

05.000

**Report by the Swiss Federal Council  
on Private Security and Military Companies**

**(report to the parliament in response to the Stähelin Postulate 04.3267 of 1 June 2004. Private Security Companies)**

of 2 December 2005

---

Dear Madam President,  
Dear Mr President,  
Dear Ladies and Gentlemen,

In response to the Stähelin Postulate of 1 June 2004 on "Private Security Companies", we present this report for your information.

...

On behalf of the Swiss Federal Council

President of the Confederation: Samuel  
Schmid

Federal Chancellor: Annemarie Huber-Hotz

## Overview

*The present report is a response to the parliamentary postulate 04.3267 on Private Security Companies submitted by the Member of the Council of States Philipp Stähelin on 1 June 2004. The postulate calls on the Federal Council to instruct its security policy bodies to present an overview over the origins, deployment and methods of private security companies in areas that have traditionally been the preserve of the state monopoly of the use of force. In particular, the report's remit was to determine whether Swiss and international law were sufficient to meet today's challenges. The report also deals with the issues raised in motion 04.3748 on "Elaboration of legally binding provisions for Switzerland's dealings with private military and security companies" submitted on 16 December 2004 by the Member of the National Council Ursula Wyss. This motion calls on the Federal Council to issue binding provisions on dealings with and the deployment of private military companies and security forces operating abroad on behalf of Switzerland as well as on the recruitment of former Swiss military officers and top-level officials by such companies. Finally the report proposes measures that Switzerland would like to take at the international level. The report therefore also takes into account the concerns set out in Wyss Motion 04.3796 of 17 December 2004 on the "Adoption of internationally valid rules for private military companies and security companies." This motion calls on the Federal Council to ensure that Switzerland advocates binding provisions at the international level to cover the deployment, the responsibilities and the compliance with international humanitarian law and with human rights law by private military companies and security forces.*

*The monopoly of the use of force is one of the core elements of the modern state. Although privatisation cannot be ruled out a priori, the privatisation of security tasks affects the foundation or at least the legitimation of the state. Only peripheral areas can therefore be considered for privatisation. The delegation of state security tasks to private individuals is also subject to strict limits, although delegation does not go as far as privatisation, because the tasks delegated remain within the area of state responsibility. A survey conducted in the federal administration showed that the delegation of state tasks to private security companies plays only a minor role within the Confederation. Nevertheless the Federal Council is willing to examine whether it would be advisable to fix generally the conditions that private security companies must satisfy in order to receive a federal mandate as well as the issues that need to be regulated in individual contracts.. Currently, these points are largely within the discretion of the mandators concerned.*

*The report also analyses the extent to which cantonal law subjects private security companies to state supervision. The Federal Council invites the cantons to harmonise their regulations on this question. Some moves in this direction have already been made. The Conference of Cantonal Chief Police Officers (KKPKS) has formulated a set of model provisions on this subject. The report also gives an overview of the provisions of current federal law that could be relevant for the activities of private security companies.*

*The report also deals with the issue of private security companies that could use Switzerland as their base for activities in foreign conflict and crisis regions. The*

*Federal Council is willing to consider whether it would be advisable to introduce authorizing or licensing requirements for such companies.*

*Finally, the report gives an overview of relevant international law. In addition to the prohibition of the use of force between states and the non-intervention rule, international humanitarian law and international human rights law are particularly relevant. The main problem here is compliance with these provisions by private security and military companies and by their employees. The report reflects on measures that states could take at the national level, but it concludes that national regulation alone is insufficient. Today there is no international dialogue or inter-state process for discussing appropriate measures to ensure better compliance with international humanitarian law and with human rights law.*

*In view of its humanitarian tradition and as a contracting party to the Geneva Conventions, Switzerland could make a meaningful contribution to the codification and specification of the legal prerequisites and limits of the activity of private security and military companies and the promotion of compliance with international humanitarian law and human rights law. It could initiate an international process or else act as a catalyst. Reflections along these lines have already taken place in cooperation with the ICRC. Initial expert meetings were held in summer 2005. A meeting of government experts is to be held in 2006. Further measures to strengthen and to refine the relevant international law are also planned. The Federal Council will thus be able to address the concerns raised in the above-mentioned motion 04.3796.*

# Table of contents

## Overview

<b>1 Mandate and organisation of the work</b>	<b>7</b>
1.1 Parliamentary initiatives	7
1.2 Mandate of the Federal Council Security Delegation	8
1.3 Organisation of the work	8
<b>2 Introductory elements</b>	<b>8</b>
2.1 The terms private security company and private military companies	8
2.2 The monopoly of the use of force as a necessary element of the state	9
2.3 The delegation of security tasks to private individuals and companies: a current problem	10
2.4 Specific problems of the enlistment of private security and military companies by the state or by private persons	12
2.5 Particular problems in connection with interventions by private security and military companies in crisis regions	12
2.6 Relevance of international developments to Switzerland	14
<b>3 The nature and extent of the activities of private security and military companies in Switzerland and abroad</b>	<b>15</b>
3.1 The use made of private security companies on Swiss territory	15
3.2 Growing importance of private military and security companies in the international arena	17
3.3 Swiss-based private security and military companies operating abroad	19
3.4 Involvement of private security companies with the federal authorities	20
3.4.1 General	20
3.4.2 Protection of Swiss missions abroad	21
<b>4 Domestic law</b>	<b>22</b>
4.1 Constitutional bases	22
4.2 Permissibility of private activities in the area of security: definition of limits in accordance with constitutional law	23
4.2.1 Problems associated with private security activities from the point of view of the citizens	23
4.2.2 Private sphere	24
4.2.3 Semi-public sphere	24
4.2.4 Public sphere	25
4.2.5 Private protection of individuals and of transports of goods and valuables	26
4.3 Limits of privatisation	26
4.4 Delegation of state security tasks to the private sector: constitutional limits	27
4.4.1 Legal basis	28
4.4.2 Public interest	30
4.4.3 Principle of proportionality	31
4.5 Federal legislation of relevance to private security activities	31

4.5.1	Federal legislation governing weapons and war <i>matériel</i>	32
4.5.2	Embargo legislation	32
4.5.3	Responsibility for prosecution of offences committed abroad	33
4.5.3.1	Individual responsibility	33
4.5.3.2	Corporate responsibility	36
4.6	Legal treatment of know-how transfer following the changeover from public service to private security companies	37
4.7	Legislative powers relating to the performance of activities in the private sector (Article 95, par. 1, Federal Constitution)	38
4.8	Cantonal legislation	38
4.8.1	Concordat of the cantons of Western Switzerland concerning security companies and other cantonal legislation	39
4.8.2	Model provisions of the Conference of Cantonal Police Chiefs	40
<b>5</b>	<b>International law</b>	<b>42</b>
5.1	Rules of international law concerning mercenarism	42
5.1.1	Art. 47 of the First Additional Protocol of 1977	42
5.1.2	Relevant instruments of the UN and individual regional organisations	43
5.1.3	Conclusions: Customary international law does not prohibit mercenarism	44
5.2	General international law	45
5.2.1	General principles of international law	45
5.3	International humanitarian law	45
5.3.1	What does international humanitarian law provide in substance?	45
5.3.2	Applicability of international humanitarian law to private security companies	46
5.3.3	Obligations of the state with regard to private security companies	46
5.4	Human rights	47
5.4.1	Safeguarding human rights as a traditional obligation of states	47
5.4.2	Direct application of human rights also for private security companies?	47
5.5	Consequences of breaches of international law	48
5.5.1	Responsibility of states	48
5.5.2	Individual responsibility under international criminal law	49
5.5.2.1	Introduction and legal sources	49
5.5.2.2	Acts constituting an offence	49
5.5.2.3	National jurisdiction to enforce international law	49
5.5.2.4	International jurisdiction	50
5.5.6	Switzerland's obligations under international law and its role as a contracting party and depositary of the Geneva Conventions	50
5.7	The international law of neutrality	51
<b>6</b>	<b>Conclusions and proposed measures</b>	<b>52</b>
6.1	Domestic outlook	52
6.1.1	Delegation of security tasks to private providers	52

6.1.2 Government supervision of the activities of private security companies	53
6.1.3 Security companies operating in crisis and conflict areas	53
6.1.4 Liability under criminal, civil and public law	54
6.1.5 Transfer of knowledge from former state employees to private security companies	55
6.2 Foreign policy implications	55
6.2.1 Possible solutions from the international perspective	55
6.2.2 Possible international role for Switzerland	57
6.3 List of measures proposed by the Federal Council	58

# Report

## 1 Mandate and organisation of the work

### 1.1 Parliamentary initiatives

The present report deals with Postulate 04.3267 of 1 June 2004 on Private Security Companies (hereinafter referred to as the Stähelin Postulate), which the Council of States referred to the Federal Council on 22 September 2004. This postulate calls on the Federal Council to instruct its security policy bodies to report on the origin, deployment and procedures of private security companies in fields which to date have been subject to the traditional state monopoly on the use of force. In particular the report should clarify whether Swiss and international law are sufficient to meet the present challenges and whether Swiss legislation regulates, or should regulate, the legal basis and the deployment of such companies in Switzerland and their use by Switzerland abroad. Moreover, it was required to establish whether international jurisdictions existed or was envisaged for the event of such private companies or their employees violating human rights or the Geneva Convention.

A motion on the "Elaboration of legally binding provisions on Switzerland's relations with private military companies and security companies" of 16 December 2004 (hereinafter referred to as the Motion Wyss 04.3748) calls on the Federal Council to issue legally binding provisions on relations with and the deployment of private military companies and security forces abroad operating on behalf of Switzerland, and on the transfer of former Swiss military officers and top-level officials to such companies. On 16 February 2005, the Federal Council recommended the rejection of this motion, as this issue was to be examined in the framework of the implementation of the more comprehensive Stähelin postulate. In the view of the Federal Council, it would have been premature to consider legislative measures before the existing situation had been analysed.

On 4 March 2005, the Federal Council recommended the adoption of a motion on the "Adoption of internationally valid rules for private military companies and security companies" of 17 December 2004 (hereinafter referred to as Motion Wyss 04.3796). This motion calls on the Federal Council to ensure that Switzerland should advocate at the international level binding provisions on the deployment, the responsibilities and the compliance with international humanitarian law and of human rights law by private military companies and private security forces. In its reply, the Federal Council also refers to the examination of these issues in the present report. The National Council approved the motion on 17 June 2005.

A parliamentary question on "Private security companies on the state of information and measures by the Federal Council" of 17 June 2005 (hereinafter referred to as parliamentary question Wyss 05.3432) asks about the criteria applied by the Confederation when selecting companies to protect Swiss diplomatic representations abroad. It also asks whether certain of the companies chosen, besides carrying out classical security tasks, also offer armed personnel for military purposes or perform support functions for armed forces, and whether to the knowledge of the Federal Council private military companies have established themselves in Switzerland or are recruiting or training personnel here. The Federal Council was also asked to state

its position on the need for legislative or other measures. In its answer, the Federal Council refers to the present report.

## **1.2 Mandate of the Federal Council Security Delegation**

At roughly the same time as the mandate to the Federal Council to produce a report for parliament in response to the parliamentary questions by Stähelin and by Wyss, the Control Committee of the National Council and of the Council of States took note of a report produced for the Federal Council Security Delegation. This report proposed that the administration should be mandated with the examination of various questions relating to private military companies. In these circumstances the Control Committee of the National Council and of the Council of States wished to be informed of the present report in the framework of its session in December 2005.

## **1.3 Organisation of the work**

The draft report was produced by the Federal Department of Justice and Police (FDJP) with the help of an inter-departmental working group consisting of representatives of the Federal Department of Foreign Affairs (DFA), the Federal Department of Finance (FDF), the Federal Department of Economic Affairs (FDEA), the Federal Department of Environment, Transport, Energy and Communications (DETEC) and the Federal Department of Defence, Civil Protection and Sport (DDPS).

## **2 Introductory elements**

### **2.1 The terms private security company and private military companies**

The above-mentioned parliamentary initiatives refer to private security companies and private military companies. These terms can be defined as follows<sup>1</sup>:

A *private security company* is a business whose object is to make a profit from providing goods or services for the protection and for the guarding and surveillance of persons and of property, particularly in the following areas:

- Guarding and surveillance of moveable objects and of property (e.g. airports or embassies);
- Protection of persons (e.g. high ranking government officials);
- Transport of persons (e.g. prisoners) or valuables, escorting and protecting humanitarian aid convoys;
- Training of police units in the protection of persons or property;
- Advice on matters of security, organisation and logistics;

<sup>1</sup> Geneva Centre for the Democratic Control of Armed Forces (DCAF), *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, Geneva (March 2005), S. 19–36.

- Logistical support, for example with the building of refugee camps, prisons or hospitals;
- Running prisons;
- Investigations similar to those carried out by private detectives<sup>2</sup>.

*Private military companies* are businesses whose object is to make a profit by providing military services in the fields of consulting, logistics and combat activity. Such companies are usually sub-divided into the following categories:

- *Military support companies*, which provide logistical services such as the supply and accommodation of troops, transportation, the securing of liaison and supply lines and similar tasks.
- *Military consulting companies*, which provide services in the fields of consulting and training of police officers and of military and paramilitary units. Such companies also specialise in the evaluation of armed forces in organisational, strategic and operational terms.
- *Military fighting companies* actively participate in military conflicts. They operate directly in the fighting zone, for example by providing troops, specialists or fighter pilots<sup>3</sup>.

## 2.2                    **The monopoly of the use of force as a necessary element of the state**

The involvement of private companies in carrying out state security tasks entails a potential conflict with the core functions of the state and the state monopoly of the use of force.

The *state monopoly of the use of force* undoubtedly constitutes the *core of the state security system*. Since the development of the modern territorial state in the 16th and 17 centuries, the state's monopoly of the use of force has been one of the pillars of state legitimacy and hence an indispensable component of state order. As a central element of *state authority*, it is one of the three constitutive elements of the state as defined in constitutional theory (the territory of the state, the people of the state, and the authority of the state)<sup>4</sup>. The state monopoly of the use of force means that the *use of physical force is the sole prerogative of the state*. The permissible use of force by private persons is confined to a small number of *exceptional rights* that are strictly limited either in temporal terms (*right of self defence, emergencies, the right to detain*) or in spatial terms (*the right to repel intruders*). These principles apply to domestic security, but they are also of central importance in guaranteeing the external security of a state.

Before the emergence of national states in the modern era, the maintenance of law and order in the community as well as the concern for personal safety and the prose-

<sup>2</sup> DCAF, S. 26–33.

<sup>3</sup> DCAF, S. 17–26.

<sup>4</sup> Cf. Pierre Tschannen, *Staatsrecht der Schweizerischen Eidgenossenschaft*, Bern 2004, § 1, Rz. 3.

cution of breaches of the law and the customs of the country were distributed among various bodies. *Self-redress (self-help)* played an important role<sup>5</sup>.

It was not until the 16th and 17th centuries that the importance of private law enforcement receded and was replaced by the state monopoly on the use of force. In addition to power-political and economic reasons (the development of absolutist forms of government and the concentration of forces in the process of colonial expansion), the experience of devastating and bitterly contested denominational conflicts, which took the form of civil wars and severely destabilised the traditional social order, played a key role in this development<sup>6</sup>.

However, this virtual replacement of private law enforcement by the state has its price: *the state monopoly of the use of force in turn obliges the state effectively to guarantee private security and to prosecute violations of the law in the public as well as in the private sphere*. As the state can achieve its goals - in the social field for example - only if internal and external security are guaranteed, he is obliged to make use of the means of enforcement at his disposal in order to bring about a stable order and legal certainty. To do this, the state has to make the necessary finance available.

In accordance with the distribution of responsibilities in Switzerland, ensuring internal security is primarily the task of the cantons, whereas the Confederation is responsible for external security.

### **2.3 The delegation of security tasks to private individuals and companies: a current problem**

Not all tasks that are of public interest have to be carried out by the state. Changing social conceptions can lead to a situation where *privatisation*, i.e. the complete transfer of a task from state responsibility, may appear to be a reasonable option<sup>7</sup>. By contrast, *necessary* state tasks are those for which *the state necessarily has to assume responsibility*, in accordance with a widespread social consensus which is also expressed in the constitution. Ensuring public security is one of the hard core state tasks. A privatisation of such tasks would call in question the existence of the state *per se* and certainly its legitimation as the entity responsible for public order. The privatisation of such tasks can therefore only be considered in limited specific instances and in a complementary context. (Cf. section 4.3 below).

<sup>5</sup> In contemporary societies where archaic-rural structures go hand in hand with a relatively under-developed state power, private order and sanctions mechanisms may still have a certain importance, for example in North Albania, where the "kanun", a customary order several hundred years old, is the main instrument of the enforcement particularly of male honour. Cf. the commentary on this legal order by Robert Elsie, *Der Kanun der albanischen Berge: Hintergrund der nord-albanischen Lebensweise*, Peja 2001.

<sup>6</sup> Marco Gamma, *Möglichkeiten und Grenzen der Privatisierung polizeilicher Gefahrenabwehr*, Bern/Stuttgart/Vienna 2000, p. 51. On the replacement of self-redress by the state monopoly of the use of force see *ibid.*, pp. 50–56.

