Report on the Berlin Workshop

Harnack-Haus, 21 May 2010

The Public-Private Interface in the Management of PMSCs

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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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1. Introduction

On 21 May 2010 the Justus-Liebig-University Giessen hosted a workshop on the 'Public-Private Interface in the Management of Private Military and Security Companies'. The workshop was organized within the framework of the EU 7th Framework Programme Research Project "Regulating Privatisation of "War": The Role of the EU in Assuring Compliance with International Humanitarian Law and Human Rights" (PRIV-WAR).

The workshop was attended by members of the seven research teams and guest speakers. This report provides a brief account of the meeting proceedings. The workshop took place under the Chatham House Rule. It is not an official or complete record, nor does it reflect the attribution of views of any of the participants.

2. Session I – Explicit and Implicit Limits to the Privatization of the Management of Public Security: Insights from the Perspective of Comparative Constitutional Law

The aim of the first session was to explore possibilities for utilizing private military or security personnel by states under constitutional law. The first presentation demonstrated the differences between the German and the US-American constitution in authorizing private actors to fulfil military or security related actions. The second presentation dealt with the state power of conscripting citizens of fighting age and sending military assistance abroad as a limit to the PMSCs in the Italian legal system.

Limits for outsourcing of military services by human rights and humanitarian law under the US-American and German constitution

While the US-American constitution contains hardly rules on the outsourcing of military services, the German constitution does not limit the privatization of military

functions ad priori. In fact, the possibilities for privatization of military services under German constitutional law need to be considered from a comparative perspective. Generally it is possible to privatize specific functions and transfer the accomplishment of such functions to private actors (so called *Aufgabenprivatisierung*). This model enables the government to entirely give up of a sector. However, the privatization of military functions has to be considered separately.

The German constitution contains specific rules which could regulate the privatization of military services. First of all, Art. 87a of the German constitution sets an explicit limit upon the privatization of military functions. Solely the federation has the right to form an army. Furthermore, the government needs an explicit approval by the German parliament for the foreign deployment of forces.

The second relevant regulation can be found in Art. 33 IV German constitution. This provision limits the delegation of function to state actors (so called *Beleihung*). State functions should in general not be transferred to private actors. The limit of outsourcing to private actors is strict, if the outsourcing is connected with human rights. Even in the case of a delegation, the authority remains with state.

The last relevant provision is Art. 12a German constitution regulating the drafting of young men to forces. The possible gap left by Art. 33 IV German constitution concerning the limit of privatization in the military sector is closed by Art. 12a German constitution.

As a result, the privatization or outsourcing of military functions is actually not possible under German constitutional law. On the other hand, the privatization of auxiliary or support service is generally possible.

The situation in the United States of America is contrary. There exists general neutral attitude to privatization. However, the US-American government accepted that privatization is not only a matter of policy but also a matter of law.

Therefore it is generally accepted that there are inherently government function and that these functions lead to limits for the military and security sector. As a rule, inherently government functions comprise an administrative nature. They have to be interpreted with by aspects like international law, democracy, accountability or social sciences. Especially the OMB Circular A 76 constituted a “responsibility to ensure the integrity of military operations”. This responsibility includes e.g. the effective control over command structure, combat condition or training. The complete delegation of governmental functions would raise problems concerning the democratic legitimacy.

Even military actions without the acceptance of the parliament are problematic (e.g. Colombia, Croatia). A further aspect complicates the outsourcing of military services: While private companies pursue economic interests, the government focus lies on strategic interests.

Furthermore, the US-American government has largely outsourced the contract supervision to private companies. As a result, private companies are responsible for the contract monitoring and the notification of breaches of contracts. As a first result, the US-American governments initiated legislative reforms making administrative law applicable to private actors. However, the criminal supervision remains incredibly insufficient.

As a result, there are no explicit limits in the US-American constitution if the private outsourcing of military functions is democratically legitimized. The main problem remains in finding an effective mechanism of supervision for democratic elements and human rights.

The state power of conscripting citizens of fighting age and sending military assistance abroad as a limit to the PMSCs in the Italian legal system

Limitations upon private military and security companies by Italian law are the reason why there is factually no private military industry in Italy. Actually, only four Italian companies are operating in high risk areas or conflict zones. The biggest company is the Security Consulting Group with about 20 employees and contractors. Furthermore, Italian security companies are involved in maritime security services against piracy.

