



PRIV-WAR Report – Germany

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Regulation of Private Military, Security and Surveillance Services in Germany

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PRIV-WAR

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

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A. Introduction¹

This report on German domestic law with respect to private military and security services (PMS/PSC) is delivered pursuant to WP 7.1 (“*The existing regulatory context for PMS/PSC 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* (PrivWar).

B. Content of the report

In Germany, there is no specific legislation concerning the activities of PSCs/PMCs abroad. Furthermore, as far as can be ascertained from open sources, while there is a well-established security service industry, there does not seem to be a developed private military service available in Germany. It is noteworthy that there are several resident private companies who qualify as private security companies, offering protection of persons, buildings, events or the transportation of goods.²

This report provides a general overview of the domestic military and security sector and its regulatory framework in Germany. To this end, the report will sketch out the actual situation in Germany (C.), summarize the legal status of pertinent companies (PSCs) (D.) and present the position of the German government on these matters (E.). The report will mainly focus on the legal situation of German companies offering security services and operating (on a contractual basis) in conflict areas abroad.

C. German Private Military and Security Companies

I. Authorisation to operate a security or surveillance service business

In Germany, while the right to pursue commercial activities is constitutionally protected,³ the operation of a security or surveillance service business, according to pertinent federal legislation,⁴ necessitates prior authorisation by a governmental authority. In light of the constitutional framework for the federal distribution of administrative powers,⁵ each *Land* (state/province) can decide by itself which organ should be competent for granting a licence.⁶ It is possible to distinguish the activities of

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² See the list annexed to this report.

³ See Articles 12, 14 and 2 (1) of the German Basic Law; for further references see M. Bothe / T. Maruhn, *The Arms Trade: Comparative Aspects of Law*, *Revue Belge de Droit International* 26 (1993), pp. 20-42.

⁴ Sec. 34a German Industrial Code (Gewerbeordnung, as published on 22 February 1999 (BGBl. I 202), with amendments as of 17 December 2008 (BGBl. I 2586)) and Sec. 9 German Decree on Security Services (Bewachungsverordnung, as published on 10 July 2003 (BGBl. I 1378), with amendments as of 14 January 2009 (BGBl. I 43; available at: http://www.gesetze-im-internet.de/bundesrecht/bewachv_1996/gesamt.pdf).

⁵ Articles 83 et seq of the German Basic Law.

⁶ In Hessen, e.g., the municipality, acting for the Land, is competent to issue such licences; see Sec. 1 (1) of the pertinent Decree (Zustimmungsverordnung zur Gewerbeordnung; available at: http://www.hessenrecht.hessen.de/gesetze/511_gewerbeordnung_im_allgemeinen/511-34-zustvo-gewerbe/zustvo-gewerbe.htm).

private security services as to protection, transport, training, backup services or administration.⁷

In order to obtain the licence, the applicant and each employee must, among others, prove their essential legal skills in the field of security law by passing a test organized by the German Chamber of Commerce and Industry.⁸ Furthermore the applicant must prove his or her reliability, a term which has been fleshed out in administrative practice and court jurisprudence. In the end, the granting of the licence is subject to administrative discretion. Such discretion must be exercised in accordance with the constitutionally guaranteed *Rechtsstaatsprinzip*.⁹

The legislative framework does not require employees of PSCs to be armed. However, as a matter of fact, most of the employees are trained in close combat. The right to carry a weapon is regulated by the German Weapons Act.¹⁰ Furthermore, there are provisions for the use of handcuffs and for the possession of dogs trained for protective (security) services.¹¹ All these elements of the legislative framework, however, are not specifically designed for nor exclusively addressed to PSC personnel but are of general application, hence relevant for all persons subject to German legislation.

II. German PSCs/PMCs operations abroad

While there is no open source evidence on German military companies, German security companies do operate in conflict areas abroad. Among others, the use and deployment of PSCs limits the financial burden resulting from German police and military operations abroad, thus enabling German Armed Forces¹² to take up responsibilities in more conflict areas than before.¹³ The companies primarily provide backup services for the German Armed Forces. They mostly operate in the field of logistics and protection of persons and buildings.¹⁴ It is noteworthy that German PSCs

⁷ Schönleitner in: Stober, Rolf: Handbuch des Sicherheitsgewerberechts, Sec. E I, 12.