<sup>7</sup> *Privatisation* is to be distinguished from the *delegation of tasks*, in which the state retains ultimate responsibility for the fulfilment of tasks that are allocated to private persons (cf. Ziff. 4.4).

However, the community can entrust the execution of certain security tasks to private persons without thereby fully transferring the state's responsibilities for such tasks. Frequent use is made of this possibility today. This is not privatisation in the strict sense of the term, but the *delegation of state tasks to private persons*.

Independently of this kind of delegation of tasks, private persons may also be tempted to take their security into their own hands by requesting private security companies to fill gaps in the state security armoury if the state no longer guarantees the standard that is considered desirable. This may occur when for financial reasons the state reduces its services or when private security aspirations increase.

In both the above-mentioned cases, the following question arises: to what extent and in what circumstances can security tasks be delegated to private persons without jeopardising the state's monopoly of the use of force? Regardless of whether the employment of private security forces is carried out by the state itself or by private individuals, the question of state legitimation always arises, in a more or a less pronounced form.

In democratic social systems, the *extent and the limits of state security tasks* have always been a *subject of discussion*.

The question of which security needs are fundamental and therefore have to be guaranteed by the state and which needs can be delegated to private persons has today become acutely relevant. In the *intra-state sphere*, several factors are decisive. There is a considerable increase in cultural, sporting and political events that make growing demands on domestic security. There has also been an increasing feeling of insecurity among the population, which can be attributed to a variety of factors. More than in the past, the forces of order are expected to demonstrate a visible presence in inhabited areas or in town centres (police patrols). Given limited resources especially in times of public budget deficits, the state has difficulty providing the necessary resources to satisfy the increasing needs. In these circumstances, private security forces may provide an alternative, particularly in financial terms, in order to meet specific one-off needs (e.g. the organisation of an international summit meeting) or to cover permanent shortages (e.g. lack of police personnel in towns).

In the *international sphere*, the issue is a slightly different one. Today we are increasingly confronted with the phenomenon of weak state structures and law enforcement, or even with state structures that have collapsed (*failed states*). In such cases there is no central authority performing basic security tasks. Security thus becomes a private matter, all the more so as many democratic states are cutting the size of their armies and in some cases are not willing to operate as external order-keeping forces and to make their armed forces and police units available for example for UN operations because they do not wish to expose them to the risks posed by the chaotic situations in deployment zones. Security is also vitally important for quite different reasons for actors in conflict zones who become the targets of aggressive acts (kidnappings, assassinations, etc.) even though they are not themselves involved in the confrontation. Such actors include humanitarian organisations, the staff of diplomatic representations or private business people. Such actors are increasingly forced to resort to private security forces, which often have the advantage of knowing the local circumstances and of being familiar with extreme situations, (acts of terrorism, guerrilla tactics, civil war). This leads to a proliferation of private security companies providing a wide spectrum of services for foreign governments (e.g. protection of embassies), for private companies (e.g. surveillance of energy produc-

tion installations) and for non-governmental organisations (e.g. escorting humanitarian convoys).

## **2.4 Specific problems of the enlistment of private security and military companies by the state or by private persons**

Quite apart from the fundamental question of the security tasks that the state should fulfil, the enlistment of private security companies raises a wide range of specific problems at the national and at the international level. Even though numerous private security companies operate correctly and professionally, this rapidly expanding sector can also attract dubious companies or individuals. Security tasks always involve the risk of the abuse of force, especially when this force is exercised by staff that has been carelessly recruited, is poorly trained or untrained and is inadequately controlled. States at the national level and the international community therefore need to consider limits that should be imposed on private security activities to protect public interests. The question arises as to who is liable for possible damages and what penal consequences the abuse of force or of coercion should have, especially when infringements occur outside the enlisting country's territory in regions in which the perpetrators cannot in effect be prosecuted because of a crisis situation.

The enlistment of private security and military companies also poses problems of legitimation and transparency vis-à-vis the citizens of a country. They are not always in a position to distinguish between state police forces and employees of private security companies, especially when the latter are wearing uniforms or emblems (badges, name tags) that could lead to confusion. People automatically tend to obey persons whose appearance is similar to that of state police forces, and this can lead to complications. Citizens do not always know what authority the staff of private security companies possesses. They therefore cannot determine whether the staff of private security companies is exceeding their authority or on whose behalf they are acting.

Finally, the possibility of private persons enlisting private services for their own security raises the tricky question of the accessibility of security for all. Those living in affluent districts can afford to employ private security services, whereas those living in less affluent areas cannot. There is therefore a risk of security becoming a good that is not accessible for everyone.

## **2.5 Particular problems in connection with interventions by private security and military companies in crisis regions**

Interventions by private security and military companies are particularly problematic when they occur in situations where state structures are seriously destabilised or have collapsed. Such situations often arise in military confrontations, especially in civil wars.

The primary motivation of the private individuals or of the private companies mandated with such tasks is essentially financial and therefore does not necessarily

coincide with the public interests of the states which mandate them. This poses problems because private military and security companies deployed in conflict zones by virtue of their weapons exercise considerable power over civilians and prisoners. Companies deployed in conflicts are also at a great distance from the supervision and the public scrutiny of the mandating state, which is frequently not identical with the target state of the deployment.

Most states simply have no regulations for the deployment of private security companies in foreign regions of conflict. This lack of national regulations means that in certain countries today it is easier to obtain a mandate from private security companies to carry out tasks abroad with an automatic weapon in one's hand than to obtain a job as a bouncer in a local bar. In a small number of states, for example South Africa, the USA, Sierra Leone and Iraq, regulations have been established in recent years. However, most of these norms have been criticised by observers as (still) inadequate or as ineffective.

As will be shown in section 5, international law does not contain norms or soft law standards specifically geared to the operation of private security companies. For this reason the question is often asked why *specific* international law norms or at least internationally recognised guidelines or standards should not be established for private security companies operating in conflict situations.

However, it is not the case that there are no applicable international legal norms at present. In addition to the *prohibition of the use of force between states* and the *obligation of non-intervention in the affairs of other states*, *international humanitarian law* and *human rights law* are of practical relevance. However, the main problem is the enforcement of these norms. There are indications that so far international humanitarian law and human rights have been respected less by military and security companies operating in conflict regions than they are by regular armed and police forces and that as a result particular challenges arise. The following reasons may play a part in the inadequate compliance with the relevant legal norms:

- Non-existent or inadequate training of the employees of private security companies in international humanitarian law and in human rights;
- Absence of a strict *chain of command* and disciplinary procedures;
- Insufficient investigation of the past of companies and of their employees, particularly with regard to compliance with relevant international law;
- The great difficulties of *monitoring* by the mandating states and the lack of control mechanisms and other measures set out in the contract, such as reporting requirements;
- The mandate, which is too vaguely defined
- Absence of law enforcement in the host state, either because this state's order is not working adequately or has failed (“*failed state*”), or because private security companies have been granted immunity from prosecution;
- Sanctions that are *de jure* or *de facto* inadequate, or insufficient enforcement of criminal responsibility in the mandating states, in the states in which private security companies are based and in the home states of security com-

pany staff, including inadequate application of the principle of universal jurisdiction<sup>8</sup>;

- The difficulty of identifying a company or its employees in the field;
- The interests of private security companies are primarily profit-oriented and do not necessarily correspond with the basic values of the state.

## 2.6 Relevance of international developments to Switzerland

Because of its neutrality and its traditional foreign policy commitment to international law and to the consolidation of human rights, Switzerland does not become involved in foreign conflicts. However, for the three reasons listed below, our country cannot avoid being affected by developments in connection with internationally active private security companies:

- Multinational companies based in Switzerland, as well as numerous smaller export-oriented companies, are active in crisis and conflict regions. So too are official Swiss representations, state-run aid projects and the branches of various Swiss non-governmental organisations in unstable states. In these cases the question arises as to the *most effective possible protection of personnel, branches and goods*. In the absence of functioning state structures and of a reliable international military presence *it is possible that only private security companies wish to or are able to perform such tasks*.
- The threat posed by globally active terror organisations, which has increased sharply since 11 September 2001, has not stopped at the borders of Switzerland. Our neutrality and our circumspect foreign policy do not provide complete protection against terror attacks on Swiss territory, particularly when such attacks are directed at foreign representations, companies, international associations, international conferences or large-scale events (e.g. sporting events), branches of international organisations, foreign airlines and tourists, prominent foreign individuals, and buildings that when attacked have the potential to inflict enormous damage (e.g. atomic power plants). Not only international cooperation in the fight against terror but also the *preventive protection of persons and of property* has increased markedly in recent years. In view of dwindling state finances, stagnating numbers in the cantonal police forces and falling army stocks, the question will increasingly arise as to *whether and to what extent private security companies can take on additional protective and monitoring mandates*.
- Finally, Switzerland's stable social structures, the constitutionally guaranteed freedom of economic activity and the country's strong position in the global financial market mean that it has become an *increasingly attractive organisational and logistical base for globally active security companies*. As the observations in section 3.3 show, there are already companies based in certain cantons that are active in crisis and conflict regions or that do not exclude engaging in activities in such regions in the future.

<sup>8</sup> In the case of the Abu Ghraib atrocities, members of the armed forces were prosecuted, but members of private security companies that were also involved were not prosecuted.

### 3 The nature and extent of the activities of private security and military companies in Switzerland and abroad

#### 3.1 The use made of private security companies on Swiss territory

According to the USIS Report of 26 February 2001 the number of private security companies in Switzerland in the year 1998 was around 250–300, and the largest of these companies had 1500 full-time and 3500 part-time employees. The total number of persons employed by all Swiss security companies and private detective companies in 1998 amounted to 8000–10,300<sup>9</sup>. New estimates by the media for the year 2005 give a total of 5800 employed in the security sector for just the six cantons of French-speaking Western Switzerland, or 1000 more than found in local police forces. In canton Geneva alone there are 80 security companies with some 2650 employees<sup>10</sup>. The neighbouring canton of Vaud has 42 companies in this sector<sup>11</sup>. The Italian-Swiss canton of Ticino has no less than 119 private companies engaged in investigation, surveillance and the transport of valuables<sup>12</sup>.

The main reasons for this growth are given below.

- *Staff reductions due to budget restrictions* In the year 2001, inquiries in the context of the USIS project revealed that the understaffing of civil police forces amounted to 800–1000 in the 26 cantons<sup>13</sup>. Swiss border guards, who as well as protecting the border have been working successfully with the police<sup>14</sup> to combat cross-border crime, also suffer from chronic under manning, to the extent of at least 200 individuals<sup>15</sup>. This manpower shortage is basically a result of budget restrictions arising from the deficit in public financing. Most studies on the subject of police work agree that it is considerably more costly than the services of private security companies, at least at the

- <sup>9</sup> See „Überprüfung des Systems der Inneren Sicherheit der Schweiz. Teil I: Analyse des Ist-Zustandes mit Stärken, Schwächenprofil, Bericht vom 26. Februar 2001“ (USIS Report I), p. 86 (German only). The USIS Report, based on an article in „Weltwoche“ of 5 June 1998, gives the figure as 8000. In an interim report for the USIS project dated 17.08.00 the Conference of Cantonal Justice and Police Directors (KKJPD) put the number at 10,300, referring to Defence Department (DDPS) data. For more information see Annex 1 of USIS Report I, p. 18.
- <sup>10</sup> «Dans la jungle des polices privées», L’Hebdo of 18 August 2005, p. 13.
- <sup>11</sup> List annexed to a written answer of the Vaud cantonal police (29 July 2005) to an inquiry sent by the Federal Office of Justice to all cantons.
- <sup>12</sup> According to Andrea Leoni in his contribution of 19.08.04 to “Ticinoonline”, the online portal created by three newspapers (Corriere del Ticino, La Regione Ticino and Giornale del Popolo), [http://www.tio.ch/common\\_includes/pagine\\_comuni/articolo\\_interna.asp?idarticolo=1785&idtipo=3](http://www.tio.ch/common_includes/pagine_comuni/articolo_interna.asp?idarticolo=1785&idtipo=3).
- <sup>13</sup> Kernteam Polizei XXI, Protokoll der Antworten zum Fragenkatalog USIS vom 5.7.2001, zit. in USIS. Überprüfung des Systems der inneren Sicherheit der Schweiz. Teil II. Grobe Soll-Varianten, Sofortmassnahmen, Bericht vom 12. September 2001 (USIS Report II), S. 87, vgl. auch [http://www.usis.ch/deutsch/berichte/pdf\\_usis2\\_voll/deutsch.pdf](http://www.usis.ch/deutsch/berichte/pdf_usis2_voll/deutsch.pdf).
- <sup>14</sup> For data on the border police in the context of internal security see the USIS Report I, in loco citato (footnote 9), p. 58–61.
- <sup>15</sup> USIS Report I, in loco citato (footnote 9), p. 60. The Security Policy Committee of the Council of States (SIK-S) on 25 November 2003 reported undermanning to be as high as 290 persons.

municipal level closest to the citizens<sup>16</sup>. It is customary today for example to entrust the policing of certain events like village fetes and sports events to private arrangements, leaving the over-stretched local police force to deal with more important surveillance and co-ordination tasks. Nor do the police have sufficient resources to provide the kind of night time patrolling of residential neighbourhoods that would contribute significantly to the community's subjective sense of security<sup>17</sup>. Although cost should not be the only consideration, since the high level of professionalism required in this line of work can only be achieved by a concrete and therefore costly training programme, budget restrictions are nonetheless one of the main causes of the frequent reliance on private sector security services.

- *Changing patterns in crime and individual feelings of security* There has been a significant rise in the number of *serious* crimes in recent decades<sup>18</sup>. With the exception of homicides, the number of attacks of all kinds on physical and sexual integrity between 1992 and 2003 has increased sharply. There has also been greater readiness to resort to violence. Delinquency among minors increased 10-fold in the period between 1956 and 2003<sup>19</sup>. It is crimes of violence that people find the most disturbing, and which receive the greatest attention in the media. The objective increase in crimes of violence, together with subjective feelings of insecurity in the general public, leads to a growing demand for security services which the police, with their frozen manpower levels, are not always in a position to satisfy.
- *Increase in major events, public and private, and the extension of public transport services* There has been a noticeable increase in the number of major sporting, cultural and political events in recent decades. These include “marathon” races in big cities with mass participation, EURO 2008, the Street Parade, open air pop concerts, and the World Economic Forum (WEF) in Davos. Most of these events draw large numbers of international participants and take place in city centres. The need for security services is correspondingly high, well beyond the capacity of the local police forces. The organisation of major private events increasingly depends on the organisers' ability to make their own arrangements to keep the peace and ensure order. Recent decades have also seen a remarkable growth in public transport services, notably in urban agglomerations where services increasingly operate throughout the night. Tight budgets leave operators with staffing shortages

<sup>16</sup> See Marco Gamma, in loco citato (footnote 6), pp. 222–23.

<sup>17</sup> Night patrols and surveillance has become an important growth area for private security companies in Switzerland – for a description of the situation in French-speaking Switzerland, see «Dans la jungle des polices privées», L'Hebdo of 18.08.05, pp. 17–18.

<sup>18</sup> A comparison of the criminal statistics for the years 1990 and 2000 shows a sharp increase in the number of violent crimes including homicides, crimes involving bodily harm, intimidation, robbery, blackmail, threats, kidnapping, hostage-taking as well as rape and other criminal acts against a person's sexual integrity, USIS Report I, in loco citato (footnote 9), p. 42. According to the criminal statistics of canton Zurich the total number of registered crimes doubled between the years 1980 and 1997, *ibid.*, p. 43. The number of break-ins also doubled between the end of the 1980s and 1997 in Switzerland, *ibid.*, p. 43, as indicated by a University of Lausanne survey of victims (Martin Kiliias/Philippe Lamon, A rise in crime? A differentiated assessment of the situation, Criminoscope, No. 12, December 2000, University of Lausanne).

<sup>19</sup> NZZ Online of 25.05.2004, <http://nzz.ch/2004/05/25/il/newzzDUNQDWN-12.html:jsessionid=DD17B20763A6CAFF9582E157DFE4F767>.

that prevent them from providing the necessary security for passengers (e.g. unattended trains). This leaves the field wide open to the private security companies.

### 3.2 Growing importance of private military and security companies in the international arena

The intervention of private, non-governmental organisations or individuals in efforts to impose a certain concept of order or a new power structure in a foreign country is not at all a new phenomenon, as is often assumed in relation to recent events (Iraq).

The Italian city states that emerged in the 13<sup>th</sup> century for example based their power almost exclusively on “condottieri” who hired themselves out to head private professional armies on a contract basis. Another well-documented example is that of the all-powerful private trading companies which first appeared early in the 17<sup>th</sup> century and which paved the way for English and Dutch colonial expansion in the Indian subcontinent and southeast Asia, with the help of private armies. By 1782, when English colonial rule was already well established in India, the private army of the English *East India Company* amounted to over 100,000 men, considerably more than the strength of the regular army<sup>20</sup>. This kind of private military organisation, not incorporated into any governmental structure, remained the exception however. *Mercenaries*, i.e. persons contractually bound for a sum of money to fight in the service of a foreign power, were much more common right up to the 20<sup>th</sup> century<sup>21</sup>.