The Italian law system contains two main limitations for private military companies in Italy. The first limitation is the state prerogative power of conscripting citizens of fighting age. The Italian government has to allow any conscripting of Italian citizens with non-Italian armed forces. The second limitation consists of the ratification of the United Nations Convention against mercenary and its transformation into the Italian criminal system. The Italian government has ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries on 5th February 1990.

Art. 288 Italian Criminal Code declares the enlisting of Italian citizens with foreign armed forces, providing military companies with contracts or the military assistance of foreign states as criminal offences. Offenders can be punished with 4-15 years prison.

The enlisted people cannot be punished. In 2004 two persons were punished in the light of Art. 288 Italian Criminal Code for the enlistment and arm supply by the court of Bari. In 2006, the Italian government made a strategic withdrawal of 3000 Italian soldiers from Iraq. However, Italian contractors were still active in Iraq and protecting civilians. Four security officers working for a private telecommunication company were kidnapped in Iraq. One hostage was killed while the other officers were rescued later.
In Italy, the transformation of the Mercenary Convention led to criminal proceedings and the reduction of private military activities abroad. The enlistment of Italian citizens is strictly regulated by Italian law and it depends of the governmental authorization.

Discussion

The first comment on the presentations emphasised the role of international law. While the presentations had a clear focus on the national law, the international law has an important influence on the application of national law. Although the Italian law regulates the enlisting of Italian citizens with foreign armed forces, international law is still applicable. The customary international law forbids overthrowing another government. Therefore even the Italian government is bound with its decisions by international law. Only if the enlisting is in line with international law the decision on enlisting depends on the Italian government.
This make the question arise why most of the national legislations do not regulate the privatization of military functions. In fact, there was no need for the limitation of privatization in history. The outsourcing of military functions or services was unthinkable. Even today the regulation of privatization in the security sector is not very common because of the political situation. The outsourcing of military functions and the privatization of security is in the interest of many states. On the other hand, the outsourcing of military functions without the exercise of governmental authority alludes to democracy and rule of law. Therefore, the outsourcing generally concerns the procedure, not the substance.
In Germany, the absence of any references to privatization in Art. 70 et seq. German constitution cannot be interpreted as legal vacuum. While Art. 83 et seq. German constitution regulate the administrative powers and the application of law, Art. 72 et seq. German constitution only regulate the legislative powers of the federation. In general, the *Länder* are competent to make law if the federation cannot claim any competences by Art. 72 et seq. German constitution. Concerning the military functions,

the German constitution clearly regulates that only the federation shall arrange armed forces for defence (Art. 87a German constitution).

3. Session II – Linking Self-regulation and Statutory Regulation: Legislative Models

The second session dealt with the legislative models for linking self-regulation and statutory regulation. The first presentation gave an overview on the role of the state in the provision of security and in how far the privatization of security can undermine the role of the state. The second presentation introduced the British regulatory system of self-regulation for the private military and security industry and it recommended models of public accountability for private military and security contractors.

The changing role of the state in the provision of security

The role of the state in the provision of security is a Janus Face. On the one hand, the state is the protector of security. On the other hand, it holds a monopoly on force. Therefore the inclusion of private military and security companies can be identified as unproblematic if these companies are controlled by the state. However, due to the fact that the market of security service industries grows, it is not clear in how far the privatization of security affects the state's decision or exercise of force. Therefore the privatization as such could already undermine the role of the state.

Therefore it is also necessary to elaborate the role of the private military companies. These companies are connecting war-making with trade. The former UN secretary general Kofi Annan called on the private military companies to become aware of their role for the rule of law and democracy initiatives. Nevertheless the companies are still blaming all responsibility to the states. The provision of security should be a political issue, not a private one. The private companies' actions necessitate a democratic control of these business actors. Private military and security companies should never have any direct influence in security nor should they be engaged in security government.

Moreover private military companies offer a wide range of services (e.g. logistics, intelligence, interrogation or police forces) and states regularly make use of them. The outsourcing allows flexibility and the governments do not have to achieve accreditation by the parliament for every action. Cost saving is not the first element any more.