⁸ Sec. 5b of the Decree on Security Services. For an account of the academic debate see Stober, Rolf: Zur Qualifizierung der privaten Sicherheitsdienste. - Gewerbearchiv, 48 (2002) 4, pp. 129 – 137.

⁹ On administrative discretion in German law see Mahendra Pal Singh, German administrative law in common law perspective, Berlin et al (Springer) (2001), at pp. 63 et seq. and 151 et seq.. For a comparative analysis of administrative discretion in Europe see Council of Europe (ed.), Colloquy on European Law (Oxford): Administrative discretion and problems of accountability, Strasbourg (1997).

¹⁰ German Weapons Act, Waffengesetz of 11 October 2002 (BGBl. I 3970 (4592) (2003, 1957)), with amendments as of 26 March 2008 (BGBl. I 426).

¹¹ The keeping of a dangerous dog is not allowed without the authorization of the competent authority. Secs 1 (2), 2, 3 and 16 Decree on Dog Keeping (Hessische Hundeverordnung; available at: http://www.hessenrecht.hessen.de/gesetze/310_polizei_waffenwesen/310-94-HundeVO/HundeVO.htm#%C2%A7%2019

¹² E.G., the Bundeswehr has employed a PSC in Afghanistan, as the company's references can prove (further information available at <http://www.ecolog-international.com/de/references.aspx>)

¹³ At the time of reporting, German Armed Forces are involved in 12 operations abroad (http://www.bundeswehr.de/portal/a/bwde/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLd443DgoESYGZASH6kTCxoJRUFw99X4_83FT9AP2C3lhyR0dFRQCopHXc/delta/base64xml/L3dJdyEvd0ZNQUFzQUMvNEIVRS82XONfNEFD). Heike Krieger „Der privatisierte Krieg: Private Militärunternehmen in bewaffneten Konflikt“ in: Archiv des Völkerrechts, vol. 44 (2006), pp. 159-186 (163).

¹⁴ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, preliminary remark; Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 23.

also provide backup services for foreign armed forces; thus, they provided waste disposal and laundry services in some cases.¹⁵ The German government does not have any data about employees involved in such activities.¹⁶ As far as can be concluded from open sources, German companies do not provide military services abroad.

D. Applicable Law

There are no specific provisions on private military or security services abroad. The applicable law must therefore be derived from generally applicable provisions. It is noteworthy that the situation is not vastly different with regard to domestic security services. Indeed, there is very little domestic law, specifically addressing private security services.

I. Military law / Law on weapons

To begin with, it is helpful to have a look at provisions relevant for members of the German Armed Forces. However, military law exclusively applies to persons who formally are members of the armed forces (soldiers), regardless of whether their service is voluntary or obligatory.¹⁷ Therefore, military law is not as such applicable to employees of PSCs/PMCs. However, military law is a relevant point of reference in assessing the regulatory approach to PSCs/PMCs.

1. Military Law

The members of the German Armed Forces are subject to military law. The German Act on the Legal Position of Soldiers establishes a system of allegiance and companionship between the members of German Armed Forces. This entails, among others, a hierarchic structure of the armed forces, an obligation to wear uniform, and certain limitations that may be imposed upon soldiers' fundamental rights.

The German Armed Forces are subject to democratic supervision and (civilian) political control. Democratic oversight is based on different pillars. First, Parliament determines whether or not Germany formally participates in armed conflict.¹⁸ Second, the Bundestag decides on the budget of the armed forces. Third, the German Constitution requires the establishment of a parliamentary Committee on Defence (Art. 45a GG) and of a Parliamentary Commissioner for the Armed Forces (Art. 45b GG). These two organs enjoy special rights and responsibilities with regard to the German armed forces and their soldiers.

¹⁵ E.g. Ecolog Company provided services for German, British and American Armed Forces in Iraq and Afghanistan. For references see www.ecolog-international.com/references.aspx.

¹⁶ Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 43.

¹⁷ Sec. 1 (1) German Act on the Legal Position of Soldiers (Soldatengesetz as published on 30 May 2005 (BGBl. I 1482), with amendments as of 31 July 2008 (BGBl. I 1629)).