The most recent international developments point to a *sharp increase in the number of private forces in the field of military and security services*, which today is a growing market employing countless thousands all over the world. The best example of this phenomenon is Iraq, where according to estimates made in spring of 2003 some 15–20,000 persons were under contract to private security companies, a number that has increased considerably in the meantime<sup>22</sup>. There are about 100 such companies active in the international market, selling their services in as many countries<sup>23</sup>. The market is estimated to be worth around US\$100 billion, and is expected to double by the year 2010<sup>24</sup>. In some countries public and private spending for the services of private security companies already amounts to one third, in certain cases as much as

<sup>20</sup> P.W. Singer, *Corporate Warriors*, Cornell University Press, Ithaca (N.Y.) 2003, p. 35.

<sup>21</sup> The significance of the phenomenon of mercenary soldiers, including its economic significance, was considerable in the “old” Swiss Confederation. During the period of the so-called “Reisläuferi” (mercenaries), which began more or less at the start of the 14<sup>th</sup> century and lasted to the end of the 19<sup>th</sup> century, an estimated 2 million Swiss mercenaries served in foreign wars. See Schweizer Lexikon 91, Vol. 2, Lucerne 1992, p. 745 (key word: “fremde Dienste”). Although international treaties allowed foreign States to recruit on Swiss soil, the first Federal Constitution of 12 September 1848 prohibited such practices, and shortly afterwards it was made a punishable offence to serve in foreign armed forces. Nonetheless the appeal of the French Foreign Legion, to mention but one group, remained strong. The number of Swiss who have served in the Legion since 1831 is estimated at around 60,000, *ibid.*, p. 746 (key word: “Fremdenlegion”).

<sup>22</sup> Daniel Berger, “The Other Army”, *The New York Times* of 14.08.05, found a total of 25,000 armed individuals working for private companies in June 2005. See also Caroline Holmqvist, *Private Security Companies. The Case for Regulation*, SIPRI Policy Paper No.9, Stockholm, January 2005, p. 1.

<sup>23</sup> Holmqvist, in loco citato (footnote 22), p.1.

<sup>24</sup> Singer, in loco citato (footnote 20), p.78.

100 per cent, of all spending on regular forces. Some of the bigger private security companies have been awarded contracts worth several hundred million US dollars<sup>25</sup>. In areas of crisis such as Algeria and Colombia private sector spending on security amounts to nine per cent of operating costs<sup>26</sup>. In the case of private companies active in the field of international military and security services, their employers provide not only logistical support, personnel and infrastructure, but in certain cases also heavy equipment of the type normally found in conventional warfare including fighter planes, tanks and artillery<sup>27</sup>.

The growing importance of private sector military and security services in the international arena is to a great extent a result of the end of the cold war, which left various regional power vacuums and led to the total or partial disintegration of States which proved to be ethnically or politically unstable. The number of so-called “*failed states*”, “*failing states*” and “*weak states*” increased, i.e. countries in which governmental or administrative structures or forces of law and order are either absent or entirely inadequate and the State’s “*monopoly of the use of force*” is called into question in certain regions or even throughout the country.

A discussion emerged in the Western democracies on the deployment of their own soldiers or police in war-torn or crisis areas when, despite the obvious risks, various regional organisations as well as certain individual States intervened under the command of the UN either in an attempt to restore a minimum of order or to prevent a humanitarian catastrophe (e.g. Somalia in 1992, Bosnia in 1992–1995, Liberia in 1994). The difficulty of assessing the risk of escalation involved in peace operations (*peacekeeping, peace building, humanitarian intervention*), as well as the increasing concern about democratic principles in Western societies, particularly in the media, has led to a more restrictive formulation of the legal requirements for the deployment of government military or police forces. It is also a fact that government agencies, supranational organisations and NGOs now want special protection for those in their employ dispatched to areas where the host country is unable to guarantee law and order. This demand is also being met by *private companies in the military and security services field*. It should be borne in mind that the statistics in certain countries are limited to military casualties, and lives lost in other circumstances do not show up in the official body count.

The growing importance of *private military enterprises* can also be attributed to the fact that at the end of the cold war the *great powers* have withdrawn from persisting internal conflicts. Lacking State support, the highly fragmented groups involved in civil wars, which often do not have the know-how necessary for the handling and maintenance of modern weapons systems, resort to private military organisations. This development has been aggravated on the supply side by the sharp reduction of the armed forces in the former East Bloc as well as in NATO countries, and with the end of the Apartheid era in South Africa, throwing growing quantities of men and materiel onto the market.

<sup>25</sup> Singer, in loco citato (footnote 20), p.80.

<sup>26</sup> Singer, in loco citato (footnote 20), p.81.

<sup>27</sup> Clearly the case in Angola, see Singer, in loco citato (footnote 20), p.10, with reference to Al Venter, «Out of State and Non-State Actors Keep Africa Down», *Janes’ Intelligence Review*, 11 (01.05.99).

### 3.3

### Swiss-based private security and military companies operating abroad

The interdepartmental working group has also looked into the situation regarding private Swiss-based security and military companies involved in operations abroad, particularly those active in conflict zones. Since there is no legal requirement for reporting such activities to the federal authorities, it was difficult to get a comprehensive overview of the extent of their activities. There is no particular supervision of companies active in this sector.

Information provided mainly by the cantons indicates that there are not many Swiss-based private security companies operating in crisis zones abroad. However the indications also suggest that such activities are likely to grow in importance. Indeed companies in this sector may see an advantage in being associated with Switzerland through a head office located in this country, enabling them to cash in on Switzerland's reputation for probity and its long history of neutrality.

The majority of cantons had no specific data relating to security or military companies based in their territory and operating in high risk areas abroad. Several cantons however were either aware of the existence of such companies on their territory or could not exclude their presence.

In the half canton of Basel-Landschaft (Basel region) for example there are three licensed companies known to be operating in war zones or crisis areas. Two of these have their head offices in Switzerland. The third is based abroad but has a Swiss subsidiary. These companies offer the following services: protection of persons and property, surveillance, video surveillance techniques, design and supply of alarm systems. Twelve other companies informed the authorities of the Basel region that they are considering the possibility of undertaking activities in risk zones in the future.

In June 2005 a private security company domiciled in canton Ticino made an unsolicited offer for its services to the Federal Department of Foreign Affairs. This company told the DFA that it specialised in the protection of officials, diplomatic missions and multinational companies in high risk zones. According to the information provided, its operatives are citizens of European Union member states and their professional experience includes military and anti-terrorism operations, the handling of explosives and expert marksmanship. Their field experience has included participation in UN and NATO operations in Iraq, Afghanistan, Somalia, Sierra Leone, Guatemala, Bosnia and Kosovo. The company in question operates from Ticino without a licence, according to the cantonal authorities<sup>28</sup>, confining its activities in the canton to administrative matters such as accounting and the negotiation of contracts, activities for which the canton does not require any special authorisation. It would appear that the company elected domicile in Ticino as a way of gilding its image (Swiss neutrality).

A case that dates back a decade shows that there may indeed be certain private individuals or companies engaged in dubious activities abroad who are operating from a Swiss base.

On 28 September 1995 a group of 34 armed men under the leadership of the notorious French mercenary leader Robert "Bob" Denard, attempted a coup d'état in the Como-

<sup>28</sup> Department of Institutions reply to the Federal Office of Justice on 6 September 2005.

ros archipelago in the Indian Ocean off the coast of East Africa. The attempt led to an armed conflict between the foreign mercenaries and their local sympathisers on the one hand, and the security forces on the other. On October 4-5 the French army intervened, arresting the 34 mercenaries and transferring them to France to face trial. The detainees included one Swiss citizen and the citizen of an EU member state domiciled in Switzerland.

The French authorities subsequently began investigations into 28 cases and requested legal assistance from Switzerland. The investigation was only recently wound up and the matter was handed over to the Office of the Attorney General for further examination. In Switzerland the military also investigated the Swiss citizen involved. A petition for investigation of the EU citizen domiciled in Switzerland by the Federal Police, relating to violation of Article 299 par. 2 of the Penal Code (violation of foreign territorial sovereignty) and crimes involving war *matériel*, was rejected by the Office of the Attorney General in 1996 in view of the fact that the case was still *sub judice* in France. The petition of the Federal Police concerned the appearance in 1995 of advertisements in mercenary publications seeking recruits for an unspecified "security mission". Interested parties were asked to write to a Swiss post office box which was used both by the private security company of the Swiss-domiciled citizen of an EU country and by the mercenary leader Denard. This led to the suspicion that the foreign resident had not only physically participated in the attempted putsch, but had played an instrumental role in the planning and recruitment.

### **3.4 Involvement of private security companies with the federal authorities<sup>29</sup>**

#### **3.4.1 General**

In the context of its inquiries, the interdepartmental working group conducted a survey of the Federal Administration, Parliamentary Services, the Post Office and the Federal Railways, to find out to what extent these made use of the services of private security companies in security and military work at home and abroad. The replies of 56 units of the Federal Administration and others indicated that 21 units had called in private security companies, either on an occasional or regular basis. The services offered by these security companies mainly concern security of buildings and various facilities, reception services and control of the access to federal buildings, transport-related protection (e.g. for receipts from the sale of motorway tax stickers, for documents to be destroyed) as well as the protection of individuals such as magistrates.

Some examples worth mentioning:

- The State Secretariat for Education and Research (Dept. Home Affairs) and the DFA make use of the services of private security companies for the protection of their offices, diplomatic missions abroad, and the places of residence of diplomatic staff (see 3.4.2 below). The contracts are awarded to local companies in the host countries.
- The Federal Office for Migration uses private security companies for the operation of its telephone exchange and at the reception centres for asylum applicants at Swiss borders. When applicants for asylum are invited to group questioning sessions in the neighbourhood of Wabern, security companies

<sup>29</sup> The extent to which the cantons and local authorities delegate their responsibilities in the field of security to private companies is not discussed in this report. This is partly because it is outside the scope of the report, but also because it would require more in-depth research than was possible in the time available.

are engaged on a contractual basis to protect people and the locality, and together with the police to verify the names on the lists of persons to be questioned (art. 17 of ordinance 1 on asylum procedural questions, 11 August 1999<sup>30</sup>).

- The Federal Office of Police employs private security companies for the protection of buildings, high ranking government officials and persons who require special protection on the basis of international law (arts. 22-24 of the federal law on the safeguarding of internal security [BWIS] of 21 March 1997<sup>31</sup> and art. 3 of the ordinance on federal responsibilities in the area of security [VSB] of 27 June 2001<sup>32</sup>). Private security companies are also employed to transport between cantons persons who have been incarcerated. The Federal Office of Police also uses these companies for the transport of persons being deported from Switzerland, on the basis of the so-called “jail-train-street” contract, which after 2005 is due to be replaced by a new contract to which the Confederation will not be a party.
- The Federal Post Office awards contracts to private security companies for the operation of the central emergency service, as well as for the protection of buildings, and of persons in special circumstances.
- The Federal Railways use private security companies to perform railway police duties in accordance with article 12 par. 1 of the federal law concerning utilisation of railway police of 18 February 1878<sup>33</sup>. Their duties include ensuring public order (prevention of trespassing, making arrests, reporting criminal acts to the authorities) as well as the protection of railway users and the surveillance of infrastructure.

### 3.4.2 Protection of Swiss missions abroad

The protection of Swiss missions abroad (embassies, general consulates, other consulates, co-operation offices), as well as of the official and private residences of diplomatic staff, has been entrusted by the DFA on behalf of the Confederation to locally based private security companies. Their duties, comparable to those of private surveillance and security companies in Switzerland, include the control of access and admission, and the surveillance of buildings. This enables the Confederation to fulfil its obligation to maintain a network of Swiss missions abroad. It does not involve the delegation of any sovereignty-related duties to third parties. The legal basis for the protection of co-operation offices involved in development and co-operation work is provided indirectly by the law on development aid and the federal law on aid to Eastern European countries since it concerns the fulfilment of a legal obligation (provision of the necessary framework conditions).

There are at present about 80 missions under surveillance. Otherwise the protection of staff could no longer be guaranteed and the missions would have to be shut down, which would be an unacceptable hindrance to the normal conduct of foreign policy and foreign trade policy.

<sup>30</sup> Ordinance on asylum 1 (AsylV 1), SR **142.311**.

<sup>31</sup> SR **120**

<sup>32</sup> SR **120.72**

<sup>33</sup> SR **742.147.1**

Protection is normally provided by the authorities of the host country, and in exceptional cases also by local surveillance companies or locally employed security staff, and is almost exclusively limited to building surveillance. The choice of security companies is based to a great extent on their “hands-on” experience of local conditions and their ability to provide the kind and degree of protection required. The deployment of security operatives for the protection of a diplomatic mission is not in contradiction with international humanitarian law. These operatives are equally under an obligation to respect international law and human rights (see under heading 5 below). Since there are no internationally valid quality standards for private security forces, great care must be taken in making the final choice. Persons who have received professional Swiss military training are eligible for security work abroad for limited periods. Deployment for a period exceeding three weeks is subject to approval by the United Federal Assembly in accordance with article 70 of the Military Law<sup>34</sup>. In making the final decision, one must consider the security risk for military personnel. In the specific case of Iraq it has to be assumed that the deployment of military personnel would increase the risk of attacks on the Swiss mission<sup>35</sup>.

## 4 Domestic law

### 4.1 Constitutional bases

The *cantons* are responsible for ensuring law and order and public safety *within their own territory*, and this is a task that is traditionally carried out by the *police force* (original cantonal police jurisdiction)<sup>36</sup>. However, the *federal government* also has *implicit constitutional powers* to take the necessary measures, both internally and externally, to protect itself and its institutions and bodies (protection of people and property, ensure security at government events). These powers are in effect substantiated through the collective Swiss polity<sup>37</sup>. The federal government also possesses comprehensive and exclusive powers in the area of *national defence* (Federal Constitution, Article 58)<sup>38</sup>.

Article 57, par. 1 of the Federal Constitution stipulates that the federal government and the cantons shall ensure “the security of the country and the population *within the scope of their powers*”. The above Article therefore does not create new federal powers in the area of security; it merely confirms the already existing constitutional responsibilities of the federal government and the cantons<sup>39</sup>.

<sup>34</sup> SR 510.10

<sup>35</sup> Reference should also be made to the following replies of the Federal Council: reply to Barbara Haering on private security forces of 4 May 2004 (04.1045); urgent inquiry by Josef Lang on mercenaries and soldiers in Iraq, 2 June 2004 (04.1066); question time of 7 June 2004, question by Ueli Leuenberger: Swiss co-operation with mercenaries must be terminated immediately (question 04.5094), question time of 14 March 2005, question by Ursula Wyss on private security companies (question 05.5075).

<sup>36</sup> Federal Constitution Message, BB1 1997 I 237.

<sup>37</sup> As, for instance, draft of Federal Law 117 Ia 202 and Andreas Auer/Giorgio Malinverni/Michel Hottelier, *Droit constitutionnel suisse*, Vol. I, Berne 2000, p. 331, Rz. 961.

<sup>38</sup> Rainer J. Schweizer/Gabriela K pfer in: Bernhard Ehrenzeller/Philippe Mastronardi/Rainer J. Schweizer/Klaus A. Vallender (ed.), *Die Schweizerische Bundesverfassung*, Zurich/Basel/Geneva 2002, introductory remarks to Articles 57–61, Rz. 11.

<sup>39</sup> Message addressing a new Swiss constitution dated 20 November 1996, BB1 1997 I 1 ff., 237 (Federal Constitution Message); Schweizer/K pfer, *ibid.* (fn. 38), on Article 57 of Federal Constitution, Rz. 1.

Article 57, par. 2 of the Federal Constitution acknowledges the fact that security cannot be divided: the federal government and the cantons are obliged to *co-ordinate* “their efforts in the field of internal security”. This co-ordination obligation applies both to the cantons, which have to co-ordinate their activities in the area of security with one another, and to the federal government. On the basis of Article 57, par. 2, the federal government may, for example, assume responsibility for co-ordinating the security of major events (World Economic Forum, EURO 2008), or introduce legislative measures if issues relating to internal security urgently call for nation-wide co-ordination, with the inclusion of – or even under the leadership of – the federal government.

In certain areas of national importance (public transport, law on foreign nationals), the federal government has increasingly drawn up regulations in recent years that govern the outsourcing of security activities to the private sector. Recent examples include the draft versions of a federal law governing security services within public transport companies (Federal Law on Security Services of Transport Companies, BGST)<sup>40</sup> and a federal law governing the use of force in the law on foreign nationals and the transport of people on behalf of the federal authorities (Use of Force Act, ZAG)<sup>41</sup>. Here the federal government places a great deal of value on precise descriptions of the scope and limits of powers entrusted to the private sector (cf. section 4.4.1).

Finally, general provisions of federal legislation – for example, those of the Weapons Act, Control of Goods Act, Penal Code, Military Penal Code, Civil Code, Liability Act – also apply to private security companies.

