



PRIV-WAR Report - The Netherlands

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The Regulatory Context of Private Military and Security Services in the Netherlands

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Regulating privatisation of “war”: the role of the EU in assuring the compliance with international humanitarian law and human rights

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1. Introduction¹

This report on Dutch domestic law with respect to private military and security services is delivered pursuant to WP 7.1 (“The existing regulatory context for private military and security services at the national and EU level, report on the domestic legislation in relevant countries”) of the project *Regulating Privatization of “War”: the role of the EU in assuring compliance with international humanitarian law and human rights* (Priv-War).

2. Scope of the report

In the Netherlands, like in many European countries, there are as yet no laws specifically directed at the regulation of PMC/PSC services abroad. Furthermore, as far as can be concluded from open sources, there is (almost) no private military and security industry in the Netherlands. Therefore, first some reports regarding the national legislations of a number of European and other States have been studied in order to get an impression of the (potential) role of domestic laws in the regulation of the PMC/PSC industry, however with a clear view to the focus of the Priv-War project.² This examination has shown that sometimes (miscellaneous) domestic laws are referred to that might possibly apply to a certain peacetime domestic service which may be provided by PSCs, but that are essentially unrelated to assuring compliance with international humanitarian law and human rights law (which is the main focus of the project).³ Therefore this report will briefly touch upon that type of legislation (see par. 3 below) and then concentrate on the hiring of PMC/PSC services which fulfills the following criteria:

- (1) The legal relationship between the hiring entity and the PMC/PSC is contractual;

¹ Prepared by Utrecht University, School of Law, Center for Conflict and Security Law, by Dr. G.R. den Dekker. Comments on the contents are welcome (g.dekker@law.uu.nl). [8 September 2008; minor update 1 December 2008]

² This examination included (part of) the domestic laws collection on the website of DCAF: www.dcaf.org, an overview of national legislation in F. Schreier & M. Caparini, *Privatising security: law, practice and governance of private military and security companies*, DCAF occasional paper 6, March 2005, an overview provided in the UK ‘Green Paper’ (Foreign & Commonwealth Office, *Private Military Companies: options for regulation*, London, 12 February 2002, Annex B), an overview provided by the European Union DG External Policies, in A. Bailes & C. Holmqvist, *The increasing role of private military and security companies, EU policy department external policies study*, October 2007, the report of the UN 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, 24 August 2007 (A/62/301) and the ‘Swiss initiative’ document ‘Pertinent International Legal Obligations and Good State Practices – explanatory comments – , draft of 20 march 2008’.

³ For example, domestic industry security regulation acts, acts on domestic community security or crime prevention, acts on domestic private policing and security guards (e.g. money transports).

(2) The PMC/PSC is hired to operate in a situation of international armed conflict or internal armed conflict or post-conflict buildup (e.g. demobilizing and reforming of warrior groups);

(3) The services provided by the PMC/PSC include (i) the carrying and use of (fire-) arms or (ii) contact with prisoners other than for medical purposes only (e.g. interrogation, prisoner detention).

This report will address the categories of law identified in the steering committee meetings.⁴ Given that the Dutch domestic laws do not have a lot to say about PMCs/PSCs operating in conflict zones abroad, the position taken by the government of the Netherlands has been added to this report (therefore based on statements of national policy rather than national laws).⁵

3. Domestic security and investigation services

In the Netherlands, the offering or conducting of private security services or private investigation services is subject to a license of the Ministry of Justice.⁶ It is an economic offence if a license is not obtained. A security organization is defined as a private organization conducting ‘security services’, i.e. the protection of the security of persons and goods or the guarding against disturbance of the peace on terrains and in buildings. The license categories are private surveillance organizations (either ‘in house’ or providing services for third parties), private alarm centers, private money- and valuables transport services and other private organizations conducting security services (e.g. bouncers). Professional training qualifications, identifications cards, uniforms and complaints procedures are part of the detailed regulations. The guards and investigators are unarmed (the only ‘arms’ referred to in this law are dogs and handcuffs, for which separate permission is required). This is not the type of organization that offers or performs (or is hired for) military or security services in armed conflict abroad.⁷ Those services are not regulated as such.

Domestic legislation containing instructions concerning the use of armed force, including firearms, by security guards of military objects (located in the Netherlands) is only

⁴ Namely: corporate law, commercial law, labor law, government procurement, criminal responsibility and civil liability. See Final Report of the Steering Committee, Florence, 5 June 2008, at 4, and see the Data-collection form of national legislation/regulation on the Priv-War website.

⁵ The information about the government position in this report is taken from the publicly available government sources which provide (general) information about the contents of the government contracts. See Answers by the Dutch Ministers of Defense and Foreign Affairs to questions raised, 7 November 2007; Answers by the Ministers of Defense and Foreign Affairs to questions raised in connection with the government reaction to the AIV-advice, 20 June 2008; Reaction of the Ministries of Defense and Foreign Affairs to the AIV-report on employing private military companies, 25 April 2008; AIV report ‘Employing private military companies, a question of responsibility’, no. 59, December 2007 (www.aiv-advice.nl). The Dutch case law with an LJN number in this report can be found at www.rechtspraak.nl.

⁶ Act on the private security organizations and private investigation bureaus (*Wet particuliere beveiligingsorganisaties en recherchebureaus*), 24 October 1997; Regulation on security organizations and private investigation bureaus (*Regeling particuliere beveiligingsorganisaties en recherchebureaus*), 3 March 1999, as amended on 2 December 2002 (with respect to educational qualifications) by Regulation of the Ministry of Justice nr. 5199069/DBZ/02.

⁷ This is confirmed by the case law with respect to this law which only relates to domestic situations and shows that almost all cases originate from problems regarding the (renewal of the) license.

applicable to members of the armed forces and civilian security guards hired by the Ministry of Defense, as they are allowed to provide these services.⁸

4. Regulation of armed force

4.1 Possession of arms

In the Netherlands, as in most European states, the possession and carrying of (fire)arms is monopolized and controlled by the government. The right to produce, trade, transfer, possess or carry firearms is prohibited. There is a licensing system in place (e.g. for sports and hunting).⁹ The prohibitions do not apply to the army or the police and some other government forces, such as special criminal investigators. The exemption may apply as well to persons that have been designated by the Ministry of Defense as persons forming part of or working for the army (including a foreign army).