¹⁸ Apart from the explicit provisions of the German Constitution on the consequences of an armed attack on Germany, the jurisprudence of the Federal Constitutional Court with regard to parliamentary approval for international activities of German armed forces has to be taken into account, cf., among others, Helmut Philipp Aust / Mindia Vashakmadze, Parliamentary Consent to the Use of German Armed Forces Abroad: The 2008 Decision of the Federal Constitutional Court in the AWACS/Turkey Case, German Law Journal, vol. 9 (2008), no. 12, pp. 2223-2236.

Members of PSCs/PMCs are not bound by military law. Their rights and responsibilities cannot be compared to the relatively strict regulatory framework applicable to soldiers. A very sensitive issue is that PMCs might evade parliamentary control. PSCs/PMCs and armed forces are not subject to the same regulatory framework. In the first place PSCs/PMCs are subject to commercial and labour law.¹⁹

2. Possessions of arms

The possession of arms is governed by the German Weapons Act (*Waffengesetz*).²⁰ Generally, the right to produce, trade, transfer, possess or carry an arm is subject to a licensing regime. Individuals must prove their need for a licence before such a licence will be granted. Typical licensees are weapon-sportsmen, arms-collectors, huntsmen or security personnel. There are exemptions from the licensing requirement for personnel of the armed forces, police officers and some other public officers.

Since PSC/PMC personnel is not formally integrated into the official armed forces, employees thereof are not exempt from the licence requirement enabling them to possess, carry or use a weapon. Indeed, the German Weapons Act includes a separate provision on PSCs. Section 28 thereof stipulates: “This Statute recognizes a need to acquire, possess or carry firearms in the case of security companies (...), if they credibly show that they perform or will perform security patrols which require firearms because of the security of a person (...) or an object at risk.”²¹ Thus, a PSC must verify the need for possessing firearms by reference to a possible threat while accomplishing a mission. The employer must ensure that his employees carry their firearms while accomplishing that particular (type of) mission only.²²

3. Export of arms

The export of arms and war material is closely regulated by domestic law. Taken as a starting point, the German Constitution, as a rule, prohibits the export of war material; exports are only permissible by way of exception subject to the granting of a pertinent licence: “Weapons designed for warfare may be manufactured, transported, or marketed only with the permission of the Federal Government. Details shall be regulated by a federal law.” (Article 26 (2) Basic Law).²³ This constitutional provision is implemented and detailed by the German War Weapons Control Act.²⁴ The War Weapons Control Act prohibits all exports of war material, including weapons, parts of weapons and munitions. Any exception to this rule, i.e., any licence for the export of

¹⁹ Heike Krieger „Der privatisierte Krieg: Private Militärunternehmen in bewaffneten Konflikt“ in: *Archiv des Völkerrechts*, vol. 44 (2006), pp. 159-186 (180); see also Ulrich Petersohn, *Outsourcing the Big Stick: The Consequences of Using Private Military Companies*, Working Paper 2008-0129, Weatherhead Center for International Affairs, Harvard University, June 2008.

²⁰ German Weapons Act, *Waffengesetz* of 11 October 2002 (BGBl. I 3970 (4592) (2003, 1957)), with amendments as of 26 March 2008 (BGBl. I 426).

²¹ Translation by the author.

²² Sec. 13 Decree on Security Services.

²³ For an overview of applicable legislation see Ian Davis, *The regulation of arms and dual-use exports*, Oxford (2002), pp.155 et seq.

²⁴ War Weapons Control Act (*Kriegswaffenkontrollgesetz*, as published on 22 November 1990 (BGBl. I 2506), with amendments as of 31 October 2006 (BGBl. I 2407).

war material is subject to governmental authorization, with guidelines being authorized by the Federal Government itself. No licence will be granted if war material is exported for non-governmental use.²⁵

The export, import or transit of all other types of weapons (not qualifying as war material) is regulated by Secs 29-32 of the German Weapons Act. According to these provisions, the export, import and transit depends on the prior consent of the state of importation, if this state is a member state of the European Union (principle of double-consent).²⁶ Similarly, the importation of weapons to Germany depends on a governmental license or the presentation of a European firearms pass.²⁷ Exports to third states are subject to a more complex procedure.²⁸

Finally, as far as dual use items are concerned, the German Foreign Trade and Payments Law is applicable.²⁹ It provides for various license requirements and the ordinance attached thereto is relevant in order to implement UN Security Council Resolutions imposing sanctions under Chapter VII of the UN Charter.