In view of their *territory-related policing competencies*, however, it has primarily been the *cantons* that have drawn up regulations in the past governing the licensing and activities of private security companies and their personnel. As described in section 4.8, no consistent sets of regulations have existed to date, though in accordance with Article 95, par. 1 of the Federal Constitution (gainful employment in the private sector), the federal government would in fact have the option of drawing up legal provisions.

## **4.2 Permissibility of private activities in the area of security: definition of limits in accordance with constitutional law**

### **4.2.1 Problems associated with private security activities from the point of view of the citizens**

In a democratic social order, *one important function of the state’s monopoly of the use of force* is to enforce law and order and in particular to protect the *fundamental rights of its citizens that are guaranteed by the constitution and international law*. The activities of private security companies and private individuals active in the area

<sup>40</sup> For draft of and message on the Federal Law on Security Services of Transport Companies, see BBl 2005 2573 ff.

<sup>41</sup> For draft of and message on the federal law governing the use of force in the law on foreign nationals and the transport of people on behalf of the federal authorities (Use of Force Act, ZAG), see the home page of the Federal Office of Justice, <http://www.ofj.admin.ch/d/index.html>, keywords “Law-making”, “Use of force”.

of security can give rise to delicate practical problems. The most difficult problem concerns the powers of intervention, permissible coercive measures and means of enforcement (e.g. use of truncheons, handcuffs, firearms, sprays, dogs) to be entrusted to private security personnel. For example, should private security personnel have the right to check private individuals, to detain them and handcuff them if necessary, to frisk them or to confiscate items from them, or should their powers be restricted to protection and surveillance activities, maintaining public order and preventing unlawful encroachments?

The answer to the question concerning the extent to which private personnel are empowered to intervene, in order to maintain public security and order and use force if necessary, partly depends on whether the intervention concerned takes place in private or public space. All space that is not reserved solely for private use may be regarded as public or semi-public. As rulings – albeit in a slightly different context – concerning Article 261<sup>bis</sup> of the Swiss Penal Code (racial discrimination) have shown, it is not always easy to differentiate between private and public space<sup>42</sup>.

#### 4.2.2 Private sphere

Even in the *strictly private sphere*, if we exclude limited private protection rights such as self-defence, measures to deal with an emergency or corresponding aid for third parties (emergency aid, disaster aid), the enforcement of public order and security is ultimately the responsibility of the state due to its monopoly of the use of force. Here the Federal Constitution leaves a certain degree of *scope for limited private security management*. This is based on the *principle of assumption of personal responsibility*, which the Federal Constitution recognises with its *protection of the private sphere* (Article 13) and *guarantee of ownership* (Article 26). In addition to private defence rights, it is above all *householder rights*, which are based on the guarantee laid down in Article 13, par. 1 of the Federal Constitution and in all cantonal constitutions that determine the extent of permissible private security activities.

Weighing personal responsibility against the state's monopoly of the use of force on the basis of the *principle of proportionality* yields the following findings:

- Permissible private measures in private premises may include: preventive measures such as *protection of property* (internal and external controls and surveillance); *expulsion*; *refusal of admission*.
- The following measures are not permissible in private premises without the consent of the person or persons concerned: *identity checks*, *searches*, *confiscation of objects*.

#### 4.2.3 Semi-public sphere

The *semi-public sphere* includes premises that are effectively private in nature but which are open to the public in view of their designated purpose. Examples here include privately operated football stadiums, schools, (enclosed) sports fields,

<sup>42</sup> SR 311.0. See e.g. Federal Court decision 130 IV 111: The Federal Supreme Court has ruled that statements made within the context of a talk held at a closed meeting that took place in a forest cabin and was attended by 40 to 50 skinheads constitute statements of a public nature.

swimming pools, restaurants, exhibition centres, cinemas, discotheques, shops and shopping centres, as well as privately operated means of transport such as buses, trams, trains and aircraft.

Here, too, the rights of self-redress such as self-defence, emergency measures, aid for third parties (emergency and disaster aid), and householder rights are applicable. In addition, private operators have still further-reaching *additional security powers*. Within certain limits, private organisers are legally responsible for ensuring the safe and orderly organisation of their events. Failure to do so may under certain circumstances result in civil law liability with compensation claims.

Since the permitted security measures in semi-public space are not covered by householder rights or other self-redress rights, a *special legal basis* is required. This usually takes the form of *contractual consent*. When use is made of a contractual service, e.g. purchase of an admission or transport ticket, the purchaser also *consents to security measures that constitute an intrusion upon personal freedom*. However, it is essential to ascertain which measures are covered by the contractual consent, and which ones are not.

The *principle of proportionality* plays a significant role here and allows conducting the following classification:

- Based on contractual consent, permissible security measures in semi-public premises include: *admission controls, measures to separate groups (e.g. rival fans), physical searches* (if they are carried out for security reasons), *confiscation of objects* (if carried out for security reasons), and recording of *personal details*.
- Private operators are not permitted to carry out actual identity recognition measures such as fingerprinting, photographing, etc.

#### **4.2.4 Public sphere**

In *public places*, i.e. localities that cannot be allocated to a specific individual or entity, private security personnel are not entitled to carry out any activities that extend beyond the self-redress rights and aid for third parties (see above) that are applicable to everyone. The maintenance of law and order in public space is by definition the responsibility of the state. Additional private powers of intervention require *special authorisation by the legislator within the scope of a specific mandate* (cf. section 4.4). Without this special authorisation, the following limits apply in public space:

- In addition to self-redress rights, *activities of a strictly preventive nature* are permitted that do not intrude upon the personal freedom of others, e.g. private patrols in residential districts. In the event that a threat to law and order or another unusual event should be detected, help can only be obtained by notifying the official security authorities. Offenders may be briefly detained until the arrival of the official authorities (*right to detain*).
- Without special authorisation, it is not permissible for private security personnel to use any coercive measures that encroach upon the personal freedom of the persons concerned and extend beyond the applicable self-redress

rights. Such measures include identification controls, confiscation of objects, and roadblocks.

#### 4.2.5 Private protection of individuals and of transports of goods and valuables

Although services to protect individuals and the transport of goods and valuables are provided in the public sphere, they are in fact special cases in that they may be designated as an individual need for protection, i.e. they have a specific focus, are readily identifiable and are clearly defined. Under these circumstances, the principle of proportionality permits private activities that extend further than those otherwise permitted in public places:

- In addition to preventive measures such as observation and surveillance, other measures such as protecting people or their vehicles by keeping other people away from their immediate vicinity are permissible if they are implemented in an proportionate manner (e.g. by creating sufficient free space, but not by setting up road blocks).
- Without special legal authorisation to delegate duties (cf. section 4.4), coercive measures of any kind that extend beyond rights of self-redress and aid for third parties, and intrude upon the personal freedom of the people concerned, are not permissible. Such measures include identification controls, confiscation of objects, roadblocks or expulsions. However, distinguishing between permissible rights of self-redress and inadmissible coercive measures can be very difficult at times: while *preventive* coercion is not permissible, in the case of an immediate threat of violence or death, the use of firearms by private security personnel can be regarded as permissible self-redress.

### 4.3 Limits of privatisation

Guaranteeing elementary private security requirements and the enforcement of public order are *essential duties of the state*. From a legal point of view, *privatising*<sup>43</sup> these duties would be possible, since neither the Federal Constitution nor the constitutions of the cantons contain any autochthonous material restrictions. But in practical terms, such a move is out of the question since the elimination, or even only slight erosion, of the state's monopoly of the use of force would place the legitimisation, i.e. ultimately the reason for the existence of the state, in question.

Privatisation is therefore only conceivable in certain peripheral areas, but not in the core areas of security and police activities. In associated literature, present-day discussion is mainly focusing on peripheral tasks such as consulting on measures to

<sup>43</sup> The complete exclusion of a given duty from the state's area of responsibility, cf. section 2.3.

prevent crime, or technical support and control activities in the area of road transport, which to some extent are performed by the police today<sup>44</sup>.

The question whether a given police or security task belongs to the core duties of the state and therefore has to be excluded from any privatisation considerations, or whether it concerns a peripheral activity that would be suitable for privatisation, has to be examined in *each particular case*. Here attention has to be paid to the following limiting criteria:

- *High risk of use of physical force*: Activities for which *the direct use of physical force must be expected beforehand* for the purpose of protection against threats or suppression of public disturbances (e.g. armed intervention to enforce or maintain public order, arrests, significant restrictions on freedom of movement due to lengthy detention of people) must be regarded as *essential duties of the state and therefore cannot be privatised*.
- *Encroachments upon fundamental rights*: Activities that can be expected to *significantly* encroach upon fundamental rights cannot be considered for privatisation. In the case of the direct use of physical force (armed intervention to enforce or maintain public order, arrests or restrictions of freedom of movement that extend beyond the strictly limited right to detain offenders), the state's monopoly of the use of force clearly rules out the possibility of privatisation. In addition, *preventive measures* such as phone tapping, intercepting and opening mail, or keeping people under surveillance also entail significant encroachments upon fundamental rights and must also remain the preserve of the state.
- *Equal provision of security (equal treatment)*: The state is obliged to observe the principle of equal treatment in the execution of its duties. The privatisation of certain state activities in areas of police and security reaches its limits when it is no longer possible to guarantee *equal maintenance of public security*. The privatisation of local protection against threats is therefore practically out of the question, since this would mean that such services would only be available to those persons (or streets or residential districts) that could actually afford them. If the public sector is not in the position to provide effective protection itself at an acceptable cost, it may call on the assistance of private security companies to provide a limited degree of support through the *delegation of duties*, ultimate responsibility for which remains with the public authorities (cf. section 4.4).

#### **4.4 Delegation of state security tasks to the private sector: constitutional limits**

Article 178, par. 3 of the Federal Constitution stipulates that the federal government may “delegate by law Administrative tasks to public or private organisations, entities or persons that do not form part of the Federal Administration”.

<sup>44</sup> See Gamma, *ibid* (fn. 6), pp. 157–59. According to some internal police force estimates, approx. 30–40 % of day-to-day police work is spent on tasks outside the actual core area of police functions, *ibid*, p. 127.

In each *canton* it is necessary to separately examine whether the legal situation is comparable to that at federal level, or whether the delegation of state duties to the private sector calls for the *specific empowerment* on the basis of the cantonal constitution.

Furthermore, according to unanimous doctrine and practice, the delegation of duties is only permissible if it meets the following *three requirements* stipulated in the Federal Constitution in Article 5, par. 1 and 2, regarding each and every action by the state, and in Article 36, par. 1 to 3, regarding restrictions of fundamental rights:

- It must be supported by an *adequate legal basis*<sup>45</sup>;
- It must be *in the public interest*;
- It must observe the *principle of proportionality*.

#### 4.4.1 Legal basis

As is the case with the delegation of any administrative tasks, the delegation of police and security duties to the private sector requires a *formal legal basis*. This is not only because of the recognised principle that every state action has to be governed by legal provisions (legality principle), but also because it affects the organisation principle laid down in the Federal Constitution, which stipulates that the state is fundamentally responsible for the execution of its duties<sup>46</sup>.

However, this does not tell us which aspects have to be regulated in the form of formal legal provisions. Doctrine often focuses on the criterion of “sovereign actions”<sup>47</sup>. And sometimes the legislator does the same, for example in Article 17 of Asylum Ordinance 1, according to which the federal office responsible for securing the operation of refugee holding centres is empowered to delegate non-sovereign duties to third parties<sup>48</sup>. From a legal point of view, distinguishing between sovereign and non-sovereign duties often appears to make good sense, but this is not enough to solve the various practical problems that arise in association with the activities of private security personnel. From the point of view of the private individuals concerned, it is not primarily the sovereignty of a duty that counts but rather the real possibility of the direct *use of force* and the accompanying *risk of encroachments upon protected fundamental rights*. For example, private security personnel who work together with the police in the semi-public (stadiums, airports, etc.) or public spheres to maintain order and security by performing non-sovereign duties can find themselves suddenly involved in escalating situations that lead to violent confrontations. *The most important issues relating to powers and means of intervention, organisation of private security personnel, and state control and supervisory mechanisms* therefore already have to be regulated at the formal legislative level.

<sup>45</sup> For the federal government, this is stipulated explicitly in Article 178, par. 3 of the Federal Constitution.

<sup>46</sup> The delegation of tasks for which the federal government is responsible to private-sector entities is frequently to be regarded as a “significant law-making provision” in accordance with Article 164, par. 1 of the Federal Constitution, which must take the form of federal law.

<sup>47</sup> As e.g. Gamma, *ibid* (fn. 6), p. 204.

<sup>48</sup> Asylum Ordinance 1 of 11 August 1999 on procedural issues (AsylV 1, SR **142.311**).

The federal government has prepared two bills relating to the areas of security and police that set out to meet these requirements, and recently submitted them for consultation.

- The draft of the *Federal Law on Security Services of Transport Companies (BGST)*<sup>49</sup> of 23 February 2005 is to replace the 120 year-old federal law on the railway police<sup>50</sup>. The bill regulates not only the purpose and duties (Article 2) and the organisational principles of security services (Article 3), but also specific powers of intervention, e.g. questioning people, checking identification papers, authority to check people or to exclude from the means of transport, confiscation of objects to secure evidence (Article 5), and restrictions on the means and methods of intervention (direct use of force only permitted against people who effectively disrupt the transport service concerned – Article 5, par. 4 in association with Article 5, par. 1 of the bill).
- The draft of the proposed *federal law on the use of force in the context of the law on foreign nationals and the transport of persons on behalf of the federal authorities* (“*Zwangsanwendungsgesetz*”, ZAG)<sup>51</sup>, which was submitted on 24 November 2004 for consultation, explicitly states that the authorities may also call on players from the private sector to help them perform their duties (Article 1, par. 1c). In addition to specifying the purpose for which force may be used (Article 3), this bill also stipulates limits relating to the permissible means and methods, e.g. limits of use of physical force, permitted and prohibited instruments (Articles 3 to 4 and 6 to 8), as well as the specific powers to use force (Articles 9 to 11).

In other cases, the federal legislators continue to formulate *mere empowerment clauses*, without more precisely specifying the purpose, scope or powers of intervention associated with the delegation of duties to the private sector:

- Article 22, par. 2 of the Federal Law on the Preservation of Internal Security (Preservation of Internal Security Act, BWIS) of 21 March 1997<sup>52</sup> empowers the Federal Council to delegate the public task of protecting the authorities, employees and buildings of the federal government to private security services. The ordinance of 27 June 2001 governing security matters within the responsibility of the federal government (VSB)<sup>53</sup> regulates the duties of those bodies entrusted with the task of protecting people and buildings in accordance with Articles 22 to 24 of the Preservation of Internal Security Act (cf. Ordinance, Article 1). In accordance with Article 3 of this ordinance, the relevant federal authorities may call on “private security services” for the surveillance of federal buildings “if it requires additional personnel” (par. 1). They may also call on private security services “for government events and,

<sup>49</sup> For the draft of and message on the Federal Law on Security Services of Transport Companies see BBl **2005** 2573 ff.

<sup>50</sup> Federal law of 18 February 1878 concerning the railway police (SR **742.147.1**). Under Article 12, par. 1 of this law “each railway company ... shall designate which of its officers and employees are entitled to act in the capacity of railway police ...”. Accordingly, delegating security tasks to private-sector entities is also permissible; see also section 3.4.1.

<sup>51</sup> For the draft of and message on the Use of Force Act, see the home page of the Federal Office of Justice, <http://www.ofj.admin.ch/d/index.html>, keywords “Law-making”, “Use of force”.

<sup>52</sup> Federal Law on Preservation of Internal Security; SR **120**.

<sup>53</sup> Ordinance on security within the responsibility of the federal government; SR **120.72**.

if necessary, to support the police” (par. 2). In accordance with par. 3 of the cited provision, the Federal Department of Justice and Police may specify the requirements to be met by private security services performing duties on behalf of the federal government<sup>54</sup>.

- In accordance with Article 6, par. 2b of the ordinance of 2 May 1990 on the protection of military installations<sup>55</sup>, the surveillance and monitoring of military installations may be delegated to private individuals or companies on the basis of appropriate contracts.

In this case, delegation is based solely on the provisions of an ordinance.

#### 4.4.2 Public interest

By contrast with privatisation (section 4.3), in the case of delegation of duties to the private sector, the state remains ultimately responsible for ensuring that the duties concerned are performed correctly<sup>56</sup>. Unlike private players who pursue their own activities, those who assume state duties are required to observe fundamental rights, as Article 35, par. 2 of the Federal Constitution<sup>57</sup> clearly stipulates. The state may also reverse the delegation of duties by effecting amendments to the relevant legal provisions. This means there is more room for manoeuvre regarding public interests that are associated with the delegation of duties than there would be in the case of privatisation.