4.2 Arms export

The export of arms from the Netherlands and the transit of military goods across the Netherlands are regulated by various domestic laws and regulations.¹⁰ Arms exports are subject to a licensing system. The rules are based on, among others, the EU Code of Conduct on Arms Exports and the Wassenaar Arrangement munitions list. The laws relate to weapons and dual use goods (which require an end-user's declaration for export). Although technical assistance with respect to dual use goods may be covered as well, the rules are equipment-related and do not regulate the export of military and security services in their own right. In recent years, the majority of Dutch arms exports consisted of radar and fire-control systems, components and sub-systems, ships and surplus military stocks.¹¹

Export to and import from other member-states of the European Union of arms and munitions is prohibited without the consent of the Dutch Tax/Customs central authority for in- and export, or, with respect to arms for the army or the public services (the police), the Minister of Defense.¹² Consent for import from a European Union member-state is refused if the applicant (requesting consent) is not allowed to have at his disposal the weapons or munitions in the Netherlands, unless they are destined for transfer and storage in customs sheds. Consent for export to a European Union member-state is refused if the applicant cannot prove with an official document or if it is not otherwise known that the receiving authorities have no objections against the presence on their territory of the weapons or munitions. 'Arms and munitions' also in this context means equipment (it includes knives, catapults, crossbows,

⁸ See Statute Law on the use of force by guards of military objects (*Rijkswet geweldgebruik bewakers militaire objecten*), 24 February 2003; Order on the use of force by personnel of the Ministry of Defense in the execution of security guard tasks (*Besluit geweldgebruik defensiepersoneel in de uitoefening van de bewakings- en beveiligingstaak*), 22 July 2000.

⁹ See Act on Arms and Ammunition (*Wet wapens en munitie*), 5 July 1997. A similar system is in place with respect to explosives for civil use, see Act on explosives for civil use (*Wet explosieven voor civiel gebruik*), 7 July 1994.

¹⁰ See General Customs Act (*Algemene Douanewet*), 3 April 2008; Strategic Goods Import and Export Order (*Besluit Strategische goederen*), 26 April 1963 as amended; financial involvement concerning strategic goods Order (*Besluit financieel verkeer strategische goederen*) of 24 October 1996; Sanctions Act 1977 (*Sanctiewet 1977*), 15 February 1980.

¹¹ See M. Brombly, 'The Impact on Domestic Policy of the EU Code of Conduct on Arms Exports: the Czech Republic, the Netherlands and Spain', *SIPRI Policy Paper* 21, May 2008, p. 34.

¹² Act on Arms and Ammunition (*Wet wapens en munitie*), 5 July 1997, art. 1 sub 7 and 14-20.

handguns, rifles and automatic weapons and munitions for those weapons) and does not relate to services.

4.3 Government policy on outsourcing of armed force

The Dutch government has made it clear that the outsourcing of tasks to private military and security contractors does not mean that the Dutch state at any point surrenders the state monopoly on the use of armed force. The undisputable starting-point according to the government is that the state maintains the monopoly on armed force at all times, including the operating (at a distance) of weapons systems.¹³ However, if the possession and carrying of arms is legal in the area of operation and the governmental powers of the host state are weak, the government considers it undesirable that the personnel of the PMCs/PSCs or their subcontractors (often locals) would be prohibited from carrying arms (a permit or endorsement for carrying the arms is then asked for with the local authorities). Here, ‘arms’ means (hand)guns for self-defense, not (assisting in) the operation of weapons systems (other than maintenance) which the Dutch government considers is not a proper task for private contractors.¹⁴ This latter consideration is also motivated by the government by the fact that allowing the exercise by PMCs/PSCs of typical elements of state power could make their actions attributable to the state under the international law of state responsibility.

The position of the government as regards the use of armed force is also reflected in the Dutch constitution. The decision to enter into an armed conflict (‘go to war’) is a government decision which requires parliamentary approval (unless the emergency situation does not allow the time to request such approval).¹⁵ The use of the armed forces for maintaining and restoring international legal order abroad (including providing humanitarian relief in armed conflict situations) is a government decision which requires prior informing of the parliament (unless this is impossible in which case the parliament is informed after the political decision has been taken).¹⁶ A (foreign) national cannot bring an action before the Dutch courts based on the use of force as authorized by the State allegedly being in contravention of Art. 2(4) UN Charter, as that prohibition is directed at the protection of states not individuals.¹⁷

4.4 PMC contracts and armed force

Although the contracts between the government and the PMCs/PSCs operating in conflict situations are not disclosed (not even on a no-names basis to the Dutch parliament) for reasons of competition, protection of operational data and privacy of personal data,¹⁸ the

¹³ See Answers by the Ministers of Defense and Foreign Affairs to questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p. 5; Reaction of the Ministries of Defense and Foreign Affairs to the AIV-report on employing private military companies, 25 April 2008, p. 4.

¹⁴ Reaction of the Ministries of Defense and Foreign Affairs to the AIV-report on employing private military companies, 25 April 2008, p. 8.

¹⁵ Art. 96 Constitution of the Kingdom of the Netherlands.

¹⁶ Art. 100 Constitution of the Kingdom of the Netherlands.

¹⁷ Supreme Court ruling of 29 November 2002 (*Danicovic et al. v State of the Netherlands*), LJN: AE5164; Supreme Court ruling in *Association of lawyers for peace and others v. State of The Netherlands*, 6 February 2004 (NJ 2004/329). This is notwithstanding the fact that individual criminal responsibility may exist for waging a war of aggression contrary to Article 2(4) UN Charter (cf. art. 6 Nuremberg Charter 1945/principle VI Nuremberg principles of 1950).

¹⁸ See Answers by the Ministers of Defense and Foreign Affairs on questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p.15.

government has indicated that the contracts contain instructions regarding the permitted use of armed force. These instructions are more restrictive than those of the Dutch government forces. The private contractors hired by the government to protect Dutch officials and diplomats abroad, according to their contract – and analogous to government employed personnel in similar positions – are only allowed to use violence in extreme emergency situations. The members of the local Afghan security organization Afghan Security Guard (ASG), which is hired by the Dutch government to man strategic posts and patrol in Afghanistan around the base camps in the province of Uruzgan, are instructed in their contracts to use violence in self-defense only. Any use of violence by ASG members must, according to their contracts, be reported to the Dutch mission in Uruzgan which thereupon can inform the Afghan authorities if suspicions that a criminal act took place are raised.¹⁹ Their contracts also stipulate that they must observe the Afghan laws (although immunity is granted from local criminal law, see below) and in general terms shall respect human rights. However the (obligation with respect to) notion of human rights has not been specified or elaborated in the contracts. Transport of goods to and from the Dutch mission in Uruzgan is carried out by local personnel employed by private contractors working for the government. The responsibility for the safety of that personnel lies primarily with their (private) employer, who makes a risk analysis in cooperation with the International Security Assistance Force (ISAF) in Afghanistan.