Nevertheless it is a moot question whether governments are completely free in contracting private military companies. There is no real competition on the contract

market. In fact, the market is fluid and many (virtual) companies are relocating wherever they find a field of actions. Most of the companies do not have a back-up for the case of emergency or failure. Furthermore, the monitoring of contract lies often in the responsibility of other private actors. This practice undermines the formal and substantial control of the government. Especially the subcontracting makes it more and more difficult for the parliament to control the companies' operations. This leads to frauds and human rights violations.

The states take a risk in losing their control in the monopoly of force and democracy. The increasing dependence on private military and security companies is a high political cost.

Models of public accountability for private military and security contractors

The history and context of UK regulation of private military and security companies is deeply connected with the Green Paper 2002. The paper presented six possible options for regulation: a complete ban of private military companies' activities abroad, a ban on recruitment for these companies' activities abroad, a licensing regime for private military companies' services, the public notification of contracts, the general licensing of private military companies or self-regulation. After a public consultation in 2009, the British government confirmed its adherence to the existing self-regulation model.

In the beginning of 2010, a multistakeholder working group met for a review of the BAPSC (British Association of Private Security Companies) Code and further international standards concerning the activities of private military companies. Members of this workgroup were the British government, representatives of the British industry and the civil society. Non-governmental organizations opposed the meeting. The working group exemplary discussed the role of a monitoring body or next steps for the implementation of recommendations. As a result, the working group elaborated a proposal which goes beyond the actual model of self-regulation: the licensing and approval of individual contracts or general licensing of contractors. This form of government-backed self-regulation shall allow the British trade association to issue sanctions for breaches (warning, fines, expulsion) of the Code of Conduct. Furthermore, the government will only contract with PMSCs upholding "high standards".

Further improvements would be the establishment of regulations at the international level. The development of the Montreux Document is not enough. The United Nations should prepare a convention on the activities of private military companies. On the other

hand, it is unlikely that the British government will sign such a convention. Conceivably, a corporate social responsibility approach could solve the problems. This approach would include a top-down, bottom-up coverage, OECD guidelines and the explicit utilization of recommendations.

Two possible alternatives are imaginable. Primarily, a model of licensing and contract approval could regulate the security industry market and put a black sheep out of business. The British government has already stated disadvantages. This model would reduce the British industry competitiveness and the market would be opened to EU legal challenges. The second model will only approve the contractors. Unfortunately the British government has stated disadvantages to this model, too. An approved contractor could act irresponsibly. Furthermore, the model will raise problems concerning the judicial review of refusals to list a contractor. Both models are able to establish a strong (first model) or cheap and fast (second model) alternative to the actual self-regulation. However, both models fail to provide remedies for victims.

A compromising solution could be a hybrid model. This model would comprehend a combination of national and international regulations. To be a strong model, it is necessary to combine general licensing with a treaty supervision and enforcement committee. This could create a more robust system of regulation and accountability.

Discussion

A general question arose after the presentations: What must been regulated by a state? It seems logical to regulate companies first and then their service. On the other hand, how is it possible to define a company if not via its service. This could lead to the regulation of services.

A comparison was drawn to the German general licence system. The German *Gewerbeerlaubnis* (business concession) allows a company to execute a specific range of activities. It is not a licence for specific companies or specific services. In Germany, the limitation of the range of activities ensures legal certainty.

A further problem is that the international humanitarian law does not apply to British companies as the international public law cannot generate any obligations for private actors but only for states. It is the states' duty to ensure the compliance with international law by private actors.

4. Session III – Reducing the Financial Burden and Ensuring Public Control: Public-Private Partnerships for Security?

The aim of the last session was to demonstrate the legal connection of public security and private law aspects. The first presentation dealt with the requirements and limits of contract law regulating the public security sector. The last presentation gave an overview on the public private partnership in the provision of security and possible inconveniences due to this model.

The privatization of military and security services and the limits of contract law

Privatization is an advancing phenomenon in public administration. The governance through contract influences more and more branches of public law. In this context, contract law is utilized as regulatory device in order to expand the range of accountability mechanisms. In fact, most of the actual contracts are not able to improve the accountability standards.

This privatization has reached the military sector. Some governments enunciate the account for "Realpolitik": Military outsourcing is an efficient "instrumentum regni". The outsourcing leads into bilateral dependency relations between the states and the contractors. But while the contractors fulfil the functions of the states, the state's duties are not transferred to the private actors. Especially human rights are a cost that contractual partners will not spontaneously internalize.