Public interests associated with the delegation of security and police duties to the private sector include the *more economical provision of services by private players* and the *potential for the duties to be performed with a higher degree of efficiency* (focus of state forces on central security and police activities). Public interest can essentially be confirmed in the following cases:

- Major requirements on public security and order cannot be sufficiently met through state resources alone. A solution involving the state alone would require a disproportionate utilisation of resources.
- Private players are more suitable for performing surveillance tasks, for example thanks to their specialist know-how and their experience in carrying out such operations. A good example here would be calling on the services of former fans to assist with the control and monitoring of potentially problematic groups of fans at sporting events in stadiums.
- The delegation of security duties to the private sector meets *exceptional needs* that would over-stretch the available state capacities. In the case of major events planned well in advance, to ensure the most efficient use of

<sup>54</sup> To date, the Department of Justice and Police has not made use of this right of delegation.

<sup>55</sup> Ordinance dated 2 May 1990 on the protection of military installations (Protection of Military Installations Act); SR **510.518.1**.

<sup>56</sup> Article 19, par. 1a of the federal law of 14 March 1958 governing liability of the federal government, public officials and civil servants (Liability Act, SR **170.32**) attributes subsidiary liability to the federal government for damages caused by private-sector entities entrusted with the task of fulfilling duties for which the federal government is responsible.

<sup>57</sup> “Whosoever shall carry out the duties incumbent upon the state shall be bound to respect fundamental rights and obliged to facilitate their substantiation.”

state resources it may be desirable to delegate clearly defined, normally unproblematic security tasks to private players so that the state will have sufficient resources at its disposal for other security activities, e.g. to deal with unforeseen crisis situations.

#### 4.4.3 Principle of proportionality

As with all state acts, the delegation of security duties to the private sector is closely associated with the principle of proportionality. This means, for example, that the cantons cannot simply delegate their entire range of police activities to private security services because this would save them money. Here there would not only be a *lack of public interest*, it would also not be in keeping with the *principle of proportionality*.

This also means that, when it comes to examining the degree of proportionality, especially stringent requirements have to be defined in the same way as for assessing the legal basis (section 4.4.1) if the delegation of duties involves *coercive measures* that might *intrude upon the fundamental rights* of the people concerned. Proportionality is always based on a *balance* between the interests of the general public, who want the maximum degree of security through an efficient use of resources, and the interests of the potentially involved citizens who expect their fundamental rights to be duly protected. *Since especially sensitive issues are involved in security and police activities, this weighing of interests often occurs at the level of formal legislation.* The following restrictive criteria have to be incorporated into this process:

- *Caution is called for when delegating powers that could give rise to the direct use of force against citizens:* As has already been pointed out in connection with the required legal basis (section 4.4.1), it is essential to specify not only the *purpose*, but also the *preconditions and means* to be used, already at the formal legislation stage.
- *Caution should be exercised concerning the delegation and execution of measures with a coercive character if there is no immediate urgency:* Exercising caution corresponds to the basic concept of a *subsidiary* form of delegation of security and police duties to private players. Public interest legitimises the involvement of private players in the fulfilment of the state security mandate, especially when it comes to *meeting exceptional requirements* (cf. section 4.4.2).

#### 4.5 Federal legislation of relevance to private security activities

Although most of the legislation governing private security companies in Switzerland exists at the cantonal level, federal legislation also comes into play with regard to certain activities of such companies – for example, laws relating to the use of firearms. Services of a military nature provided to other countries may therefore be subject to special provisions of federal law. This report also examines the options provided by the Penal Code and Military Penal Code for dealing with offences committed by private security personnel, especially those committed within the scope of operations carried out abroad.

### 4.5.1 Federal legislation governing weapons and war *matériel*

The Federal Weapons Act<sup>58</sup> restricts the security and policing powers of private individuals and private organisations. It applies both to commercial and non-commercial activities of private players.

Anyone wishing to *purchase a weapon* in Switzerland from a licensed dealer has to apply for a *permit* (Article 8, Weapons Act), the issue of which is based on the fulfilment of *special personal requirements*. Various provisions of the Weapons Act and Weapons Ordinance<sup>59</sup> stipulate that applicants for a permit have to possess the necessary character and skills for using a weapon without endangering others (cf. Article 8, par. 2, Weapons Act and Article 32, par. 1, Weapons Ordinance). The same principle applies to the purchase of weapons from private individuals, for which a permit is not required. Here the seller is obliged to ensure that the purchaser meets the above requirements.

Anyone who *wants to carry a weapon in public* has to apply for the relevant *permit* (Article 27, par. 1, Weapons Act), which is issued by the relevant authority in the applicant's canton of domicile with a maximum validity of five years (Article 27, par. 3, Weapons Ordinance). This permit will only be issued if the applicant (cumulatively) meets the requirements for the issue of a permit to buy a weapon, plausibly declares that the weapon is genuinely needed for the purpose of self-protection or the protection of other people or objects, and passes a test comprising questions about the proper handling and legal prerequisites for the use of the weapon concerned (Article 8, par. 2, Weapons Ordinance). The relevant restrictions imposed by the *principle of proportionality* are specified in Article 31 of the Weapons Ordinance, which states that a weapon may only be carried for as long as appears reasonable for the use for which it is authorised (par. 1), and that pistols and firearms may only be carried if they are not loaded (par. 2).

The Federal Act on War *Matériel*, KMG of 13 December 1996<sup>60</sup> should also be mentioned here. It regulates the manufacture and trade of defence equipment, but also covers the transfer of immaterial goods that are associated with war *matériel*.

### 4.5.2 Embargo legislation

Although federal legislation does not prohibit activities relating to the supply of military goods and services in a comprehensive manner, it does contain a number of special provisions. For example, based on the Federal Law dated 22 March 2002 on the Enforcement of International Sanctions<sup>61</sup> the federal government may resort to coercive measures in order to enforce international sanctions aimed at securing the observation of international law. These measures may take the form of restrictions in the area of trade in goods and services, but may also carry the threat of prohibitions

<sup>58</sup> Federal law dated 20 June 1997 on weapons, munitions and related material (Weapons Act), SR **514.54**.

<sup>59</sup> Ordinance of 21 September 1998 governing weapons, munitions and related material (Weapons Ordinance), SR **514.541**.

<sup>60</sup> Federal Act on War *Matériel*, SR **514.51**.

<sup>61</sup> Embargo Act; SR **946.231**.

or licensing obligations (Article 1, par. 1 and 3, Embargo Act). The federal government has made use of these powers and drawn up a variety of associated ordinances<sup>62</sup>.

### **4.5.3 Responsibility for prosecution of offences committed abroad**

Since the possibility cannot be ruled out that private security companies based in Switzerland may be involved in activities abroad, or Swiss citizens may be recruited for foreign operations, it is necessary to examine to what extent offences committed abroad come under the jurisdiction of the Swiss Penal Code. Parliamentary motion 04.3748 (Wyss) raised *i.e.* the question whether crimes committed abroad by employees of private security companies acting on behalf of Switzerland are in fact prosecuted. Here it is necessary to ascertain under which circumstances Swiss legislation permits the prosecution of such offences. The question of prosecution before an international criminal court is dealt with in section 5.5.2.

#### **4.5.3.1 Individual responsibility**

The Swiss Penal Code, StGB<sup>63</sup> covers a variety of offences that may be of relevance in the context of the activities of private security companies, such as unlawful actions on Swiss territory on behalf of a foreign country (Article 271), hostilities from the neutral territory of Switzerland against a belligerent [in a foreign conflict] or hostilities against foreign troops admitted to Swiss territory (Article 300), violation of foreign territorial sovereignty (Article 299) and espionage against foreign states (Article 301).

In addition, certain provisions of the Swiss Military Penal Code, MStGB of 13 June 1927<sup>64</sup> could be applicable to employees of private security companies if the relevant personal prerequisites are met. For example, if people follow an army without directly belonging to it (Article 4, par. 1 MStGB), if civilians commit certain offences in times of war (Article 4, par. 2 MStGB), or if people participate in a breach of international law together with other persons who are subject to the Military Penal Code in the context of an armed conflict (Article 6, par. 1).

The Military Penal Code punishes the following offences in particular: Hostilities from the neutral territory of Switzerland against a belligerent [in a foreign conflict]

<sup>62</sup> Ordinances formulated on the basis of embargo laws are published on the home page of the State Secretariat for Economic Affairs (seco) and are available at the following address: [www.seco.ch](http://www.seco.ch).

<sup>63</sup> Penal Code; SR 311.0. The general section of the Penal Code underwent a revision; see amendment to the Penal Code of 13 December 2002, BBl 2002 8240 ff. The Federal Council has not yet specified the date on which the revised Code is to come into force. The tentatively scheduled date is 1 January 2007.

<sup>64</sup> Military Penal Code; SR 321.0. The Military Penal Code underwent a revision; see amendment to the Military Penal Code dated 21 March 2003, BBl 2003 2808 ff. The Federal Council has not yet specified the date on which the revised Code is to come into force. The tentatively scheduled date is 1 January 2007.

or hostilities against foreign troops admitted to Swiss territory (Article 92 MStGB – breach of neutrality), espionage against foreign states (Article 93 MStGB – breach of neutrality), foreign military service (Article 94 MStGB – weakening of the armed forces), breaches of contractual service obligations (Article 97 MStGB), violations of military secrecy (Article 106 MStGB), and breaches of international law in the case of armed conflicts (Articles 108 to 114 MStGB).

An action carried out by the personnel of a private security company is deemed lawful if it is appropriate in accordance with a provision of law or with an official or a professional obligation (Article 32, Penal Code)<sup>65</sup>, or if the person concerned has to act in self-defence (Article 33, Penal Code)<sup>66</sup> or in an emergency (Article 34, Penal Code)<sup>67</sup>. The Military Penal Code regards actions carried out in self-defence and in an emergency as lawful in the same way as the Penal Code (Articles 25 and 26, MStGB)<sup>68</sup>.

If an offence has been committed *abroad*, the Swiss Penal Code is applicable in the following circumstances:

- If a crime or offence has been committed against the state (Article 4 Penal Code)<sup>69</sup>.
- (1) If a crime or offence has been committed against a Swiss national; (2) the deed is also punishable at the location at which it was committed; and (3) the offender is either already in Switzerland and will not be extradited to a foreign country or if he or she has been extradited to Switzerland because of the deed concerned (Article 5 Penal Code). This provision underscores the passive personality principle.
- (1) If a crime or offence has been committed by a Swiss national; (2) the deed is also punishable at the place where it was committed; (3) Swiss legislation permits extradition for the offence concerned and (4) the offender is either already in Switzerland or is to be extradited to Switzerland because of the deed concerned (Article 6 Penal Code). This provision underscores the active personality principle.
- If a crime or offence has been committed that Switzerland has undertaken to prosecute within the scope of an international treaty (Article 6<sup>bis</sup> Penal

<sup>65</sup> In contrast to Article 32 of the Penal Code, Article 14 of the draft revision of the Penal Code of 13 December 2002 limits the justification grounds to legal duty and/or legal authorisation, and no longer mentions either official or professional obligation.

<sup>66</sup> The draft revision of the Penal Code dated 13 December 2002 includes provisions on *justifiable* (Article 15) and *excusable* self-defence (Article 16): The first provision corresponds substantially to the prevailing Article 33, par. 1 of the Penal Code, and the second to Article 33, par. 2 of the Penal Code.

<sup>67</sup> The draft revision of the Penal Code dated 13 December 2002 includes provisions on necessity as *justification* (Article 17) and necessity as *excuse* (Article 18): The first provision corresponds substantially to the prevailing Article 34, section 1 of the Penal Code, and the latter provision adopts the premise of Article 34, section 1, par. 2 of the Penal Code with two amendments.

<sup>68</sup> The draft revision of the Military Penal Code dated 21 March 2003 contains the grounds for justification of legally permissible actions (Article 15), justified self-defence (Article 16), excusable self-defence (Article 16a), necessity as justification (Article 17) and necessity as excuse (Article 17a).

<sup>69</sup> Articles 3 and 4 of the draft revision of the Penal Code dated 13 December 2002 correspond substantially to the prevailing Articles 3 and 4 of the Penal Code.

Code)<sup>70</sup>. This provision extends the scope of validity of the Swiss Penal Code in that it obliges Swiss authorities to instigate criminal proceedings even in cases that do not comply with the territorial principle or the active or passive personality principle, if the following prerequisites are met: (1) The offender is currently in Switzerland; (2) he/she will not be extradited to another country; (3) the deed is punishable by law both in Switzerland and in the country in which it was committed; (4) Switzerland has undertaken to prosecute the deed within the scope of an agreement under international law. The various international agreements that apply to deeds covered by Article 6<sup>bis</sup> of the Penal Code are not listed in this provision.

Mention should also be made here of Article 7 of the draft of the revised Penal Code of 13 January 2002, par. 2 of which extends the scope of application of Swiss criminal law in that it underscores the principle of *substituting criminal justice*. This provision deals with cases in which persons who do not possess Swiss citizenship commit a crime or offence abroad involving a foreign victim. In such cases, prosecution by the Swiss authorities is possible if the following prerequisites are (cumulatively) met: (1) The deed is also punishable by law at the location in which it was committed, or the location concerned is not subject to any criminal jurisdiction; (2) the offender is currently in Switzerland or is to be extradited to Switzerland because of the deed concerned; (3) although Swiss legislation permits extradition for the offence concerned, the offender is not extradited; (4) an extradition request has been denied on grounds that do not concern the deed; and (5) the offender has committed a particularly serious crime and is recognised as such by the international legal community.

In accordance with Article 9, par. 1 of the Military Penal Code (MStGB), military criminal law applies to offences committed both in Switzerland and abroad. Switzerland claims primary responsibility for prosecuting its own nationals who have committed an offence in Switzerland or abroad that is punishable in accordance with the provisions of the Military Penal Code, as well as foreign nationals who commit such an offence in Switzerland. Following the addition of par. 1<sup>bis</sup> of Article 9 MStGB<sup>71</sup>, the comprehensive principle cited in Article 9, par. 1 MStGB has been more narrowly defined and qualified: Foreign nationals who have violated international law abroad in the context of armed conflicts (Articles 108 to 114, MStGB), can only be judged by Swiss courts if three cumulative conditions are met: (1) if they are currently in Switzerland; (2) if they have a close connection with Switzerland; (3) if they can neither be extradited to a foreign country nor brought before an international criminal court. Articles 218 to 223 MStGB contain additional competency regulations relating to jurisdiction of military courts.

At the international level, the Rome Statute of the International Criminal Court of 17 July 1998 should be mentioned here<sup>72</sup> (cf. sections 5.5.2.3 and 5.5.2.4). Article 1 of this Statute entrusts to the International Criminal Court a complementary function of national penal jurisdiction. This is restricted to extremely severe crimes that affect

<sup>70</sup> Article 6 of the draft revision of the Penal Code dated 13 December 2002 corresponds substantially to the prevailing Article 6<sup>bis</sup> of the Penal Code.

<sup>71</sup> AS 2004 2694; BBl 2003 767 ff.

<sup>72</sup> SR 0.312.1. The Swiss Penal Code is currently undergoing revision in order to amend material criminal law in line with the Rome Statute and to facilitate prosecution of genocide, crimes against humanity and war crimes.

the international community as a whole, namely genocide, crimes against humanity, war crimes and the crime of aggression (Statute, Article 5).

### 4.5.3.2 Corporate responsibility

In accordance with Article 100<sup>quater</sup> of the Penal Code<sup>73</sup>, an offence committed by the personnel of a company may result in the criminal responsibility of the company itself if the offence was committed within the company and in the performance of business activities within the scope of the company's declared purpose.

These objective requirements serve to restrict the scope of application of the above Article. The aim here is to prevent companies from being made legally responsible for every conceivable offence. The criminal responsibility of the company has to be limited to prohibited behaviour in which typical risks arise that is associated with the permitted and normally conducted business activities.

Article 100<sup>quater</sup>, par. 1 of the Penal Code substantiates a *subsidiary* responsibility of the company: it states that a company may only be held responsible if the committed crime or offence cannot be attributed to a particular person or persons due to inadequate internal organisation. With respect to security companies, it would normally be possible to attribute offences to particular persons, in which case there is no need to resort to the question of the responsibility of the company itself.

Paragraph 2 of this Article goes further than paragraph 1 in that for certain offences it places *primary* responsibility on the company regardless of, or parallel to the responsibility of a particular person.

As far as *location* is concerned, a company (to which the requirements stipulated in Article 100<sup>quater</sup> of the Penal Code apply) may be held criminally responsible and be subject to Swiss jurisdiction if the offence is committed in Switzerland. This provision also applies to companies that are domiciled abroad<sup>74</sup>. This is in line with the principle of territoriality, according to which a foreign company may also be held liable in Switzerland for offences committed here. If an offence has been committed abroad, a distinction has to be made between the following two situations:

- Article 4, Penal Code (crimes or offences committed abroad against the state): In this case, the company may be prosecuted in Switzerland, regardless of whether its domicile is in Switzerland or abroad<sup>75</sup>.
- Article 5, Penal Code (crimes or offences committed abroad against Swiss nationals), Article 6, Penal Code (crimes or offences committed abroad by Swiss nationals) and Article 6<sup>bis</sup>, Penal Code (other crimes or offences abroad): In these cases, in accordance with Article 100<sup>quater</sup>, Penal Code, proceedings may only be instigated against a company domiciled in Switzerland<sup>76</sup>. Proceedings may be instigated in Switzerland against a person or company as an accomplice if they have contributed towards a crime or of-

<sup>73</sup> Article 102 of the draft revision of the Penal Code dated 13 December 2002 corresponds substantially to the currently prevailing Article 100<sup>quater</sup> of the Penal Code.