5. Corporate law

5.1 Registration and purpose

Every owner of a business (incorporated businesses such as limited liability companies but also one-man businesses) in the Netherlands has to register with the Trade Register of the Dutch Chambers of Commerce.²⁰ Establishing a public or private limited company requires a certificate of no objection from the Ministry of Justice.²¹ This however is not very difficult to obtain as it may only be refused on the ground that there is a risk the directors will use the company for illegal purposes (or to infringe on creditor's rights).²² Registration includes a brief description of the corporate purpose which must not consist of illegal activities. In practice it is far-fetched to imagine any company providing a corporate purpose which is illegal since a very general description is sufficient. The Public Prosecutor can request the district courts to dissolve a company having legal personality if its purpose is contrary to public order. In that event the court can give the company the opportunity to change its purpose so that it is no longer contrary to public order.²³

If a company having legal personality carries out activities contrary to public order, the Public Prosecutor can request the district courts to declare that the company is prohibited and will be dissolved.²⁴ Activities 'contrary to public order' include the threat or use of force against persons (state officials or not) and conspiracy with a foreign entity against the State, in a systematic and serious manner such that, if applied on a large scale, the Dutch society would be disrupted.

¹⁹ Answers by the Ministers of Defense and Foreign Affairs on questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p. 7.

²⁰ Trade register Act 2007 (*Handelsregisterwet 2007*), 22 maart 2007.

²¹ Dutch Civil Code 2:64 and 2:175.

²² Dutch Civil Code 2:68 and 2:179

²³ Dutch Civil Code 2:20(2).

²⁴ Dutch Civil Code 2:20(1).

5.2 Dutch PMCs

Of the (only two) Dutch PMCs found listed on the Internet, the one called Global Dutch Dynamics is not incorporated but is a one-man business (in fact, a call with the Dutch Chamber of Commerce learned that it is led by a man calling himself Mr. “Watchus”, which sounds like an alias) and seems to be no more than a clearing house or contact person. It pretends to be active in conflict zones around the world and is also concerned with exit strategies in emergency situations. The other PMC found registered in the Netherlands is Prevent International which is incorporated (it is a limited liability company). Prevent International is mainly active in the field of security training and risk management, industrial security in particular (there are no indications that it is also active in conflict zones, even though its personnel is claimed to have experience in ‘crisis areas all over the world’).

6. Labor law

6.1 Employment

There are no specific rules on PMC/PSC services in Dutch labor law. Not much is known about deployment instructions to or training of PMCs/PSCs (employees) before they start working in their area of operation. The government has indicated that sometimes it has been agreed in the contract that PMC employees before being deployed in the area of operation go through a short training with the Ministry of Defense. In the event of long-term contracts the private firm to some extent will be involved in the planning of the missions after the political decisions about these missions have been taken.²⁵

The national labor laws on personnel health and safety only have very limited extraterritorial application (not relevant to ground operations abroad).²⁶ Still in Dutch law, the employer in principle is responsible for damages incurred by the employee in the course of his work (the same applies to the person who in the course of his trade or business uses someone’s labor without an employment contract).²⁷ Furthermore, Dutch law has a vicarious liability in tort for subordinates.²⁸ It means, in brief, that the person in charge (e.g. employer) is responsible towards third parties for damages resulting from faults of his subordinates (e.g. employees) committed in the performance of their tasks, if the risk of the fault being committed has been increased as a result of the tasks ordered and the person in charge on the basis of the legal relationship with the subordinate had control over the acts during which the fault was committed. In Dutch service contracts usually liability of the company and its executives is limited to direct damages except in case of willful intent or conscious neglect.

6.2 Assignment

If the private company hires independent – i.e. not-subordinate – contractors for a job, the legal relationship is not employment but assignment. If the independent contractor subcontracts part of the assignment under his responsibility he remains answerable towards

²⁵ See Answers by the Ministers of Defense and Foreign Affairs on questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p. 10.

²⁶ E.g., Labor Conditions Act 1998 (*Arbeidsomstandighedenwet 1998*), 18 March 1999; Working Hours Act (*Arbeidstijdenwet*), 23 November 1995.

²⁷ Dutch Civil Code 7:658.

²⁸ Dutch Civil Code 6:170.

the principal.²⁹ There is a complementary statutory liability of the contracting party for actions of those persons whose assistance he has called in for the performance of the contract (in which case his liability extends to those actions as if they were his own).³⁰ If the independent contractor is liable towards a third party for tort, also the person who hired him is (jointly) liable towards the third party if the fault was committed by the contractor during his work in pursuance of that person's business.³¹ Normally, issues of liability will be arranged in the contract. The Dutch government has indicated that the main PMC/PSC contractor is responsible for his subcontractors, and has made it clear that if necessary for the performance of the contract it is stipulated in the contract that some of its clauses (which clauses is not revealed) be made part of the contracts between the main contractor and his subcontractors.³²

6.3 Temporary workers

In Dutch labor law there is no special regulation (anymore) with regard to temporary workers (*uitzendkrachten*). As of 2003, temporary workers receive a temporary employment contract (which can become permanent after two times extension) with the temporary employment agency as their employer. This means that under Dutch labor law it does not make much of a difference if the employee is a (permanent) employee of the PMC/PSC as would probably be the case with the management of the PMC/PSC or is a temporary worker – as would most probably be the case with most of the people 'on the ground' –, with the PMC/PSC acting as a temporary employment agency.

7. Government procurement

7.1 Government procurement policy and PMCs

Dutch foreign policy today is characterized by the combination of Diplomacy, Defense and Development ("3D") of which the operations in Bosnia, Iraq and Afghanistan are examples.³³ It means that providing security and stability will be linked to initiatives to strengthen local governance and societal build-up. The use of private contractors is a structural part of the Dutch concept of operations. The extent to which PMCs/PSCs will be used depends on the situation and is subject to continuous appraisal. The Dutch government has hired private security companies for the benefit of the army, among which there is construction, advisory and organizational work including armored transports, pre-reconnaissance and personal protection, as well as for the protection of diplomats in cities where special threats are discerned.

The most extensive use of PMCs/PSCs so far is in the Dutch contingents of the mission in Afghanistan. In other missions where the Dutch army is involved, the Netherlands is a junior partner and does not hire private contractors (they are hired by the UN or the EU).³⁴ With respect to military services, the Dutch Ministry of Defense has initiated a number of

²⁹ Dutch Civil Code 7:404.

³⁰ Dutch Civil Code 6:76 (*hulppersonen*).

³¹ Dutch Civil Code 6:171.

³² Answers by the Ministers of Defense and Foreign Affairs to questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p. 20-21.

³³ Ministry of Defense policy brief "In service World-wide" (*Wereldwijd Dienstbaar*) 2007, p.1.