4. Export of military services

The export of military or security personnel or services is not expressly regulated. The decision to participate in an armed conflict is a shared governmental and parliamentary prerogative. This also means that any possible military or armed security operation of German PSCs/PMCs abroad will not have an immediate effect on the diplomatic (or other political) relations between Germany and the state concerned. Furthermore, according to the principles of state responsibility, acts of non-state entities, including private individuals, are generally not attributable to the state.³⁰ On the other hand, the state's inactivity in the case of national PSCs/PMCs' operations in spite of the state's capacity to prevent this military or security-relevant operation could trigger the state's responsibility under international law.³¹

Soldiers serving in the German Armed Forces are not allowed to work for PSCs/PMCs while on vacation. Furthermore, retired members of the German armed forces are not allowed to work for companies if this affects public (i.e., governmental)

²⁵ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 47.

²⁶ German Weapons Act available at http://bundesrecht.juris.de/bundesrecht/waffg_2002/gesamt.pdf

²⁷ See Council Directive 91/477/EEC of 18 June 1991 on the control of the acquisition and possession of weapons [Official Journal L 256 of 13.09.1991, Corrigendum: Official Journal L 299 of 30.10.1991].

²⁸ For further information: Sec. 33 German Weapons Act (available at http://bundesrecht.juris.de/waffg_2002/_33.html) and Sec. 7 Foreign Trade and Payments Law (available at <http://bundesrecht.juris.de/bundesrecht/awg/gesamt.pdf>)

²⁹ Außenwirtschaftsgesetz as published on 26 June 2006 (BGBl. I 1386), with amendments as of 28 April 2008 (BAnz. No. 69, 1662).

³⁰ Heike Krieger „Der privatisierte Krieg: Private Militärunternehmen in bewaffneten Konflikt“ in: Archiv des Völkerrechts, vol. 44 (2006), pp. 159-186 (172).

³¹ Heike Krieger „Der privatisierte Krieg: Private Militärunternehmen in bewaffneten Konflikt“ in: Archiv des Völkerrechts, vol. 44 (2006), pp. 159-186 (174).

interests. Retired members of the German armed forces are subject to professional ethics, including non-disclosure, etc..³²

5. Privatization and German Armed Forces

According to German constitutional law, the transfer of governmental responsibilities in the field of internal security is permissible to a certain, however, limited extent, whereas this is not the case with regard to external security.³³ Therefore, PSCs/PMCs cannot perform governmental responsibilities abroad. The German government has made it clear that it will not task PSCs/PMCs with military missions (*stricto sensu*) in crisis areas abroad.³⁴

However, as far as procurement of other activities than those of a strictly military character is concerned, the German government has transferred responsibilities to PSCs. Thus, the government has transferred non-security matters to private companies for German military operations abroad. This form of privatization takes place in the sector of backup services. However, the core competences (like fundamental-servicing of military equipment) have not been and (at least according to governmental statements) cannot be transferred to private companies.³⁵ By way of example: The maintenance of non-military materials was transferred to HIL GmbH³⁶, a private company in the field of logistics, servicing and repair. Altogether, private companies perform the following tasks for German armed forces abroad: logistic services (e.g., catering, electricity), provision of operating supply items, provision of sutler-products, transport services, reconditioning services, construction works, disposal services, cleaning of clothes and vehicles and telecommunication services.³⁷

6. PSC contracts and German Armed Forces

Apart from the afore-mentioned non-security and non-military services, the German Armed Forces can conclude agreements with PSCs concerning the protection of military facilities. The Law on the Application of Direct Force and on the Use of Special Powers by German and Allied Armed Forces and Civil Security Guards³⁸ specifies the rights and duties of such non-governmental personnel.

³² Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 33.

³³ Heike Krieger „Der privatisierte Krieg: Private Militärunternehmen in bewaffneten Konflikt“ in: Archiv des Völkerrechts, vol. 44 (2006), pp. 159-186 (182).