The transaction cost economics account characterizes that most of the contractual limits of regulation are explained by transactional barriers and hazard characteristic of the market. Accountability, legitimacy and efficiency are better conceived as functions of regulations than as properties of particular ways to manage security and force. The dependence of PMSCs from governmental procurement is a hindrance, not pre-condition, of a regulatory strategy based on contract standardization.

This led to a convoluted system of management. Especially in Iraq, there were three main factors for the breakdown of the public acquisition system. Firstly, there were too much waivers to competitive bidding. This has prohibited an open market and real competition. Secondly, most contracts are open-ended and the private contractors do not have to pass through competitive biddings again. Lastly, the poor contract monitoring prevents a later evaluation of the private actors.

These interferences cause an internal political accountability problem. There is a separation of planning authority from procurement authority. The exercise of authority

loses its uniform appearance. Furthermore, the interagency procurement undermines the public service mission. The state gives up more and more authorities and it loses control on the exercise of the services.

This development can be exemplified by the model of interrogation support. It is not unusual that the orders for services are beyond the scope of the underlying contract. The results are abuses in the interagency contracting procedure and the violation of competition rules. It is interesting that private contractors legitimate their non-complying execution of the contracts by ensuring the best value for the government. In fact, the non-complying does damage to the procedure. The non-complying is again a result of inadequate monitoring.

Can better contract management be the solution? The U.S.-American Appeal Court for the District of Columbia has decided in 2009 that the cost of imposing tort liability on government contractors would be passed through to the American taxpayer. It is an inverse relation between the extent to which PMSCs are integrated into the chain of command and the utility and feasibility of contract law as a regulatory instrument. It seems to be impossible to combine accountability and efficiency in the field of military privatization.

Some comments on public-private partnerships and joint ventures in the provision of security

The privatization in the military sector represents a shift from government to governance. Several forms have been established in the regulatory context: Outsourcing, joint venture or public shareholdership. These models were combined under the definition public private-partnership. However, there is no definitive and final definition for public-private partnership.

On the other hand, it is possible to separate the forms by their procedure. Governments can completely outsource specific functions to private actors. The private actor plans and exercises the outsourced function. Another model is a joint venture. In this case, the state organ is operating together with private actors or it participates in private companies. The government can also be the sole owner of a private company. For example, the German ministry of defence is the sole owner of *the Gesellschaft für Entwicklung, Beschaffung und Betrieb (g.e.b.b.)*, a private company for development, supply and operation.

In Germany, privatization has established in the 1990s. The *Bundeswehr* always remains owner of actions. The outsourcing in the German military sector includes support, training or military service. Armed military service or military actions are exclusively performed by official armed forces.

The public-private partnership in the military sector can bring up new problems. For example, contracts on refuelling aircrafts were designed for a validity period of about 40 years. This is a heavy burden to public-private partnership. These contracts have also a binding effect on later governments although the contracts do not correspond to the governments' will. Therefore, a contract adaption could be necessary. Furthermore, these contracts often lack of experts and publicity.

Discussion

The question arose if and how the contract law between a state and a private actor can manipulate the state duties. Especially the humanitarian law is only directly applicable to states. Can a contract or a public-private partnership models influence the immunity of foreign states? The question of state immunity is always connected to state sovereignty.

In fact, a government can be hold responsible because of the simple fact that there is a contract. On the other hand, the contracts are not created for litigation. The type or level of a contract can be important for the exact determination of state responsibility. A contract between a private actor and a government will have another influence than a simple employee contract. Furthermore, the legal, political or cultural tradition can play a major role in defining responsibility. Only one statement was indisputable: Both forms of companies can make mistakes, private or governmental owned.

5. Conclusion

The outsourcing and privatization of military services are heterogeneous among the different states. Although the states regulate the outsourcing and privatization by national law, the role of international cannot be trivialized. On the other hand, the outsourcing and privatization of military services was unthinkable in history. Therefore no state was really prepared for any regulation.

In this perspective, it is problematic that the public international law is not directly applicable to private actors. This results in a serious threat to humanitarian law or states' sovereignty. Furthermore, the contracts between private actors and governments have

continuous binding effects. This effect is problematic if contracts were concluded without participation of the parliament as democratic state organ. In addition, the accountability of private military actors and the question of state responsibility have not been regulated in a satisfying manner.