³⁴ Answers by the Ministers of Defense and Foreign Affairs to questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p.3.

performance based outsourcing projects relating to the (purchase and) maintenance of certain loading systems, trailer trucks and certain battlefield control radar systems, and logistics.³⁵

In the selection of the private companies, according to the government the highest quality standards are set out and the fulfillment of the tasks is bound to meticulous instructions. The desirability of continuity and sustainable cooperation with PMCs/PSCs for a specific task is taken into account as well. There are eight policy criteria explicitly mentioned by the government in the process of decision-making to hire PMCs/PSCs: (1) maintenance of the state's monopoly on the use of force; (2) the importance of the mission and the tasks to be outsourced; (3) the security risks to which the personnel in question will be exposed; (4) the degree of operational dependence on PMCs; (5) the existence of military alternatives; (6) the legal framework pertaining to state responsibility; (7) the scope for monitoring the implementation of the tasks that are to be outsourced; (8) the financial and economic issues.³⁶ The government generally supports the hiring of or subcontracting to locals, as they are usually most familiar with the situation on the ground and the circumstances in the area of operation (although reportedly only in one contract it has been stipulated that goods and services are to be procured as much as possible from local private contractors).

Depending on the circumstances, general tendering rules for government procurement may apply to the hiring of the services of PMCs/PSCs.³⁷

7.2 Policy limitations on government outsourcing

Special care is taken with respect to the hiring of armed contractors. The government has indicated that in future missions it will differentiate between armed and unarmed private contractors. The necessity of hiring armed contractors is assessed on a case-by-case basis, taking account of (undisclosed) criteria established by the Director of Operations after advice from the Directory of Legal Affairs of the Ministry of Defense. The government has indicated to the parliament that contractors shall not under any circumstances be used for offensive tasks including the operation of weapons system, also taking into account that otherwise they might lose their status as civilians under IHL.³⁸

Tasks directly related to strategic planning, the interrogation of prisoners (of war) and the gathering and processing of information from several sources of intelligence (unless the gathering of information would not mean that the employees of the private contractor loses the protection offered by the status of civilian under IHL and also the Netherlands itself does not have the means to gather this information) shall not be outsourced to private parties,

³⁵ Answers of the Ministry of Defense to questions regarding new forms of material procurement, 21 December 2007.

³⁶ See reaction of the Ministries of Defense and Foreign Affairs to the AIV-report on employing private military companies, 25 April 2008, p. 4; AIV report 'Employing private military companies, a question of responsibility', no. 59, December 2007, p. 32.

³⁷ Tendering of public procurement is largely regulated on the EU level. The current Dutch regulation on tenders for government procurement (*Besluit Aanbestedingsregels voor Overheidsopdrachten 2005*) has inter alia implemented EU Directive 2004/18/EC on the procurement of goods, works and services. Defense contracts fall under Internal Market Rules according to existing EU law. It is recognized in (Art. 10 of) EU Directive 2004/18/EC and the Dutch implementation regulation, that the rules apply to contracts awarded by contracting authorities in the field of defense "subject to Article 296 of the EC Treaty". However this exemption is related to the trade in arms, ammunition and war material and applies only to protect the essential security interests of the Member State involved. In addition, the Court of Justice of the European Union has ruled that the exemption should be interpreted in a restrictive way.

³⁸ Answers by the Ministers of Defense and Foreign Affairs to questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p. 20.

either.³⁹ Similarly, medical personnel on Dutch missions is always military personnel (sometimes reserve) and translator-interpreters receive a temporary appointment with the army and during their operations are always military personnel.⁴⁰ Generally speaking, chances that a private contractor might get involved in hostilities must be kept as limited as possible. The government is not opposed to hiring local armed contractors (in fact it does so in Afghanistan) but this always requires a careful risk assessment and proven care with respect to arms and instructions for using violence (which are part of the contracts), and it must provide a clear contribution to greater effectiveness of the government military and security personnel (i.e. the army and the Royal National Police Corps). Locals hired by the government for the protection of diplomats in unstable countries only have supportive functions within the embassy premises (e.g. manning entrance checkpoints).

8. Criminal responsibility

8.1 Mercenary activity

Dutch law does not prohibit mercenary activity as such. The voluntary participating by a Dutch national in an armed conflict abroad or voluntary enlisting in a foreign army of a state with which the Netherlands has no (imminent) armed conflict is not prohibited. Dutch law does prohibit the recruitment (without permission of the State⁴¹) in the Netherlands of personnel for a foreign military service or armed conflict, which is an offence. Furthermore, voluntary enlisting by a Dutch national in the army of a foreign state with which The Netherlands is at war (of which the Dutch national was aware at the time of enlisting), or similarly when war was imminent and broke out after enlisting is an offence for that person under criminal law.⁴² The same applies to armed conflict other than war in which the Netherlands is involved, either in individual or collective self-defense or to restore international peace and security.⁴³ No prosecutions based on these prohibitions have been found. The Dutch national who voluntarily fights in the foreign army against the Netherlands or its alliances (read: NATO) in principle loses the Dutch nationality.⁴⁴

The Netherlands has not indicated that it will support (or become a party to) the 1989 UN Convention against the recruitment, use, financing and training of mercenaries.

8.2 Individual criminal responsibility

Dutch criminal law is applicable to individuals committing certain defined serious crimes outside of the Netherlands and irrespective of nationality of the perpetrator based on

³⁹ See reaction of the Ministries of Defense and Foreign Affairs to the AIV-report on employing private military companies, 25 April 2008, p. 7; Answers by the Ministers of Defense and Foreign Affairs to questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p. 5, 26.

⁴⁰ Answers by the Ministers of Defense and Foreign Affairs to questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p. 17.

⁴¹ See Dutch Penal Code art. 205. The literal text says 'King' so formally it is the head of the state that would grant permission.

⁴² See Act on Martial Law (*Wet Oorlogsstrafrecht*), 10 July 1952 as amended, art. 4, and see Dutch Penal Code, art. 101 and 87.

⁴³ See Dutch Penal Code art. 107a.