<sup>74</sup> Alain Macaluso, La responsabilité pénale de l'entreprise, Commentaire des art. 100<sup>quater</sup> et 100<sup>quingues</sup> CP, Zurich 2004, p. 177, Rz. 1028.

<sup>75</sup> Alain Macaluso, p. 177, Rz. 1034.

<sup>76</sup> Alain Macaluso, p. 177, Rz. 1036.

fence committed (partially) abroad. However, it should be pointed out here that there are still many aspects relating to this topic that have not been conclusively resolved in legal practice.

Two additional clauses (Articles 59a and 59b) relating to the criminal liability of companies have been added to the draft revision of the Military Penal Code of 21 March 2003. The aim here is to align the Military Penal Code more closely with the relevant provisions of the Penal Code (general section) that are currently undergoing revision. These two provisions more or less correspond to Articles 100<sup>quater</sup> and 100<sup>quinquies</sup> of the Penal Code<sup>77</sup>.

#### **4.6 Legal treatment of know-how transfer following the changeover from public service to private security companies**

In her motion submitted to Parliament on 16 December 2004 (04.3748, “Formulation of legally binding provisions concerning Switzerland’s dealings with private military and security companies”), National Councillor Ursula Wyss also addresses the problem of know-how transfer via former high-ranking military officials who enter into gainful employment with private military companies after they leave public service. In order to carry out a legal assessment of such activities, a variety of aspects have to be taken into account:

- *Secrecy obligations*: Employees are obliged to observe official, business and professional secrecy even after they leave public service. Confidentiality obligations extend to all matters that have to be kept secret due to regulations or in view of their nature. Secrecy obligations apply both in private employment relationships (manufacturing and business secrets)<sup>78</sup> and in public service<sup>79</sup>. Infringements of secrecy obligations are punishable by law even after termination of the employment relationship<sup>80</sup>.
- *Non-competition clauses*: Secrecy obligations are restricted to the relatively narrow area of official and professional secrets. They cannot encompass a person’s entire acquired know-how (including skills, general knowledge and experience), since this would effectively amount to a ban to pursue the profession. The fundamental right of economic freedom protects free access to private gainful employment and free exercise thereof, though for private employment relationships, Articles 340 ff of the Swiss Code of Obligations provides for the option of negotiating a non-competition clause that enters

<sup>77</sup> Alain Macaluso, pp. 196–197, Rz. 1150–1155.

<sup>78</sup> Article 321a, par. 4, Swiss Code of Obligations.

<sup>79</sup> Article 22 of the Federal Employees Act dated 24 March 2000, SR **172.220.1** and Article 94, par. 2 of the Federal Employees Ordinance dated 3 July 2001, SR **172.220.111.3**. By advice of a special delegation of the Supervisory Committee for government business and practices of both chambers of parliament, upon termination of an employment relationship, the employer should remind the employee in writing of the employee’s duty to observe secrecy and may expressly list the main issues to which this duty applies and have the employee acknowledge the duty of secrecy by signing said confidentiality agreement; see 2004 Annual Report of the Supervisory Committees for government business and practices and the Delegation of the Supervisory Committee for the chambers of parliament of 21 January 2005; BBl **2005** 1889 ff., 1925.

<sup>80</sup> Articles 320–321<sup>ter</sup> of the Penal Code.

into effect upon termination of the employment contract<sup>81</sup>. In the view of the Federal Council, while the relevant provisions of the Code of Obligations (Articles 340 ff) are theoretically applicable to employment contracts within the federal administration, in practice they can only be enforced under extremely restrictive circumstances. Restrictions of freedom of this kind have to be legitimised by a *predominant public interest*. Furthermore, a new professional activity adopted by a former public servant has *effectively to be in direct competition with his or her former duties as an employee of the federal administration*, and this only applies in very few areas.<sup>82</sup> In the area of military services, competition between the federal government and the private sector is practically inconceivable<sup>83</sup>.

#### **4.7 Legislative powers relating to the performance of activities in the private sector (Article 95, par. 1, Federal Constitution)**

In accordance with Article 95, par. 1 of the Federal Constitution, the Confederation may issue regulations governing the performance of activities in the private sector. This constitutional provision grants the federal government very broad legislative powers<sup>84</sup>. Although it has not made use of these powers to date, the Confederation has the authority to draw up regulations governing the activities of private security companies, especially to protect police interests. These are *competing powers*. As pointed out in section 4.8, most of the cantonal authorities have drawn up their own regulations.

#### **4.8 Cantonal legislation**

Since the Confederation has not made use of its legislative powers in this area, most of the legal provisions governing private security companies are to be found in cantonal legislation, as outlined below.

<sup>81</sup> This requires the form of a written agreement between the employer and employee (Article 340, par. 1 of the Swiss Code of Obligations), which is frequently stipulated at the time the employment contract is concluded. Unilateral provisions on the part of the employer alone are not possible.

<sup>82</sup> 2004 Annual Report of the Supervisory Committee for government business and practices and the Delegation of the Supervisory Committee for the chambers of parliament dated 21 January 2005; BBl 2005 1889 ff., 1925.

<sup>83</sup> Article 58 of the Federal Constitution gives the federal government the responsibility for organising the armed forces and calling them into action, with a minor degree of responsibility falling to the cantons. The military represents a core area of the state's monopoly of the use of force. It is therefore not possible for private-sector military activities to compete with national armed forces on domestic soil. In the case of military actions abroad, a competitive situation is conceivable. However, Article 66a, par. 2 of the federal law governing the army and military administration of 3 February 1995 (Military Act, SR 510.10) prohibits armed intervention abroad, even for the purpose of peace enforcement, such that this competitive situation is also effectively eliminated.

<sup>84</sup> Jean-François Aubert/Pascal Mahon, Petit commentaire de la Constitution fédérale de la Confédération suisse du 18 avril 1999, Zurich/Basel/Geneva 2003, on Article 95 of the Federal Constitution, p. 743, § 5.

#### 4.8.1 Concordat of the cantons of Western Switzerland concerning security companies and other cantonal legislation

All the cantons of western Switzerland signed the *Concordat dated 18 October 1996 concerning security companies* (hereinafter referred to as “Concordat”). This document specifies joint regulations governing the activities of security companies and their personnel and stipulates a licensing requirement for all activities in the area of security. Nine other cantons<sup>85</sup> have formulated legal provisions governing private security companies that, like the Concordat, include a licensing requirement for all related activities. Eleven cantons<sup>86</sup> currently do not impose a licensing requirement, though in three of these<sup>87</sup>, anyone involved in security activities has to observe the following regulations: They are required to notify the police about implemented and planned measures, and about all notable occurrences, they must maintain strict secrecy regarding all observations made in association with the activities of the police, and they must refrain from carrying out any activities that might prevent the police from performing their official duties<sup>88</sup>.

The Concordat and relevant cantonal legislation encompass the *following activities*: protection of individuals, monitoring and surveillance of buildings and movable objects, transport of valuables. In some cases, cantonal legislation also cites the surveillance of hazardous goods.

No special regulations exist that govern *activities carried out abroad* by security companies registered in Switzerland. The extent to which the performance of such activities is subject to a licensing requirement depends on the laws of the canton in which the company is domiciled. The cantons of western Switzerland that signed the Concordat impose a licensing requirement for performing the designated activities not only in their own canton, but also for the operation of a security company in another canton covered by the Concordat. The other cantons that call for a licensing procedure merely describe the activities that are subject to a licensing requirement<sup>89</sup> or stipulate that the licensing requirement covers activities carried out within their sovereign territory<sup>90</sup>.

The Concordat and the provisions of those cantons that call for a licensing procedure place certain *personal requirements* on persons in charge of a security company, namely Swiss citizenship or possession of a residence permit, observation of civil rights, no criminal record, sound credit record. Verification of the records of persons in charge of a security company is only called for by the signatory cantons of the Concordat.

In a variety of cantons a licensing obligation also applies to *employees of security companies*. The provisions of the Concordat stipulate that employees must meet similar requirements to those imposed on management staff, while those of the other

85 Aargau, Basel-Land, Basel-Stadt, Lucerne, Nidwalden, St. Gall, Solothurn, Thurgau and Ticino.

86 Aargau, Appenzell Innerrhoden, Berne, Glarus, Grisons, Obwalden, Schaffhausen, Schwyz, Uri, Zug and Zurich.

87 Berne, Schaffhausen and Zurich.

88 The information on cantonal law is based on a study conducted by the Institute of Federalism, University of Fribourg, on request of the Federal Office of Justice.

89 Aargau, Basel-Land, Basel-Stadt, Lucerne, St. Gall, Solothurn.

90 Nidwalden, Thurgau and Ticino.

cantons that require a licensing procedure<sup>91</sup> usually also require a licensing obligation for employees.

Four cantons that are not signatories of the Concordat<sup>92</sup> keep a publicly accessible register, whereas the Concordat does not contain any clause to this effect. However, most of the signatory cantons have also formulated supplementary provisions for enforcement purposes (i.e. within the relevant ordinances). In two cantons<sup>93</sup>, the issue of licences is published in the official gazette.

The applicable legal provisions in a number of cantons<sup>94</sup> expressly stipulate that natural persons and legal entities active in the security business do not possess *any sovereign powers*, or else they state that coercive measures and criminal investigations are the responsibility of the police.

Only the provisions of the Concordat explicitly specify that the use of force by private persons active in the area of security must be limited to permissible self-defence and emergency measures in accordance with the Swiss Penal Code.

With reference to the *purchase and carrying of weapons*, the provisions of the Concordat and of various cantons refer to corresponding special legislation. The canton of St Gall prohibits the carrying of weapons without a special permit from the relevant authorities, in particular with regard to the protection of individuals and the transport of valuables.

Most of the signatories of the Concordat have issued ordinances governing the *use of dogs*.

The canton of Geneva plans to create a law governing the training of security personnel. The canton of Ticino also plans to revise its legislation and make the federal certificate for security personnel compulsory.

#### **4.8.2 Model provisions of the Conference of Cantonal Police Chiefs**

At the request of the Association of Swiss Security Companies (ASCC), the Conference of Cantonal Police Chiefs (CCPC) drew up a set of so-called model provisions governing the activities of private security companies<sup>95</sup>. The aim is to recommend to the cantonal authorities that they should incorporate these provisions into their own legislation. In view of certain difficulties experienced by some companies in observing the relevant cantonal regulations, the ASCC felt that it would be useful to draw up guidelines in order to promote uniform cantonal practice, especially in connection with the granting of licences to operate private security companies.

The resulting model provisions were inspired by legislation from the canton of Solothurn. Persons responsible for private security companies require a licence if they are active in the following areas: protection of individuals, surveillance and

<sup>91</sup> Aargau, Basel-Land, Basel-Stadt, Lucerne, Nidwalden, St. Gall, Thurgau.

<sup>92</sup> Aargau, Solothurn, St. Gall and Thurgau.

<sup>93</sup> Vaud and Ticino.

<sup>94</sup> Aargau, Basel-Land, Basel-Stadt, Lucerne, Nidwalden, St. Gall, Solothurn, Vaud and Zurich.

<sup>95</sup> The interministerial working group had the opportunity to confer with a CCPC representative.

protection of property, transport of valuables, performance of security tasks mandated by the public authorities, private detective activities. The names of holders of such licences are to be published. All employees hired for the purpose of performing security activities must be registered with the cantonal licensing authorities. The model provisions are expressly subject to the legal division of competencies between cantonal and municipal police forces and private security companies. Furthermore, they expressly state that the issue of a licence in no way grants any sovereign powers to the holder. The model provisions also regulate co-operation between security companies and the police, and stipulate that licence holders must make every effort to ensure that security personnel can in no way be confused with police organisations. In particular, uniforms worn by security personnel must be clearly distinguishable from those worn by police officers. With respect to carrying weapons, the provisions refer to the relevant provisions of federal legislation.

The model provisions of the CCPC were submitted for consultation, and the feedback was generally very positive. The general consensus was that a uniform solution was called for, perhaps in the form of a concordat. However, the feedback from the consultation process did not point to a specific desire on the part of the involved parties for federal legislation. The option of other cantons signing the Concordat of the western cantons of Switzerland was not pursued. Several cantons feel that the formal requirements laid down by the Concordat for the issue of a permit to hire employees are too restrictive.

The model provisions of the CCPC do not have any legal force. Instead, they are intended to encourage cantonal authorities to draw up uniform regulations. The cantons of western Switzerland do not need to amend their current practice since they are signatories of the Concordat.

## 5 International law

*International law does not explicitly regulate the activities of private security companies in conflict areas.* Specific norms in international law exist only in relation to the issue of mercenaries (No. 5.1). *What are relevant* however are the *general rules of international law, of international humanitarian law and in certain cases human rights law* (Nos. 5.2 to 5.4). Finally, the law on neutrality imposes certain obligations on neutral states (No. 5.7).

### 5.1 Rules of international law concerning mercenarism

#### 5.1.1 Art. 47 of the First Additional Protocol of 1977

International humanitarian law contains only one provision specifically concerning the mercenary activity<sup>96</sup>, namely Article 47 of the first additional protocol of 1977 (AP1)<sup>97</sup>. Additional Protocol I has been ratified by a large majority of states.

As understood by the first paragraph of this provision, Article 47 AP1 does not forbid mercenary service, although especially African countries had wished otherwise during negotiations on this provision. However on the basis of Article 47 AP1, mercenaries can be denied the privileged status of a combatant or prisoner of war. In particular, mercenaries, in contrast to combatants and prisoners of war, can be held criminally responsible by the opposing state merely for having taken part in an international armed conflict.

However a state is not obliged to deny prisoner of war status; the mercenary simply has “no claim” to such status. Even if prisoner of war status is denied, mercenaries are not totally unprotected. Under Article 75 AP1 they enjoy a minimum protection which has the character of customary international law.

The significance of Article 47 AP1 is infinitesimal in practice. In paragraph 2, the list of six *cumulative definitions* is so *restrictive* that it becomes difficult to prove that employees of a private security company fall under the description. The majority of private military companies indeed offer inherent military services, but are only

<sup>96</sup> Article 47 is entitled “Mercenaries” and states:

- “1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who
  - a) is specially recruited locally or abroad in order to fight in an armed conflict;
  - b) does in fact take a direct part in the hostilities;
  - c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
  - d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
  - e) is not a member of the armed forces of a Party to the conflict; and
  - f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.”

<sup>97</sup> Additional protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949 on the protection of victims of international armed conflicts (Protocol I) (with annexes), SR 0.518.521.

seldom directly involved in hostilities. Finally, by definition, citizens of a country in conflict cannot be considered mercenaries. Actually, one must proceed from the fact that only a small part of employees of private security companies involved in military functions and active in conflict situations could be qualified as mercenaries.

### 5.1.2 Relevant instruments of the UN and individual regional organisations

Debate in the United Nations about mercenary service has essentially borne the stamp of *post-colonial experiences*. During the period of *decolonisation* several of the states that came into being and regimes striving for independence were directly threatened by mercenary forces. Because of these experiences, the resulting UN instruments aimed to prevent mercenary operations against legitimate governments and their self determination.

In 1970, the UN General Assembly adopted the *Friendly Relations Declaration 2625 (XXV)* concerning principles of international law relating to friendly relations and cooperation between states. While this declaration is not formally binding, it is considered one of the more fundamental documents of the United Nations interpreting its Charter. The first principle in the declaration deals with the *ban on the use of force*, and falls under *customary international law*. It stipulates that any threat of or use of force in international relations against the territorial integrity or political independence of a state is incompatible with the purposes of the United Nations. One of the specifications states:

“Every State has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.”

This declaration of 1970 therefore makes it a duty of the state not to use mercenaries against the territorial integrity or independence of another state. The explicit reference to mercenary service by the UN General Assembly represents something new in the way the issue of mercenary service is dealt with internationally because international law had never before come to grips with this topic. However, the declaration does not define what is meant by “irregular forces or armed bands”.

On 3 July 1977 the *African Union, AU, (formerly Organisation of African Unity, OAU)* accepted the *Convention for the Elimination of Mercenarism in Africa*. Article 1, par. 1 of this convention defines the term mercenary almost word for word the same as in Article 47 AP1. As already mentioned this makes it difficult in practice to legally qualify someone as a mercenary on the basis of the AU convention<sup>98</sup>. The

<sup>98</sup> Article 1, par. 2 of the convention qualifies as crimes the organisation, financing, training or any other support or use of mercenary groups for the purpose of armed force against a process of self determination or against the territorial integrity of another state. Groups, associations and even States Parties can be guilty of mercenarism. It is also a crime for a state to passively permit mercenary activities in its territory or to enable the transit or transport of mercenaries. Article 3 denies mercenaries the status of combatant or prisoner of war. Article 6 requires therefore that States Parties should prevent the recruitment, training, financing and arming of mercenaries as well as mercenary activities by nationals or foreigners on the territory of the state concerned.

convention however does not bar the States Parties from using mercenaries in operations against dissident groups within their own borders<sup>99</sup>.