³⁴ Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 4.

³⁵ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 45.

³⁶ Further information available at <http://www.hilgmbh.de/de>.

³⁷ Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 25.

³⁸ Gesetz über die Anwendung unmittelbaren Zwanges und die Ausübung besonderer Befugnisse durch Soldaten der Bundeswehr und verbündeter Streitkräfte sowie zivile Wachpersonen, published on 12 August 1965 (BGBl. I 796), with amendments as of 21 December 2007 (BGBl. I 3198).

German diplomatic missions abroad have entered into contracts with security services for the protection of buildings and personnel. These contracts have mostly been concluded with local PSCs or international PSCs with local agencies.³⁹

II. Corporate law

In Germany, businesses have to register with the German Commercial Register.⁴⁰ According to the pertinent statutory provisions, this applies to every person engaging in a trade or a business (commercial or industrial). Therefore, it depends on the precise nature of the business whether there is a need to register. As a rule, PSCs/PMCs have to register with the local German Commercial Register.

III. Commercial and civil law

The applicable law of contract and the applicable commercial law can be municipal or foreign law. In Germany, commercial law is part of the private law. Private law is governed by the principle of freedom of contract. Therefore, statutory provisions are only applicable in so far as the parties to a contract have not reached agreement or in so far as they are peremptory norms.

1. Choice of law / choice of forum

While in principle this is a matter of agreement between the parties, in cases of dispute, a court will determine the applicable law for “international” contracts concluded between a PSCs/PMCs and a governmental (or other) entity. The Introductory Act to the German Civil Code⁴¹ (EGBGB) includes provisions on the applicable law. Basically, the parties to a contract are free to choose which national law should be applicable (Sec. 27 EGBGB). In the absence of a choice of law and in case of a dispute, courts will determine which law governs the contract. If so, the law most closely linked to the contract will be applicable (Sec. 28 EGBGB).

In the case of contractual disputes, courts will also determine the competent court (choice of forum). It is the German Code of Civil Procedure⁴² which deals with the courts’ competences. It is also possible that the parties to the contract choose the competent court (Secs. 38-40 ZPO). If there has not been a choice, the competent court will normally coincide with the domicile (place of residence) of the respondent (Secs. 12-37 ZPO). The domicile of an individual will be his ordinary place of residence; the domicile of a legal person will be the statutory seat or registered office.

³⁹ 170 of about 230 German diplomatic missions have concluded such contracts. Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 16.

⁴⁰ Sec. 29 German Commercial Code (Handelsgesetzbuch, as published in BGBl. III, no. 4100-1, with amendments as of 23 October 2008 (BGBl. I 2026).

⁴¹ Einführungsgesetz zum Bürgerlichen Gesetzbuch, published on 21 September 1994 (BGBl. I 2494; 1997 I 1061), with amendments as of 10 December 2008 (BGBl. I 2401)

⁴² Zivilprozessordnung, published on 5 December 2005 (BGBl. I 3202; 2006 I 431; 2007 I 1781), with amendments as of 30 October 2008 (BGBl. I 2122).

2. Type of contract

Contracts in the field of private security services normally are service contracts. This type of contract is specifically addressed by Secs. 611-630 German Civil Code⁴³ (BGB). In German law, this type of contract must be distinguished from contracts to produce work⁴⁴. In contracts to produce work (sometimes called contracts for work and services) the contracting party must bring about a particular result (obligation of result), while in service contracts the contracting party must perform services (obligation of conduct).

Some security service contracts include obligations of conduct as well as obligations of results. They are considered mixed contracts. Examples for service contracts which only include obligations of result are contracts for the transport of valuables (especially currency) or for the search of persons or goods.⁴⁵

3. Law of Contract

The general principles of contract law are applicable also to contracts for security services.

A contract is based on agreement between the participating parties. When interpreting contracts, the principle of good faith must be observed. Unless properly fulfilled, German contract law allows termination of a contract either on the basis of individual contract clauses or for particular reasons, including a serious breach of contract.