⁴⁴ See Statute Law on the Dutch Nationality (*Rijkswet op het Nederlanderschap*), 9 December 1984, Art. 15(1(e)). In principle, because it does not happen if losing the Dutch nationality would prevent the Dutch courts from assuming jurisdiction over the person in respect of war crimes or crimes against humanity, whereas also the loss of the Dutch nationality may be reconsidered if statelessness would result.

the principle of universality (however most of these listed crimes are concerned with threats against the Dutch State and do not seem particularly relevant to the conduct of private contractors abroad).⁴⁵ The Act on Martial Law (which used to include war crimes but for the most part has been replaced by the Act on International Crimes) is concerned with certain crimes in times of armed conflict (relating to treason of the state and collaboration with the enemy) and their prosecution.⁴⁶ On the basis of the Act on International Crimes, which *inter alia* implements the crimes in the Statute of the International Criminal Court, individual criminal jurisdiction based on responsibility for grave and other breaches of the Geneva Conventions and AP I and torture and genocide – both in international and in non-international armed conflict – can be exercised against anyone present in the Netherlands (including if a person seeks asylum or refugee status in The Netherlands⁴⁷), or if the perpetrator is or later becomes a Dutch national, or if the victim is a Dutch national.⁴⁸ The crimes defined include attacking individual civilians in international armed conflict and attacking individual civilians not directly participating in hostilities in non-international armed conflicts.⁴⁹ Also complicity in war crimes is a ground for prosecution.⁵⁰ The Act on International Crimes excludes the possibility of prosecution with respect to persons who have been granted immunity on the basis of any treaty valid for the Netherlands.⁵¹ The same exception applies under common criminal law.⁵² Apart from the specific crimes against the state and the war crimes etcetera described, Dutch criminal law does not apply to the conduct of local or foreign private contractors in their field of operation.

With respect to Dutch nationals the Dutch penal code can be applicable irrespective of where the crime was committed, generally if it is a crime according to Dutch law and is also punishable under the laws of the state where it was committed, although double penalization is not required with respect to certain very serious crimes such as war crimes.⁵³

8.3 Command responsibility and PMCs

Dutch Military criminal and disciplinary law is only applicable to members of the armed forces. The private contractors hired by the government are not (made) formal members of the Dutch armed forces. In Dutch law command responsibility is recognized as a basis for criminal punishment,⁵⁴ but there has not yet been a conviction on that basis.⁵⁵ A

⁴⁵ See Dutch Penal Code art. 4.

⁴⁶ Act on Martial Law (*Wet Oorlogsstrafrecht*), 10 July 1952 as amended.

⁴⁷ Two Afghan military intelligence officers who in The Netherlands applied for asylum/refugee status were detained and tried for war crimes and torture committed in Afghanistan in the 1980s and sentenced to many years imprisonment. See The Hague Court of Appeal cases against *Heshamuddin Hesham* and *Habibulla Jabelzoy*, judgments of 29 January 2007 (LJN: AZ7143 and AZ 7147). The appeal in cassation was denied by the Dutch Supreme Court, judgments of 8 July 2008 (LJN: BC7418 and BC7421).

⁴⁸ Act on International Crimes (*Wet International Misdrijven*), 19 June 2003.

⁴⁹ Act on International Crimes (*Wet International Misdrijven*), 19 June 2003, Art. 5(2)(c.1) and 6(3)(a).

⁵⁰ See the case of *Frans Van Anraat*, a Dutch national who was sentenced for complicity of war crimes. He delivered chemicals to Iraq in the 1980s that were requisite by the regime of Saddam Hussein to produce chemical weapons used against Iraqi Kurds. Court of Appeal The Hague, judgment of 9 May 2007, LJN: BA 4676 (*Van Anraat*).

⁵¹ Act on International Crimes (*Wet International Misdrijven*), 19 June 2003, Art. 16(b).

⁵² Dutch Penal Code art. 8 stipulates that the applicability of the Dutch criminal laws is restricted by the exceptions recognized in public international law.

⁵³ See Dutch Penal Code art. 5.

⁵⁴ Act on International Crimes (*Wet International Misdrijven*), 19 June 2003, Article 9.

subordinate is not liable to punishment if he acted upon an order of his superior which he considered to be valid in good faith and which fell within the boundaries of his tasks as subordinate. This exemption does not apply to superior orders to commit genocide or crimes against humanity.⁵⁶

The Dutch government considers it unlikely that a military commander of the armed forces (present in the area of operation) would be responsible for violations of the laws of war by the conduct of PMCs/PSCs. The - factual - question in that regard is whether the military commander through a hierarchical relationship can exercise effective control over the behavior of the other person as his subordinate (and was aware of that behavior and could have acted but failed to do so). Generally speaking, this will not be the case in the relationship between the military commander and the member of the PMC/PSC.⁵⁷

With respect to the local Afghan forces in the Afghan Security Guard (ASG) hired for the Dutch mission in Uruzgan, the government has indicated that the local forces have to follow the instructions of the ISAF commander although formally they are not under ISAF military command and are not subject to the Dutch military criminal and disciplinary laws.

8.4 Immunity from local criminal law

In the status agreements between the Netherlands and the host state (like in status agreements between international organizations and the host state) it is common practice that immunity from local criminal law is granted to all personnel including PMCs/PSCs personnel for all activities in the performance of their tasks. It is usually possible to lift immunity of the PMC/PSC (employee) in individual cases. The Dutch government has confirmed that with respect to the local Afghan employees of ASG, the Netherlands can lift immunity in individual cases, e.g. in case the instructions regarding the use of armed force have been breached, although this has not happened so far.⁵⁸

Furthermore, the government has noted that the granting of immunity in a contract cannot alter the fact that individual employees of PMCs/PSCs bear criminal responsibility for committing international crimes on the basis of international law.⁵⁹ True as this is, as long as immunity of PMCs/PSCs is arranged in status of forces agreements it seems treaties not contracts would normally govern the immunity issue.

⁵⁵ The only attempt so far (on the basis of the old Act on Martial law) was against the Dutch national Guus Kouwenhoven, who allegedly allowed some security guards of his timber companies in Liberia to participate in hostilities as members of the armed forces of Charles Taylor. However, no sufficient proof for this was found and the case ended in a full acquittal. See Court of Appeal The Hague, judgment of 10 March 2008, LJN: BC6068 (*Kouwenhoven*).

⁵⁶ Act on International Crimes (*Wet International Misdrijven*), 19 June 2003, Article 11.

⁵⁷ Answers by the Ministers of Defense and Foreign Affairs to questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p. 23.

⁵⁸ Answers by the Ministers of Defense and Foreign Affairs to questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, pp. 6-7 and 25.

⁵⁹ See reaction of the Ministries of Defense and Foreign Affairs to the AIV-report on employing private military companies, 25 April 2008, p. 11.