The *UN Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989* defines the term mercenary in Article 1, par. 1 in a way closely resembling that in Article 47 AP1. Here too, it is difficult in practice to qualify who is a “mercenary” due to the definition in the UN Convention. Nevertheless the definition in the UN Convention goes slightly beyond the one in Additional Protocol I in that it takes into consideration not only situations of armed conflict but also of organised violence to bring about the collapse of a government, to undermine constitutionality or against the territorial integrity of a state.

The United Nations Convention criminalises the recruitment, financing, training and the use of mercenaries as well as the active participation of mercenaries even in the organised use of force. These activities are to be forbidden by the States Parties.

The UN Convention entered into force more than 10 years after its adoption<sup>100</sup>. Switzerland has so far not ratified the convention. The issue of ratification was not a priority in the 1990s, particularly because there were different opinions regarding its effectiveness. *The UN Convention does not reflect customary international law* as can be seen by the small number of ratifying countries.

### **5.1.3 Conclusions: Customary international law does not prohibit mercenarism**

While Article 47 AP1 and the *Friendly Relations Declaration* of the UN do not forbid mercenarism, the AU Convention of 1977 and UN Convention of 1989 are by no means universally accepted legal instruments. Therefore *customary international law does not forbid mercenarism* and contains no specific standards limited only to mercenary activities.

With reference to the Conventions of the AU and the UN, it must be noted that several of the defining elements set down are so restrictive and difficult to prove that the practical relevance of the Conventions even for States Parties is limited. Both Conventions deal mainly with individuals acting against national governments and are not intended to regulate the operations of private security companies in general conflict situations. The *concept of the “mercenary”* is for these reasons partly described as *outmoded and considered inappropriate for the practical regulation of the phenomenon of private military and security companies*.

Thus the generally valid standards of international law which do not relate specifically only to mercenaries must be checked to find norms regulating the operation and the conduct of private security companies.

<sup>99</sup> [On 30 November 2004, 26 African states have ratified the convention, including Egypt, Congo and Dem Rep. of Congo, Liberia, Libya, Nigeria, Senegal, Sudan and Tunisia. Sierra Leone, Chad and Angola have not ratified, but signed. South Africa has not ratified and not signed.]

<sup>100</sup> [On 30 November 2004, 28 states have adhered to the convention including, New Zealand, Senegal, Guinea, Liberia, Libya, Mali, Mauritania and Togo. Six European states have ratified (Belgium, Italy, Croatia, Ukraine, Belarus, Cyprus) and nine states have signed (Angola, Dem. Rep. Congo, Congo, Germany, Morocco, Nigeria, Poland, Romania and Serbia). Militarily influential western states such as the USA, Britain, France, Russia and the People’s Republic of China have not ratified.]

## 5.2 General international law

### 5.2.1 General principles of international law

According to the customary *prohibition of the use of force*, reflected in Article 2 par. 4 of the UN Charter, states must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. Exceptions are the individual or collective self defence (Article 51, UN Charter) or a resolution of the UN Security Council under Chapter VII of the UN Charter. As already mentioned the UN's *Friendly Relations Declaration* of 1970 also says that every state has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands including mercenaries, for incursion into the territory of another State. *States may not violate the ban on the use of force and the obligation of non-intervention either with their own armed forces or through the use of private security companies.*

## 5.3 International humanitarian law

### 5.3.1 What does international humanitarian law provide in substance?

International humanitarian law is also known as the law of armed conflicts, international law of war or "*ius in bello*". It is applicable only in times of armed conflict and aims to ease the suffering of potential victims and reduce other negative effects arising from war.

The most important legal sources of international humanitarian law are the *four Geneva Conventions* of 1949<sup>101</sup> and their *two additional protocols* of 1977<sup>102</sup> as well as the *Hague Convention on Laws and Customs of War on Land* of 1907<sup>103</sup> and *several conventions which ban or limit the use of specific weapons*. Practically all countries in the world have ratified the Geneva Conventions and the two additional protocols are binding for the large majority of states, including Switzerland. The Hague Convention too enjoys broad recognition. *A relatively large part of international humanitarian law is also binding as customary international law.* The provisions of international humanitarian law applied in international armed conflicts are nevertheless considerably more numerous and detailed than those used in internal conflicts.

International humanitarian law contains, first, specific rules to be respected with regard to persons in custody or under the power of a party to a conflict, such as prisoners and civilians in occupied territories. Such rules include the ban on torture, the ban on inhuman treatment, the ban on the deportation of civilians and the obligation to release prisoners after the end of the armed conflict. International humanitarian law also limits the conduct of military operations permissible under international law. Thus for example, attacks against protected groups and property such as civilians and civilian property as well as the staff or property of the Red Cross are for-

<sup>101</sup> SR 0. 518.12; 0.518.23; 0.518.42; 0.518.51

<sup>102</sup> SR 0.518.521; 0. 518.522

<sup>103</sup> SR 0.515.21; 0.515.22

bidden. Attacks against military targets are also forbidden if there's a chance that civilians or civilian objects would be disproportionately affected. The use of certain weapons such as biological or chemical weapons is also forbidden. Certain methods such as perfidiousness or the abuse of the Red Cross emblem are excluded. Occupying powers also have specific duties with regard to the people and administration of the occupied territory.

### **5.3.2 Applicability of international humanitarian law to private security companies**

*International humanitarian law is aimed not only at states.* It also contains numerous provisions for individuals and even civilians to observe. Perhaps the most well known example is *Article 3 common to all four Geneva Conventions*<sup>104</sup>, according to which persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanly, without violence to life and person, in particular mutilation, torture and cruel treatment. *All individuals who take an active part in internal or international armed conflicts must, regardless of their nationality, observe the minimum rules regarding the conduct of war whether they are members of the armed forces, taken up weapons spontaneously as a civilian or are employed by private security companies.* The same applies to individuals who have surveillance over prisoners captured in an armed conflict.

### **5.3.3 Obligations of the state with regard to private security companies**

*Common Article 1 of the four Geneva Conventions* states that the States Parties undertake to respect and to ensure respect for the present convention under all circumstances. This means that the States Parties must see to it that all state players respect international humanitarian law. Moreover the contracting states have the duty to ensure that third parties, whether they are other states or private entities, also observe international humanitarian law. *States cannot escape their obligations under international humanitarian law by placing certain tasks in the hands of private companies. In fact they have to ensure even more that the private security companies which they deploy in conflict situations, which are based in their state or which are operational on their territory, respect international humanitarian law.* In addition, the contracting states are obliged to prosecute especially in cases of serious breaches of the Geneva Conventions regardless of where the act took place or the nationality of the perpetrator.

<sup>104</sup> SR 0.515.12; 0.515.23; 0.515.42 und 0.515.51

## **5.4 Human rights**

### **5.4.1 Safeguarding human rights as a traditional obligation of states**

As a component of international law *human rights* traditionally commit states only to their citizens or other individuals. *Therefore it is the duty of states to see to it that human rights are respected by the actors working for these states.*

In the case of private security companies which are mandated by states without at the same time also being integrated into the armed forces or the police, the question arises whether they count as state actors and as such must observe the human rights embodied in international law.

*As with international humanitarian law, the stipulation applies that state cannot shrug off their human rights obligations by giving certain tasks to private groups.*

*International human rights conventions also apply in situations of armed conflict as the International Court of Justice<sup>105</sup> and the UN Commission on Human Rights<sup>106</sup> have confirmed. There are exceptions in the form of those human rights which, according to the terms of the convention, can be derogated. Rights that may not be derogated include the right to life, as well as the ban against torture and inhuman treatment. In addition, international humanitarian law is often considered the “lex specialis”, i.e. it declares how a concrete human right is to be interpreted in a situation of armed conflict.*

### **5.4.2 Direct application of human rights also for private security companies?**

If private security companies are mandated not by states, but by private individuals or companies, then clearly they are non-state actors. In this case, the question arises whether human rights or at least certain human rights apply to the employees of that private security company in their dealings with other private individuals. *Such a horizontal application of human rights is controversial.*

Nevertheless it should be mentioned *that private individuals also in times of peace can be directly prosecuted on the basis of international law for gross abuses of certain human rights.* This is confirmed by the *Rome Statute of the International Criminal Court* of 1998<sup>107</sup> which has been ratified by Switzerland. Under Article 7 of the Rome Statute private individuals can be held criminally liable for crimes against humanity such as torture or forced disappearance of people.

<sup>105</sup> Opinion of 9 July 2004, “Legal consequences of the construction of a wall in the Occupied Palestinian Territory”.

<sup>106</sup> General Comment No. 31 of 29 March 2004.

<sup>107</sup> SR **0.312.1**

## 5.5 Consequences of breaches of international law

To date, international law has no direct provisions on which to base the criminal liability of companies although there have been certain efforts in this direction. However individuals can very well be held criminally responsible directly on the basis of the provisions in international law. In certain cases, states too may be held criminally responsible under international law for harm caused by private companies, such as where these states disregard their obligations under international law not to carry out or not to tolerate activities on their own territory that cause grave harm across their international borders.

### 5.5.1 Responsibility of states

Nonfeasance in international law or activities running counter to international law which can be ascribed to states raises the question of their so-called *state responsibility*. Important rules regarding state responsibility are contained in the “Draft Articles on Responsibility of States for Internationally Wrongful Acts” of the “International Law Commission” of the United Nations (ILC), a document reflecting international customary law.

*A state can be held responsible for acts carried out by its authorities who contravene international law*<sup>108</sup>. Conduct running counter to international law of an individual, a group of individuals, or a corporate body which are not state bodies can also be ascribed to a state if the named actors are empowered on the basis of the laws of this state to carry out sovereign activities, or if in their activities they in fact act under the instructions or under the direction or control of this state. In addition, the conduct of an individual or group of individuals, according to international law, is considered to be an act of the state if the individual or group of individuals, in the absence or default of the official authorities actually assume sovereign functions, and conditions are such that the exercise of such sovereign functions are required (Art. 5, 8 and 9 of the ILC Draft Articles).

The consequence of this state responsibility is the *obligation to provide full reparation in the form of restitution, compensation and satisfaction* to the wronged state or if necessary to the international community (Part 2 of the ILC Draft Articles).

Thus the conduct of private security companies mandated by states can potentially be ascribed to a state under international law.

While the “Draft Articles” of the ILC describe state responsibility towards other states or the international community, individuals also have the possibility to bring before certain national and international forums a state which has violated certain rules of international law (international humanitarian law or human rights). However the investigation of the different national and regional possibilities to call a state to account on the basis of international law is beyond the scope of this report.

<sup>108</sup> It is irrelevant whether the state body exercises legislative, executive, judicial or other functions, what position it holds in the state organisation and whether or not it reports to a central or federal body (Arts. 1, 2 and 4 of the ILC Draft Articles).

## 5.5.2 Individual responsibility under international criminal law

### 5.5.2.1 Introduction and legal sources

*Certain violations of international law result in individual criminal responsibility directly based on international law.* The legal sources of relevant international criminal law are certain international agreements such as the Geneva Conventions<sup>109</sup> and the UN Convention on Torture of 1984<sup>110</sup>. *Customary international law* is also of great importance. This was perfected through national and international practice. For example, national legislation has contributed to the development of customary international law as have military handbooks, written and unwritten legal principles of national and international courts such as the ad hoc tribunals in Nuremberg and Tokyo after the Second World War and the tribunals for the former Yugoslavia and Rwanda. The crimes against international law named in the *Rome Statute of the International Criminal Court*<sup>111</sup> reflect customary international law, as is broadly recognised.

### 5.5.2.2 Acts constituting an offence

Acts which constitute an offence that are of potential relevance for private security companies operating in conflict situations include *war crimes*<sup>112</sup> and *crimes against humanity*<sup>113</sup> as well as individual acts such as torture<sup>114</sup> and the forced disappearance of individuals<sup>115</sup>.

### 5.5.2.3 National jurisdiction to enforce international law

In *the implementation of international criminal law*, national courts traditionally base their competence mainly on the *following principles*: the *territorial principle* (crimes committed on the territory of the state of the presiding court), the *active personality principle* (crimes committed by a citizen of the state of the presiding court), the *passive personality principle* (crimes against a citizen of the state of the presiding court) and the *principle of universal jurisdiction* (especially grave violations of international law without the obligation of a reference to the state of the presiding court).

Some conventions contain provisions making it the duty of contracting states to prosecute certain violations of those conventions through their own penal courts.

<sup>109</sup> SR 0.518.12; 0.518.23; 0.518.42; 0.518.51

<sup>110</sup> SR 0.105

<sup>111</sup> SR 0.312.1

<sup>112</sup> *War crimes* are criminal violations of international humanitarian law such as the torture of prisoners in relation to an armed conflict, the killing of unarmed civilians and the plundering of objects of value..

<sup>113</sup> *Crimes against humanity* are essentially large-scale systematic human rights violations.

<sup>114</sup> SR 0.105

<sup>115</sup> On 23.09.2005 an intersessional working group of the UN Commission on Human Rights accepted a draft convention on the protection of individuals against forced disappearances: <http://www.ohchr.org/english/issues/disappear/group/index.htm>.

The Geneva Conventions<sup>116</sup> and the UN Convention on Torture<sup>117</sup> oblige the States Parties to prosecute serious infringements against both conventions. This obligation is based on the principle of universal jurisdiction and thus applies if the crime takes place in another country and is not against or by a national of that state.

Accordingly, under certain conditions, *Swiss legislation* considers *cases of grave violations against the Geneva Conventions, genocide, other war crimes and torture* as falling under *Swiss criminal jurisdiction on the basis of the principle of universal jurisdiction*. A revision of criminal law is under way in Switzerland which would extend criminal jurisdiction to crimes against humanity. This is a follow-up measure to Swiss ratification of the Rome Statute.

#### **5.5.2.4 International jurisdiction**

Because many states have for a long time not met their obligations to prosecute breaches of international law, the international community has set up several *ad hoc tribunals* as well as the *permanent International Criminal Court*. However competence is given to the International Criminal Court according to the Rome Statute<sup>118</sup> only if a crime has taken place on the territory of one of the contracting states, or has been committed by a citizen of a contracting state or if the UN Security Council refers a case to the court for judgement. Moreover the International Criminal Court has no competence if the alleged crime is being investigated by a serious national criminal procedure. Also because of its limited financial resources, the International Criminal Court can investigate only a small number of the most serious crimes against international law.

#### **5.6 Switzerland's obligations under international law and its role as a contracting party and depositary of the Geneva Conventions**

Switzerland's obligations to respect and promote respect for international humanitarian law have less to do with its role as the depositary state than as a contracting party to the Geneva Conventions<sup>119</sup>. Nevertheless, the international community has recently entrusted Switzerland in its capacity as the depositary state with a number of tasks concerned with promoting respect for international humanitarian law.

As a contracting party to the Geneva Conventions, Switzerland has the duty to respect and "to ensure respect for the Conventions". This involves *the duty to see to it that the Geneva Conventions are observed by other states and individuals, including any Swiss-based private security companies active in conflict situations*. This applies all more so if Switzerland has itself mandated security companies to carry out certain tasks in conflict situations.

Under the Geneva Conventions, Switzerland, as a contracting party, also has the *duty to call to account Swiss nationals or foreigners living in Switzerland, whether*

<sup>116</sup> SR **0.518.12; 0.518.23; 0.518.42; 0.518.51**

<sup>117</sup> SR **0.105**

<sup>118</sup> SR **0.312.1**

<sup>119</sup> SR **0.518.12; 0.518.23; 0.518.42; 0.518.51**

*they are employees of private security companies or not, if they have committed war crimes.*

Switzerland is also active on a regular basis at the international level in promoting systematic compliance with the Geneva Conventions. Possible international initiatives that Switzerland could take are treated in the final part of this report (No. 6.2).

## **5.7 The international law of neutrality**

In cases of international armed conflicts, neutral states must conduct themselves in a neutral manner and not take part in the hostilities. They may also not become indirectly involved through private military or security companies which are mandated to support militarily one of the parties in an international conflict. The law on neutrality is *not* applicable in non-international armed conflicts.

In this connection, Articles 4 and 5 of the Hague Convention of 18 October 1907 respecting the rights and duties of neutral powers and persons in case of war on land (5<sup>th</sup> Hague Convention)<sup>120</sup> states that neutral powers cannot allow the formation on their territory of “corps of combatants” or the opening of recruiting agencies to assist the belligerents.

This raises the question whether Switzerland has the duty to prevent private security companies from actively recruiting people in Switzerland to take part in military operations in an on-going armed conflict between states. Recruiting of “combatants” in the sense of the 5<sup>th</sup> Hague Convention by Swiss-based companies could be forbidden, for example in the context of the possible formulation of a legal principle regarding the introduction of a licensing regulation. Moreover the Federal Council has the possibility to issue a decree or an ordinance on the basis of Article 184, par. 3 of the Federal Constitution in the event that the protection of Swiss interests demands it. In the long run, this would not be a satisfactory solution. Furthermore it must be remembered that in the global market for security services the offer of combat services is clearly the exception.