4. Duty of notification

At present, there is no obligation to notify the government of the conclusion of any contract on security (or even military) services. Notwithstanding a parliamentary motion to this end, the German government does not presently intend to change this.⁴⁶ Any obligation to notify such contracts, according to the government, would constitute a disproportionate interference with entrepreneurial freedom.⁴⁷

5. Civil liability

In Germany, a party to a contract can be held liable both for the breach of one of the (explicit or implicit) contractual obligations or for the violation of third party's interests. PSCs/PMCs will hence be held responsible for their activities (including those performed by their employees) and they will be obliged to compensate any violation of

⁴³ Bürgerliches Gesetzbuch (BGB), published on 2 January 2002 (BGBl. I 42, 2909; 2003 I 738), with amendments as of 10 December 2008 (BGBl. I 2399).

⁴⁴ As governed by Secs. 631-651 BGB.

⁴⁵ Wolfgang B. Schünemann „Vertragstypen im Sicherheitsgewerbe“ in: NJW 2003, pp.1689-1691 (1690).

⁴⁶ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 39.

⁴⁷ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 38.

victims' interest arising from unlawful conduct. In order to ensure the enforceability of any pertinent claims, PSCs must be insured pursuant to German law.⁴⁸

IV. Labour law

1. Assignment of personnel

Since security service employees need special skills and conditions, each employee must prove his pertinent knowledge in the field of security law by passing a test arranged by the German Chamber of Commerce and Industry. In addition, the employee must (seem to) be reliable. In order to ensure such reliability, governmental authorities (in charge of licensing etc.) normally require a "certificate of good conduct" and will check whether the employee is a member of unlawful associations or unconstitutional political parties.⁴⁹

2. Labour relations

Employees of PSCs/PMCs are generally responsible to their company. Employees protecting properties of the German Armed Forces are subject to pertinent contractual obligations and – on that basis – must meet the same military guard duties as regular German soldiers.⁵⁰ On the other hand, these employees are not subject to parliamentary control. Their labour relations are governed by contract law, not by administrative law.

V. Government procurement law

1. Outsourcing of security services

While the government's responsibility for internal and external security (for constitutional reasons) cannot be outsourced as a whole, some activities in this field are performed by PSCs. However, these companies are under close scrutiny of the administration and there is even effective (political) control by the government.⁵¹ By way of example, outsourcing is implemented in air traffic control (e.g., control of aircraft in flight or inspection of luggage).⁵²

Nevertheless, it is noteworthy that the parliamentary bill providing for fully privatized air traffic control was not signed by the German President because of serious doubts as to the constitutionality of the bill.⁵³ President Köhler doubted that there was a sufficient degree of administrative and governmental control.

⁴⁸ Sec. 6 German Decree on Security Services (Bewachungsverordnung).

⁴⁹ Sec. 9 (2) No. 1 German Decree on Security Services (Bewachungsverordnung).

⁵⁰ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 18.

⁵¹ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 2. For an account of the current academic debate cf. Felix Hammer, *Private Sicherheitsdienste, staatliches Gewaltmonopol, Rechtsstaatsprinzip und "schlanker Staat". - Die öffentliche Verwaltung*, 53 (2000) 15, pp. 613 - 621

⁵² See detailed competences in the German Law on Air Traffic Security, *Luftsicherheitsgesetz* of 11 January 2005 (BGBl. I 78), with amendments as of 5 January 2007 (BGBl. I 2).

⁵³ Press release by the German President available at <http://www.bundespraesident.de/dokumente/-,2.633675/%20Pressemitteilung/dokument.htm>.

2. Limits of lending and outsourcing

Every form of lending and outsourcing in the field of military or security services must keep in mind the constitutionally protected governmental monopoly on the legitimate use of force. The government cannot dispose of this monopoly as a whole. Therefore, core military tasks cannot be outsourced to private companies.⁵⁴

According to the existing legal framework, as argued by the German government, PSCs/PMCs are not allowed to use force while on duty abroad.⁵⁵

VI. Criminal law

1. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries

Germany has not ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. The German government argues that this would necessitate a complex re-drafting of much of the existing body of criminal law.⁵⁶ In particular, the government perceives a risk that national implementation of the Convention will destabilize the well-balanced doctrinal elements of German criminal law; the German government seeks to avoid such a reform. According to the German government's position, the application of international criminal law and the establishment of the International Criminal Court (ICC) suffice to counteract the recruitment of mercenaries.⁵⁷