8.5 Criminal responsibility and companies

In Dutch law a company with legal personality (and certain partnerships not bearing legal personality) can be subject to criminal punishment.⁶⁰ Although the company itself by its nature cannot be subject to certain criminal law penalties (such as imprisonment) fines also of a punitive nature can be applied to a company. For example, many of the prohibitions in the field of arms exports and dual use goods are sanctioned by administrative fines.⁶¹ Furthermore, the natural persons who ordered the prohibited behavior and those who fulfilled an executive function as a matter of fact with respect to the prohibited behavior can be prosecuted as well (also together with their company).⁶²

For completeness' sake, if an organization has as its objective to commit (war) crimes anyone participating in such organization (which includes funding and personal/material recruitment activities) can be prosecuted.⁶³

9. Commercial law/civil liability

9.1 Choice of law and forum

A choice of law made in the contract will in principle be upheld by the Dutch courts. In the government contracts with PMCs/PSCs, Dutch law is chosen as the law governing the contract. In the absence of a choice of law, the law of the state with which there is the closest connection would normally govern the contract. Generally speaking, a Dutch court will consider the closest connection to be with the (laws of the) state where the party to the contract is resident or incorporated which delivers the characteristic performance (which determines the nature of the contract). The delivery of services is by definition more characteristic than the payment of money. However, the Dutch courts have the liberty to examine all the circumstances of the concrete matter and determine the closest connection on that basis instead. Furthermore, certain mandatory rules of national or European law can be applied by the Dutch courts irrespective of the choice of law (based on considerations of protecting the weaker party to the contract). The choice of forum will be upheld in Dutch courts in principle as well.⁶⁴ Parties may e.g. choose to subject contractual disputes to arbitration. If no choice of forum has been made, under Dutch law the principal rule is that the courts of the defendant are competent.⁶⁵ In this context, an individual defendant is considered to be Dutch if he has his normal residence in the Netherlands. A company is considered to be Dutch if it has its statutory seat/registered office in the Netherlands (even if its activities are mainly carried out elsewhere).⁶⁶ If it is clear that the Dutch judiciary is competent but no choice of forum has been made in the contract, the civil courts are deemed competent.⁶⁷ Finally it is noteworthy that if it turns out that there is no other (effective) forum available to the plaintiff, Dutch courts may assume competence on the basis of *forum necessitatis*.⁶⁸

⁶⁰ Dutch Penal Code art. 51.

⁶¹ Economic Offences Act (*Wet Economische Delicten*), 22 June 1950.

⁶² Dutch Penal Code art. 51.

⁶³ Dutch Penal Code art. 140. The same applies to terrorist attacks, art. 140a.

⁶⁴ Dutch Code of Civil Proceedings, art. 8.

⁶⁵ Dutch Code of Civil Proceedings, art. 2. If a contract is performed in the Netherlands or if a tort has occurred in the Netherlands, this provides a ground for competence of the Dutch courts as well.

⁶⁶ Dutch Civil Code 1:10.

⁶⁷ This is inferred from Art. 112 Constitution of the Kingdom of the Netherlands.

⁶⁸ Dutch Code of Civil Proceedings Art. 9.

9.2 Freedom of contract

Dutch contract law allows large freedom to the contracting parties. There are no specific civil law rules on PMC/PSC activities. In general, transactions which by their nature or content are contrary to public order or morality are void or voidable.⁶⁹ PMC services in general would not fall under this type of transactions unless the contract was clearly meant to serve a prohibited purpose (e.g. to overthrow a foreign government by armed force). A choice of forum clause is deemed to exist independently of the contract, so even if the contract is void the Dutch court or arbitrator would still be competent on the basis of such a clause.⁷⁰ The interpretation of written contracts by a court according to Dutch case law must not be based exclusively on the literal wording of the contract, but should also take into account the meaning which the parties to the contract could (have) reasonably attach(ed) to the clauses of the contract based on their mutual statements and conduct in practice – even though contracts which (also) regulate the legal position of third persons tend to be interpreted more strictly according to their literal wording. Reasonableness and fairness are recognized as a separate source of legal obligations which complement or in exceptional circumstances may even override the contractual clauses.⁷¹

9.3 Termination of contract

If the contract has been entered into for a specified term, it cannot be terminated early without cause unless termination has been arranged in the contract, which usually is the case (a notice period is commonly to be observed). In Dutch commercial practice, a serious and attributable breach of contract is a ground for immediate termination. Contracts of unlimited duration can be terminated without cause on grounds of reasonableness and fairness but usually a reasonable notice period has to be observed (or payment of equivalent financial compensation). With regard to PMCs/PSCs the growing practical dependence of the hiring government on the PMCs/PSCs' continuing presence in the area would seem to be more pressing than legal obstacles to termination of contract, if any (although the Dutch government denies that the Dutch armed forces currently are really dependent on private contractors for their operations). It has been reported by the government that only one event of early termination of contract with a PMC/PSC has taken place.⁷² In that case the regular notice period of three months was observed (indicating that this early termination was not for cause) and another private contractor was hired.

9.4 Civil liability

The Dutch government has made clear that in the contracts concluded by the Ministry of Defense, it is stipulated that the Dutch state and its personnel shall not be responsible for any damages which may occur with the PMC/PSC and third parties (including the employees of the PMC/PSC) in connection with the performance of the contract. In principle, the PMCs/PSCs are responsible for their own actions and have to compensate themselves any victims of their actions. The PMC/PSC has the obligation to arrange for insurance covering

⁶⁹ Dutch Civil Code 3:40.

⁷⁰ Dutch Code of Civil Proceedings, art. 8 and 1053.

⁷¹ Dutch Civil Code 6:248.

⁷² Answers by the Ministers of Defense and Foreign Affairs to questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p. 14.

the risks that he and his employees run, the costs of which are calculated in the price of the contract.⁷³ This is a standard clause in Dutch service contracts, although the practical importance in this type of agreements is considerably higher than on average in supply services contracts. So far the government has no indications that it would not be possible for the PMCs/PSCs to cover their risks on the (international) insurance market.⁷⁴ The government has indicated that although it is not responsible, it can still decide on a case by case basis to compensate any victims of the conduct of the PMCs/PSCs *ex gratia*. Considerations of force protection and own fault are criteria used in that decision.⁷⁵ If the PMCs/PSCs fail to perform under the contract, the government can hold them liable for the damages which result from the non-fulfillment of their obligations.⁷⁶ The fact that the PMC/PSC can terminate the contract or decide not to renew it according to the government is one of the reasons why private contractors can never (fully) replace government forces in areas of operation.⁷⁷ Under Dutch law there is a general duty for the aggrieved party to prevent or reduce his damage as much as possible.⁷⁸ In the event of early termination negative consequences for the mission could e.g. be limited by bringing into action the army instead or rapidly hiring another private contractor.