A neutral state “can’t be held responsible by the fact of persons crossing the frontier separately to offer their services to one of the belligerents” (Art. 6 of the 5<sup>th</sup> Hague Convention). A neutral power is also not obliged “to prevent the export or transport ... of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet” (Art. 7 of the 5<sup>th</sup> Hague Convention). In addition, Article 18 of the 5<sup>th</sup> Hague Convention states expressly that “services rendered in matters of police or civil administration shall not be considered as being committed in favour of one belligerent or another”. Furthermore, services in favour of peace-keeping or peace promotion, which have been legitimised by a resolution of the UN Security Council as a measure of the international community, are also not viewed as services in favour of one belligerent or another.

<sup>120</sup> SR 0.515.21

## **6 Conclusions and proposed measures**

### **6.1 Domestic outlook**

#### **6.1.1 Delegation of security tasks to private providers**

The Swiss federal government's current deployment of private security companies may be said to be fundamentally unproblematic, since the duties so delegated are relatively narrow in scope. On the other hand, the Swiss cantons and municipalities seem to delegate state duties to private providers more frequently than is the case at the federal level. The cantons are entitled to make such delegations as part of their organisational autonomy. Numerous private security companies established in the cantons and municipalities carry out traditional control tasks for both the private and the public sectors (such as guarding or surveying property, or monitoring entry points at major events). In many cases government bodies collaborate well with private companies in the provision of public security and the maintenance of order. Nevertheless, problems may arise when private individuals are subjected to checks carried out by employees of private security companies if the authority and right to intervene enjoyed by such employees are insufficiently clear.

Many government security duties may not be delegated to private providers. The state's monopoly of the use of force (cf. sec. 2.2), which is determined in a positive legal manner in the constitutional ordinance of the federal government and the cantons (cf. sections 4.1 and 4.2), sets relatively narrow limits in this regard.<sup>121</sup>

If private providers are to be used to perform delegable security and police duties that fall within the authority of the federal government, a *sufficient, specific legal basis* is necessary. In view of the central importance to a liberal-democratic state of the state's monopoly on the use of force and its protection of basic rights a broadly-based delegation clause referring to a subsequent ordinance is not sufficient. Rather, the formal law must contain, in addition to organisational principles, the basic conditions and scope of the private security duty under regulation, which is its aims and limits, as well as specific details as to permitted and proscribed means of coercion and the degree to which force may be used. The basic range of supervisory and monitoring methods must also be set out at this level. Examples are the recently completed drafts of the Federal Law on Transport Companies' Security Services (Bundesgesetz über den Sicherheitsdienst der Transportunternehmen, BGST) and the Law on the Application of Force (Zwangsanwendungsgesetz, ZAG), which contain detailed provisions regarding the conditions and scope of the delegation of security duties to private providers, notably when the use of force is involved.

When the federal government does make use of a private security company, the contract drawn up between the Swiss Confederation and the company in question routinely sets out the following: the duties to be performed, the compensation, the level of training and skills expected from the staff of the private security company, the means of intervention permitted to such staff, the matter of liability in the case of damages, the duration of the contract, the place of performance and the place of jurisdiction. Such a contractual arrangement is advantageous since it is flexible enough to suit each particular case. Nevertheless, the question remains whether the

<sup>121</sup> The Swiss Police Officers' Federation (Verband Schweizerischer Polizeibeamter, VSPB) recently commissioned Professor Walter Kälin to prepare an assessment of the limits on delegation of security duties to private providers.

contractual elements and the minimum conditions for a private security company's work for the Swiss federal government should not be set out in a general manner.

### **6.1.2 Government supervision of the activities of private security companies**

The cantons are currently responsible for supervising private security companies. The question is whether the present regime is sufficient.

The *cantonal* regulations concerning private security companies and individuals providing security and police services are at present *highly varied*. *Increased standardisation of cantonal regulations in the longer term would certainly be desirable*, in particular considering the increasing importance of major transregional or international events and that generalised risk scenarios require security details to enjoy better networking and a base which frequently extends beyond cantonal borders, thus necessitating appropriate organisation on the part of the event convenors. It also seems necessary for *all* cantons to introduce *minimal standards* for the accreditation and supervision of private security companies and their operations so as to prevent the problems that arise with unprofessional or dubious providers.

The German-speaking cantons are making very promising progress standardising their regulation of private companies and individuals providing security services, particularly since they are working in close collaboration with the security industry, indeed, in response to its requests. For their part, since the Concordat went into effect in 1996, the cantons of western Switzerland have embarked on their own process. *The Swiss Federal Council not only believes further standardisation of cantonal regulations is desirable: considering the fast pace of change in the security services sector, it also deems it necessary*. Those cantons which have yet to significantly regulate private security providers, or have not yet begun to do so at all, should initiate the process soon, either by joining the Concordat regarding security companies or by adapting their regulations to the "model provisions" developed by the Conference of Cantonal Police Chiefs. In view of the fact that the cantons have begun to standardise their provisions, the Federal Council does not believe that federal regulations are required at the present time.

However, the issue of security companies based in Switzerland with operations abroad does deserve special consideration (cf. Sec. 6.1.3 below).

### **6.1.3 Security companies operating in crisis and conflict areas**

A survey of the cantons has shown that, in isolated cases, private security companies based in Switzerland are already operating in conflict areas, or have at least considered initiating such operations in the near future.

Two conclusions can be drawn from the overview contained in section 3.3 of activities of private providers of military and security services operating abroad from a base in Switzerland:

- A comprehensive overview of such activities is virtually impossible at present since the relevant companies are registered only at the cantonal level (if

at all) and are not subject to much supervision, and because regulations vary so widely from canton to canton.

- *Research at the cantonal level has shown that individual security and/or military companies operating in conflict or crisis areas, or which do not exclude such operations, may also be, or become active from a base in Switzerland. It is impossible at present to conclusively determine the scope of this issue. Nevertheless, in view of the potential risks (involvement in international conflicts in such a way as to pose a threat to Swiss neutrality, grave breaches of international law emanating from a base in Switzerland), Switzerland has a crucial interest in information concerning any persons or companies operating in crisis and conflict areas from a base in Switzerland, as well as in being able to check the conformity of such activities with the provisions of national and international law.*

For these reasons, the Federal Council is prepared to review whether private providers of military and security services operating in crisis and conflict areas should be obliged to obtain federal approval or to register themselves, as is already the case (or under serious consideration) in other countries, such as the US, the United Kingdom and South Africa. This would also involve testing the constitutional basis for such federal regulation. Such a basis could be provided by Article 95, Par. 1 of the Swiss Federal Constitution, as well as on the federal government's comprehensive authority in matters of foreign policy (Art. 54, Par. 2 BV), which makes the federal government liable under international law for any violations of international law abroad on the part of private security companies operating with its approval from a base in Switzerland. What is more, the Swiss Confederation's top-level political bodies have the authority to enact measures aimed at ensuring the external security and neutrality of Switzerland, as well as to take any steps necessary to defend national interests (cf. Art. 173, Par. 1a BV; Art. 184, Par. 3 BV; and Art. 185, Par. 1 BV).

Thus the Federal Council resolves to follow international developments and to examine at greater depth the issue of security and/or military companies operating internationally from a base in Switzerland.

#### **6.1.4 Liability under criminal, civil and public law**

The Federal Council believes that an expansion of the regulation of liability under criminal, civil and public law is at present *unnecessary* for private individuals and companies providing security services, as well as for their clients, both private and public.

The Federal Council believes that *liability under civil and public law* for damages arising from illegal activities is already sufficiently regulated.

For its part, *international criminal law* provides sufficient specific *provisions* to punish serious violations of protected legal values, including human rights and international humanitarian law. At the *domestic level*, Swiss law contains a range of principles (Art. 3–6<sup>bis</sup> of the Swiss Penal Code which set forth not only the scope of Swiss national law but also the competence of Swiss judicial bodies to prosecute offenders under criminal law. According to these principles, Swiss law applies when there is a *connection* to Switzerland, that is, when the offender in question is resident

in Switzerland (cf. for example Art. 6<sup>bis</sup> of the Swiss Penal Code). Foreign legal systems operate according to the same principle. On the other hand, Swiss law does not grant judicial authorities universal jurisdiction in the prosecution of all crimes and misdemeanours committed outside of Switzerland. This means that the foreign staff of a private security company domiciled in Switzerland but operating outside of its borders cannot in principle be prosecuted for offences committed abroad, as long as the staff members concerned are not resident in Switzerland. Such a case would lack a legal connection to Switzerland. In this regard, it should be recalled that any expansion of the penal jurisdiction of Swiss authorities must take into account the parliament's decision that war crimes committed by foreign nationals may only be prosecuted and punished by Swiss judicial authorities if there is a close connection between the offenders and Switzerland.<sup>122</sup> This decision may well be reconsidered by parliament in connection with the consideration of draft legislation to provide domestic jurisdiction over offences under the Rome Statute (the so-called "Rome Statute follow-up measures"). It should not be overlooked that universal penal jurisdiction for Swiss judicial authorities would bring with it significant procedural difficulties, in particular as regards preliminary investigation and rules of evidence. Private security companies could in certain cases be tried in criminal court, as shown in section 4.5.3.2, under Article 100<sup>quater</sup> of the Swiss Penal Code, if the conditions of this provision are met.

### **6.1.5 Transfer of knowledge from former state employees to private security companies**

It does not appear necessary to enact any special regulations concerning the *transfer of knowledge* from former state employees to private security companies. The Federal Council believes that the provisions currently in effect are sufficient, in particular Articles 320–321<sup>ter</sup> of the Swiss Penal Code which set out the penalty for violations of the confidentiality obligation. Going further by forbidding former federal employees or individual categories of employee to make use of their knowledge in the context of a private professional activity would in practice frequently amount to prohibiting an individual to exercise his or her profession, especially with regard to professions requiring specialist expertise that cannot be found through the private job market. Such a measure could have disproportionate consequences, particularly since continuing employment of such persons in the public sector can no longer in every case be guaranteed.

## **6.2 Foreign policy implications**

### **6.2.1 Possible solutions from the international perspective**

It remains to be determined whether new international legal norms are required specifically for private security and military companies and/or for private individuals operating in these fields. In any case, however, the international community must initiate an intergovernmental discussion to review *effective national regulations* for

<sup>122</sup> AB SR 2003 938.

proper supervision of the use of private security companies in conflict situations abroad.

For example, the following national steps and preventive measures might be possible (as discussed as well among experts in the field):

- a. *Restraint in the case of deviations from the state's monopoly of the use of force*: Restraint should be exercised in the delegation to private providers of duties that fall within the state's monopoly of the use of force;
- b. *Regulation of the use of force by private security companies*: Companies that are deployed in foreign conflict zones could to some extent be subject to the same regulations as apply to armed forces. Efficient state control would particularly require an appropriate structure of authority, i.e. a clear chain of command;
- c. *Efficient oversight*: Appropriate national bodies (such as parliaments) and international or other organisations should have an overview of the activities of private companies with international operations and should be able to intervene in a supervisory capacity as need be;
- d. *Effective individual sanctions and responsibilities*: Criminal offences should be effectively prosecuted and punished, especially if they involve war crimes or other violations of international law;
- e. *Licensing system and/or authorisation process*: Private security companies could be required to obtain a state licence as a condition for their operation in foreign conflict zones. This would involve such companies disclosing their ownership, their structure and their service offering. It might also be possible to require approval for individual assignments. Such licences could be made public. The following points could play a role in the granting of licences:
  - *A definition of minimum conditions*: for the basic training and preparation of staff for a particular deployment, as well as for their comportment in their host country (i.e. a *code of conduct* and *rules of engagement*);
  - *Vetting and screening*: Checking the suitability of staff with regard to character (e.g. police record and reputation);
  - *Monitoring*: A guarantee of efficient and permanent supervision (e.g. the duty to include appropriate clauses in the contracts signed by mandatory states with private companies);
  - *The duty to include minimum conditions in contracts*: e.g. the duty to comply with international humanitarian law and human rights law, the duty to train staff in such matters, limits on subcontracting security assignments to local or other foreign private companies, the duty to respect the laws of one's host country;
- f. *Appropriate regulation of exports*: Practicable and effective export controls must be established, especially in the case of goods with *dual-use* character, which are used in the logistics and infrastructure of private security companies;
- g. *Harmonisation of arms legislation*: The provisions governing private security companies operating abroad could be harmonised with national *arms*

*export legislation* (coherence as regards the export of militarily sensitive goods and services);

- h. *Ban on certain activities*: It might be possible to forbid certain operations entirely, such as those carried out by private individuals operating outside a company structure, as well as for example deployment in battle or especially delicate services such as interrogation and intelligence activities.

*A purely national solution, however, is not sufficient.* For one thing, private security companies with international operations and often very flexible organisational structures can get around national regulations, for instance by moving their headquarters to another country (with or without a change of name) or by dissolving themselves and continuing their operations with the same staff elsewhere under another name or with another structure. In addition, the extraterritorial implementation of standards without international recognition is constrained by factual and, as the case may be, legal considerations.

## 6.2.2 Possible international role for Switzerland

Public interest in the delegation of what have traditionally been state security duties to specialised private companies has increased sharply since the beginning of the war in Iraq.<sup>123</sup> Despite the efforts of various countries to develop solutions adapted to their own particular areas of competence, *there has however been to date no international process* affording countries a forum to *come together* to discuss *approaches* to the establishment of both international and national standards, as well as mechanisms designed to improve respect for international humanitarian law and human rights law.

The issue of private security companies operating in international crisis and conflict areas has become particularly acute since the 1990s. With the recent war in Iraq, and particularly events of this past year, the Swiss people and their parliament have also become increasingly aware of the subject. In the summer of 2004 the DFA expressed Switzerland's concern regarding the incidents at Abu Ghraib prison (in Iraq) to representatives of the United Kingdom and the US. Employees of private security companies had been among those participating in those human rights violations. That same year, then, the Swiss federal administration began increasingly to consider the appropriateness and potential of international, binational and supranational initiatives.

There are *three reasons* in particular for Switzerland's inevitable involvement in internationally problematic developments in the area of private military and security companies:

- In order to ensure the safety of its representatives abroad, particularly in conflict zones, Switzerland must *itself on occasion have recourse to the services of private security companies*.

<sup>123</sup> There has been an increase in the number of public events devoted to the subject, and the relevant literature has also grown rapidly. Nevertheless, such literature has tended to be descriptive in nature, only occasionally relevant from the perspective of political science, and very rarely providing legal analysis.

- Selective researches show, that *Private military or security companies active in conflict zones could be operating from within Switzerland*. Switzerland however has an interest not to be used as a base for illegal or dubious operations abroad.
- *The implementation and, where necessary, the development of international law, especially human rights and international humanitarian law, is among Switzerland's traditional concerns.*

In view of its humanitarian tradition and as a contracting party to the Geneva Convention, *Switzerland* could make a significant contribution to the codification and clarification of the legal conditions for and limits on the activity of private military and security companies, as well as to the promotion of respect for international humanitarian law and human rights law.

At present Switzerland is primarily concerned with the initiation of an international process with the following three main objectives:

- To contribute to an intergovernmental discussion on the issues raised by the use of private security and military companies;
- To reaffirm and clarify the obligations of states and other actors under international law, in particular under international humanitarian law and human rights law;
- To study options and regulatory models and other appropriate measures at the national, regional and international levels.

Switzerland is *cooperating with the International Committee of the Red Cross (ICRC)* in this international process, having already drafted with that organisation common guidelines for intergovernmental initiatives. The first meetings with selected experts took place during the summer of 2005, and consultations with targeted individual states were held in autumn 2005. A conference of government experts is planned for 2006.

The substantive discussions held in the course of this international process, in addition to any conclusions arising from them, would ideally have positive consequences for domestic developments as well, and bring about a rethinking of their own regulations on the part of states, supranational and non-governmental organisations, and multinational corporations, which also employ private security companies. It would also be useful to establish international standards, and thus render coherent the range of national regulations.

Finally, it should be noted that the Swiss initiative is essentially neutral in its attitude towards the desirability of private security and military companies. Nevertheless, the deployment of private security and military companies, which is in fact expected to increase, is a reality, and for this reason the initiative aims to consider measures designed to mitigate potential negative consequences of the use of such services.

### **6.3 List of measures proposed by the Federal Council**

The Federal Council intends to take the following steps:

1. The Federal Council will call for administrative bodies to comply with the limits imposed by the Federal Constitution upon the delegation of security duties to private companies.
2. The Federal Council will invite the cantons to harmonise their legal systems.
3. The Federal Council is willing to review the possibility of setting minimum conditions for the Swiss government's use of private security companies to perform security duties.
4. The Federal Council is willing to review the advisability of requiring providers of military or security services based in Switzerland with operations in crisis and conflict zones to obtain approval, or of subjecting them to a licensing system.
5. The Federal Council, as far as possible in cooperation with the ICRC, wishes to initiate an international process aimed at contributing to an intergovernmental discussion, enhancing and clarifying the obligations under international law on the part of states and other actors, and studying regulatory models on the national, regional and international levels.