2. Criminal Responsibility

German criminal law can also be applied if the criminal activity does not take place in Germany. Extraterritorial application of German criminal law, however, requires a link to Germany, particularly, to German criminal law.⁵⁸ Based on the personality principle, the easiest case is where the perpetrator is of German nationality.⁵⁹ Therefore, a German employee of a PSC/PMC may be liable under German criminal law for criminal offences committed abroad. There are, however, other bases for the exercise of German criminal jurisdiction, including the passive personality principle, the protective principle and the universality principle. Apart from the establishment of German criminal jurisdiction, there are a number of subsidiary means to ensure that the exercise of criminal jurisdiction becomes a reality.

⁵⁴ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 1.a.

⁵⁵ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no.1.b.

⁵⁶ Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 7.

⁵⁷ Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 8.

⁵⁸ The applicability of German criminal law for misconducts committed abroad is regulated in §§ 5-7 StGB.

⁵⁹ Other possible conditions are left aside.

Thus, Germany has concluded various international bi- and multilateral agreements promoting criminal prosecution for offences committed abroad. Furthermore, the Law on International Legal Assistance in Criminal Matters⁶⁰ governs legal assistance in criminal matters.

The use of military courts to try employees of PSCs or PMCs does not meet the approval of the German government.⁶¹ The government argues that such employees can not claim the status of combatant and therefore cannot be treated the same way.

VII. Case law

At the time of reporting, no specific German case law related to activities involving German PSCs or PMCs abroad or foreign PSCs or PMCs in Germany was available.

E. State liability for PSCs' missions abroad

There is no specialised regulation concerning responsibility or liability for German PSCs' missions abroad. On the other hand, the Federal High Court of Justice (*Bundesgerichtshof*) has determined the responsibility and liability of *Bundeswehr* activities in former Yugoslavia. The German Federal Army participated (and is still participating) in the NATO operation in Kosovo (KFOR). On May 30th 1999, a bridge near the Yugoslavian village Varvarin was destroyed by an aerial attack. Ten Yugoslavians were killed and about 30 other persons were injured. Although the aircrafts' nationality was not clear, the victims and their representatives claimed for damages against the German government.⁶²

The court decided that there does not exist any possibility for private subjects to claim damages against the state on an international level. Only states could claim damages against other states in international public law by relying on the right of diplomatic protection.⁶³ On the other hand, claims for damages based on state liability are generally possible.⁶⁴ In the present case, the claim was rejected because of the lack of any connection between the aerial attack and the German officials or authorities.⁶⁵

It is possible to draw some conclusions on governmental responsibility and liability for PSCs' missions abroad where the PSC causes damage. The principle of diplomatic protection would only allow the state of the individual victim to claim damages against the state which is legally responsible for the PSC. In this case, the claim becomes that of the state. The PSC will not be directly involved in the ensuing procedure.

⁶⁰ Gesetz über die internationale Rechtshilfe in Strafsachen, published on 27 June 1994 (BGBl. I 1537), with amendments as of 6 June 2008 (BGBl. I 995).

⁶¹ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 33.

⁶² BGH file number III ZR 190/05 (Judgement available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=d32d56e1b75209e4604187c4c8c1571e&clent=12&nr=38105&pos=0&anz=1&Blank=1.pdf>)

⁶³ BGH III ZR 190/05, para. 6.

⁶⁴ BGH III ZR 190/05, para. 20.

⁶⁵ BGH III ZR 190/05, para. 20, 23.

Any claim for damages relying on the principle of state liability would be rejected because of the absence of a connection between the governmental authorities and the PSCs. The liability of a State is engaged only if a governmental authority authorizes a PSC mission abroad. Such a situation is currently not conceivable.