In contracts with PMCs/PSCs where the use of armed force is or may be part of the job, the contract stipulates that the restrictions placed by the Dutch government on the use of armed force shall be strictly observed. This includes compliance with international law, including the laws of war and human rights.⁷⁹ Again, it is not made clear if and how this obligation has been specified or elaborated in the contract. Even if upholding humanitarian law and human rights law is not made explicit in the contract, it could still be argued that the proper fulfillment in good faith of the contract includes observing fundamental human rights and the fundamental principles of the laws of war. However in practice an action for breach of contract would no doubt be combined with a tort claim. The general tort law clause is very broadly defined (it includes breach of a duty of care towards any others' person or goods)⁸⁰ and therefore readily allows for an action for damages (including immaterial loss although Dutch courts are as a rule restrictive). Most of the time the tort action shall be governed by the same law that is chosen in the contract because it is closely linked to that contract, but in the absence of a written contract (or an express choice of law through other means) the tort action may be governed by the laws of the state where the tort was committed.⁸¹

⁷³ See reaction of the Ministries of Defense and Foreign Affairs to the AIV-report on employing private military companies, 25 April 2008, p. 10.

⁷⁴ Answers by the Ministers of Defense and Foreign Affairs to questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p. 22.

⁷⁵ Answers by the Ministers of Defense and Foreign Affairs on questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p. 24.

⁷⁶ Dutch Civil Code 6:74. I leave aside a discussion of *force majeure* or other defenses.

⁷⁷ See reaction of the Ministries of Defense and Foreign Affairs to the AIV-report on employing private military companies, 25 April 2008, p. 4, 5.

⁷⁸ This is inferred from Dutch Civil Code 6:101 (own fault).

⁷⁹ See reaction of the Ministries of Defense and Foreign Affairs to the AIV-report on employing private military companies, 25 April 2008, p. 10.

⁸⁰ Dutch Civil Code 6:162

⁸¹ See Act on the conflict of laws regarding tort claims (*Wet Conflictenrecht Onrechtmatige Daad*), 11 April 2001, Art. 3-6.

9.5 State immunity before the civil courts

With respect to immunity of the Dutch State before the civil courts, case law shows that the Dutch courts look at the nature of the contracts rather than its purpose. This means in brief that if a contract by its nature is commercial and the (foreign) government has entered into it on the same footing as a private party, the possible ‘public’ purpose in principle cannot prevent the exercise of jurisdiction.⁸² Legal actions concerning monetary claims against the State would in principle be admissible. Further-reaching applications to the courts, in particular claims to order the State to display particular conduct or to prohibit the State from displaying particular (future) conduct, could be admissible as well, but if so, the civil court would exercise utmost judicial restraint in its assessment given the political nature of matters in the field of foreign affairs and defense (which will as a rule result in a rejection of the claim).

It is established case-law that the Dutch courts do not make political assessments and should allow the government sufficient room for maneuver with respect to (future) policy decisions in the field of foreign affairs and defense.⁸³

The possibilities to enforce judgments against a foreign State are even more limited (in particular, seizure of assets for the public services is prohibited by law).

10. Case law

No Dutch (criminal or civil) case law on mercenary activities or activities involving PMCs/PSCs in armed conflict abroad has been found.⁸⁴ According to the government, so far no incidents have occurred in which private contractors hired by the Dutch government claimed victims, nor have they undertaken any acts of violence. The local Afghan force ASG has been involved in acts of violence, but according to the government all members of the force have acted in accordance with their instructions.

The Dutch government has stated that it must be prevented that a private contractor can go unpunished in an area of operation due to a lack of jurisdictional powers.⁸⁵ The Dutch public prosecutor has already proved to be willing to initiate proceedings against a Dutch sergeant-major (marine corps) for allegedly breaching his use of force instructions which allegedly resulted in the killing of a civilian in the area of operation (in Iraq; this case did not result in a conviction).⁸⁶ In addition, certain Dutch law firms (which are specializing in public international law) are increasingly active in initiating proceedings against the State based on tort actions and complaints for failure to prosecute.⁸⁷ It is not unlikely that a case will be

⁸² Although in case-law an exception has been made with respect to the use and operation of a war ship of a foreign state in a Dutch harbor, see e.g. Supreme Court ruling of 12 November 1999, NJ 2001, 567 (*USA v. Havenschap Delfzijl/Eemshaven*).

⁸³ A case in point is Supreme Court ruling in *Association of lawyers for peace and others v. State of The Netherlands*, 6 February 2004 (NJ 2004/329).

⁸⁴ According to the government there are no known cases of criminal proceedings with regard to Dutch private contractors, see Answers by the Ministers of Defense and Foreign Affairs to questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p. 25.

⁸⁵ Answers by the Ministers of Defense and Foreign Affairs to questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p. 6.

⁸⁶ Court of Appeal of Arnhem, judgment of 4 May 2005, LJN: AT4988 (*Eric O.*). The accused was fully acquitted and now seeks reparation of damages on the basis of unjustified prosecution.

⁸⁷ Article 12 Dutch Code of Criminal Proceedings gives a general right to the directly interested party (including organized interest groups – foundations in particular) to issue a complaint to the Courts of Appeal against the State for not prosecuting a (legal) person or for not continuing prosecution.

initiated in the Netherlands when an incident involving a government hired PMC/PSC, e.g. in Afghanistan, would claim (civilian) victims.

11. The Dutch government position on the status of PMCs/PSCs

According to the Dutch government, in the event of an armed conflict the status of private security personnel not in the service of the army with the Ministry of Defense depends on the circumstances in each case. The government has signaled that ‘persons accompanying the armed forces’ are a category under IHL if the private contractors have an authorization and an identity card from the armed forces they accompany (but no such identity cards have been provided according to the Ministry of Defense). Also, the Dutch government has indicated that it can make use of reservists or appoint temporary military personnel e.g. if specialists such as helicopter mechanics, interpreters, medical personnel or agricultural specialists are needed in an area of operation. However, according to the government usually the circumstances will be such that the private contractors can be considered civilians under IHL.

This is also the status ‘favored’ by the government: the government has indicated to the parliament that personnel of private contractors enjoy the protection offered by IHL to civilians. Like other civilians, they lose this protection when and as long as they engage in direct participation in hostilities. As the government has put it, “in principle the use of armed force in self-defense is not covered by the notion of direct participation. After all, a direct connection between the use of armed force and the armed conflict as a rule is absent when a private contractor uses their arms in self-defense. Such use of armed force is not directed at harming the enemy but at self-protection instead”.⁸⁸ The use of armed force out of self-protection would not be punishable under Dutch criminal law on the ground of self-defense (the attack would be illegal because the private contractor attacked is a civilian).⁸⁹

Of course the quoted statement of the government cannot solve the problem that there may be a very thin line between defending oneself individually and defending a military object against an attack by a party to the conflict (which would come down to denying the enemy a military advantage and thus could be considered to constitute direct participation). Under Dutch law the contractor’s acting in defense against a legitimate attack arguably could be justifiable on the ground of *force majeure* or distress (in the meaning of the choice to preserve one’s own life at the cost of harming another).⁹⁰

12. Hiring by non-state actors or foreign governments

In the previous paragraphs, the main focus has been on the hiring of PMCs/PSCs by the Dutch government. However, potentially a large part of the problem of the use of PMCs/PSCs in conflict zones lies in the hiring by certain non-state actors such as armed opposition groups or irresponsible governments. There is no information available about

⁸⁸ Answers by the Ministers of Defense and Foreign Affairs to questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p. 21 (Translation GdD).

