essential national interests of Switzerland. The direct participation in combat situations or the provision of military and security personnel for such a purpose clearly run contrary to the Swiss policy of neutrality, which is a cornerstone of Swiss foreign policy and of our country's self-conception. The prohibition to provide security services associated with serious violations of human rights does not aim at the violation itself. It applies to activities which, *per se*, are legitimate but become problematic if provided in a context of serious human rights violations. An example would be the operation of a prison by private security personnel, when it is used by state officials to commit acts of torture.

Prohibitions pronounced by the authority

Except for the two activities mentioned before (direct participation in hostilities, security services in association with serious human rights violations), all other private security service provisions abroad are basically and *prima vista* legal. The competent federal authorities, however, **must closely examine whether generally admitted activities are consistent with the aims of the draft law**, i.e. whether they are in line with the essential national interests laid down there. Some private security services can be perfectly legitimate in one situation but inadmissible in another. The draft law enumerates different contexts where the provision of a security service could be problematic, for example the provision of security services in armed conflict or other situations of violence.

The competent Federal authorities shall decide whether the security service is compatible with the aims of the law. If their conclusion is negative, they have to pronounce a prohibition.

Concluding my remarks on the Swiss draft law on private security service provisions abroad, I'd like to mention that all security service providers subject to the law shall have an **obligation to sign the International Code of Conduct for Private Security Service Providers** and to observe its regulations.

What difficulties did you face in developing law and policy in this area?

In my view, one of the biggest difficulties we face in Switzerland from the beginnings of the process to regulate private security services abroad is the distinction between reasonable legal solutions and the politically contaminated **mercenary concept**. Politicians and media in Switzerland are focused on the mercenary phenomenon, based on recent events as well as on well-known reminiscences of Swiss history. Nevertheless, the mercenary terminology proves to be inadequate for developing legal regulations on private security service providers in Switzerland. With respect to this point, a great deal of explanatory work and persuasive power will still be necessary on the part of the Swiss Government.

Can you already see an impact of those measures?

The legislative process in Switzerland to regulate private security service provisions abroad is still going on and has not yet led to the adoption of a law. Therefore it is not possible to give an assessment on the measures proposed in the draft. However, based on the participation and the results of the external consultation on the draft law, the following two conclusions can be made:

- the public interest in the proposed regulation is high;
- a broad consensus exists that Switzerland should act and adopt firm and sustainable measures to regulate trans-border activities of private security service providers.

Besides the Montreux Document, what other tools could help states to implement their international obligations? Recommendations?

When it comes to the regulation of private security service providers, the different power positions, cultures and historical experiences of countries around the world are important factors to be considered. I therefore think that the development of national legislations based on the rules of humanitarian law and the Montreux principles is indispensable to make fruther progess in this area. Equally important is a regular international exchange on the various national legislations. National regulations could thus serve as inspiration for others.

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