F. Policy issues

I. The German government's position on the status of PMCs/PSCs

The German government has twice declared its policy on the status on PMCs/PSCs in parliament. The government replied to two parliamentary interpellations concerning the status of PSCs/PMCs.⁶⁶

In doing so, the German government made it clear that – according to its views – military activities within as well as outside German territory cannot be transferred to private companies.⁶⁷ However, security matters can be delegated to private (civilian) actors subject to close supervision and scrutiny of the competent governmental body (organ) which has authorized such delegation.⁶⁸ Since it is not possible generally to distinguish military from security operations, decisions have to be made on a case-by-case basis.⁶⁹

According to the German government, employees of PSCs/PMCs are and remain civilians. They do not enjoy the rights of combatants or incorporated members of armed forces.⁷⁰ In particular, captured employees of PSCs/PMCs cannot claim prisoners of war (POW) status, but they are entitled to be treated (and protected) the same way as civilians.⁷¹ It is against this background, that the German Armed Forces are not planning to involve PSCs/PMCs' employees in armed missions abroad.⁷²

While military activities remain the domain of the government, PSC/PMC employees who act under Government procurement law discharge official governmental duties. They act as public authority and exercise jurisdiction.⁷³

German military forces do not have special rules of conduct as far as their relationship with PSCs/PMCs employees is concerned. Thus, the government argues

⁶⁶ Parliament from 24 June 2005, Bundestag printed paper 15/5824 and from 26 April 2006, Bundestag printed paper 16/1296.

⁶⁷ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 1.a.

⁶⁸ This is a special form of administrative delegation which is characterized as “Beleihung” in German administrative law.

⁶⁹ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 15.

⁷⁰ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 20.a.

⁷¹ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 25 and 52.

⁷² Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 20.b.

⁷³ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 4.

that the general rules of conduct for contacting third parties in crisis areas abroad will be applied to such persons.⁷⁴

According to the German government, existing rules of public international law are adequate to address the problem of PSCs/PMCs.⁷⁵ Also, the government does not see a need to further regulate PSCs/PMCs at the national level.⁷⁶ At the same time, the German government supports any initiative against international mercenary.⁷⁷

II. The use of PSCs/PMCs by other governments

The use of PSCs/PMCs, according to the German government's view, indicates weaknesses in governance and relatively low public authority. In particular, their use and deployment in developing countries is perceived by the German government as a value loss of public security.⁷⁸ The German government is concerned about the spread of PSCs/PMCs and their use instead of police; it will keep tabs on these developments.

German citizens are entitled to perform security services as employees of PSCs for foreign armed forces based in Germany.⁷⁹ On the other hand, German citizens need authorisation to join foreign armed forces.⁸⁰ If a German citizen joins a foreign armed force without such an authorisation, this person may lose their German citizenship.⁸¹

G. Conclusions

In Germany, security services and related businesses are comprehensively regulated for operations in Germany. There is a lack of specialized rules for private security services abroad; and there is a general lack of particular regulation with regard to military services. In particular with regard to international activities, therefore, the general rules applicable to export controls apply. According to the official position of the German government, German law complies with all pertinent international standards. Hence, the government does not perceive a need for specialized legislation with regard to German PSC/PMC operations abroad.

⁷⁴ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 17.

⁷⁵ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 27 and 35.

⁷⁶ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 65; Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 15.

⁷⁷ Answer by the German Government to Parliament, 24 June 2005, Bundestag printed paper 15/5824, Answer no. 60.

⁷⁸ Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 6.

⁷⁹ Answer by the German Government to Parliament, 26 April 2006, Bundestag printed paper 16/1296, Answer no. 30.

⁸⁰ Sec. 8 Law on Compulsory Military Service (Wehrpflichtgesetz, published on 16 September 2008 (BGBl. I 1886).

⁸¹ Sec. 28 Nationality Act (Staatsangehörigkeitgesetz, published in BGBl. III, no. 102-1, with amendments as of 5 February 2009 (BGBl. I 158).

On the other hand, it is well recognized that the privatization of domestic security prepares the ground for the privatization of security services abroad.⁸² Such privatization and outsourcing strategies have even reached the German Armed Forces. However, the German government actually takes a reserved position on private actors in crisis areas. For that reason, there are significant legal objections to the privatization of military services abroad. It remains to be seen whether the German government can uphold this view in the light of increasing international military operations.

⁸² Heike Krieger „Der privatisierte Krieg: Private Militärunternehmen in bewaffneten Konflikt“ in: Archiv des Völkerrechts, vol. 44 (2006), pp. 159-186 (163).