⁸⁹ Dutch Penal Code Art. 41 (*noodweer*). Under extreme circumstances, the ground of excessive self-defense (*noodweereces*; Dutch Penal Code art. 41 sub 2) arguably could be invoked to exclude the defender’s culpability.

⁹⁰ Dutch Penal Code Art. 40 (*overmacht/noodtoestand*); this ground does not require that the attack against which defense took place was itself illegal.

contracts, if any, between non-state actors or foreign governments hiring Dutch PMCs/PSCs or Dutch nationals in their personnel.

In the Dutch embassy in Kabul a number of Dutch nationals are working on the premises as armed security guards for a non-Dutch private security firm. As long as recruitment by or of Dutch PMCs/PSCs is not tantamount to hiring personnel for foreign military service or armed conflict (and without consent of the State) it is not prohibited by Dutch law. Although under international law the Dutch state has the obligation to ensure respect for human rights and IHL and on that basis may arguably have a ground to meddle in the commercial export of Dutch PMCs/PSCs services⁹¹, it is likely that hiring by other entities (especially by non-state actors such as private companies) may be out of the governments' sight. If incidents are reported the loss of government support or even opposition of the government may cause a PMC to terminate its activities⁹², even though it is difficult to keep track of new companies which are essentially a continuation of the 'disappearing' ones. Ideally, PMCs/PSCs in their pursuit of continuity, the building of a respectable client portfolio and profit maximizing would cherish their reputation and prefer to operate in full openness and legality, but the problem lies in excesses which may go unnoticed or are covered up. National law (as yet) does not have an answer to that, also because most of the time there is (almost) no monitoring system in place in conflict areas. Furthermore, although private parties in the Netherlands are not allowed to possess or carry firearms, arms may be provided through regular arms trade or already be present in the conflict area or become available through illegal channels.

With respect to civil law, if the parties agree to it there is no reason why Dutch law could not apply to a contract between a Dutch PMC and a private party or foreign government. However, the typical nature of 'covered' operations (for example, training members of an armed opposition group) will be such that the PMC concerned will not make use of a regulated court system in case problems with the contract arise (in addition, the involvement of a foreign government may give rise to immunity issues before a court).

With respect to individual criminal liability, the Dutch nationality of the individual or the company provides a jurisdictional link, as has already been addressed. Still the question is if in the absence of any monitoring system in place, violations of the laws of war or fundamental human rights may reach the (host) State authorities and if so, whether they are able and willing to prosecute. The Dutch Advisory Council on International Affairs has advised that with regard to the measures the Dutch government should adopt, it is thinking mainly in terms of strengthening existing instruments such as contracts and national supervision of PMCs, and less in terms of drafting new legislation.⁹³ The government is of the opinion that extension of Dutch criminal legislation with respect to PMCs/PSCs is not necessary.⁹⁴ The government has indicated that it will keep close track of international

⁹¹ The 'Swiss initiative' refers to good practices for home states in respect of commercial export of military and security services based on regulations of the UK, US, South Africa and Switzerland, see 'Pertinent International Legal Obligations and Good State Practices – explanatory comments – , draft of 20 march 2008', p. 52.

⁹² As happened with *Sandline International* (incorporated in the Bahamas, but mainly active in the UK and the US), see its comment of 16 April 2004 on www.sandline.com/comment.

⁹³ AIV report 'Employing private military companies, a question of responsibility', no. 59, December 2007, p. 33.

⁹⁴ See reaction of the Ministries of Defense and Foreign Affairs to the AIV-report on employing private military companies, 25 April 2008, p. 11.

developments, also in order to prevent a unilateral approach (with all possible negative consequences for the conclusion of contracts with private firms).⁹⁵

13. Conclusions

There are as yet no specific laws in the Netherlands governing the provision of services by PMCs/PSCs in armed conflict areas. Therefore the contract is the main source of the legal relationship between the hiring entity and the private firms. The number of Dutch PMCs/PSCs offering services in (armed) conflict areas appears to be very small, if any.

The Dutch government has issued policy statements regarding its hiring of PMCs/PSCs in conflict areas abroad. Although the contracts are not disclosed, the statements indicate that the government maintains the monopoly on the use of force in all circumstances and will not outsource essential tasks of the army. PMCs/PSCs according to the government should be regarded as civilians under IHL and the outsourcing of tasks which may involve actions that might jeopardize this status should be avoided. Therefore, private contractors are not hired for tasks involving direct contact with prisoners (of war) or offensive actions including the operations (at a distance) of weapons systems. PMCs/PSCs which are hired to provide services that include the carrying of arms (e.g. guarding and patrolling in Afghanistan) may use their arms in self-defense only – which according to the government does not amount to a direct participation in hostilities – and are bound to instructions regarding the use of armed force in their contracts. The obligation to observe human rights law and the laws of war is part of the contracts as well, although it is set in general terms and has not been further specified in the contracts. Breach of contract may result in termination of the contract as well as legal actions for the recovery of damages (also based on tort). PMCs/PSCs hired by the government have to arrange proper insurance and in principle are responsible for any damage done to third parties. There is no information available about contracts, if any, between non-state actors or foreign governments hiring Dutch PMCs/PSCs or Dutch personnel.

Dutch criminal law provides a jurisdictional basis for prosecuting Dutch offenders, and, irrespective of nationality and place, any person if the crimes constitute war crimes or crimes against humanity and were committed against a person with the Dutch nationality or if the defendant is present in the Netherlands.

It is difficult to establish in the abstract whether the regulatory context in the Netherlands is currently insufficient to effectively ensure compliance by PMC/PSC with international humanitarian law and human rights law in armed conflict areas abroad, also considering that so far no incidents have been reported involving victims of Dutch private contractors or of private contractors hired by the Dutch government. However, it can be observed that the monitoring of compliance with IHL and human rights on site seems not really developed and may not always be possible, whereas in addition it can be questioned whether non-state actors or foreign governments hiring PMCs/PSCs are always committed to ensuring such compliance through the contract.

⁹⁵ See reaction of the Ministries of Defense and Foreign Affairs to the AIV-report on employing private military companies, 25 April 2008, p. 3.