

PRIVATE MILITARY AND SECURITY COMPANIES
IN INTERNATIONAL LAW

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AND SECURITY COMPANIES
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A Challenge for Non-binding Norms:
the Montreux Document and
the International Code of Conduct
for Private Security Service Providers

Corinna SEIBERTH



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*For Einat
You will always be an inspiration*

FOREWORD

This is a well-written and well-argued monograph, which explores in great detail the position of private military and security companies (PMSCs) in international law, specifically the value and effect of softer forms of regulation embodied in the recently adopted Montreux Document for states and the International Code of Conduct for PMSCs themselves.

The book starts (in the introduction and chapter 1) by establishing the hypothesis to be tested, that PMSCs are a growing development and problem as states increasingly outsource (some of) their military functions, whose presence and conduct in post-conflict and conflict zones lead to violations of international law and that, unlike states' militaries where direct state responsibility is inherent, there are problems in making both the private contractors and the states that employ them responsible for any violations of international law. Traditional forms of international law, treaties and custom, are inapplicable to PMSCs themselves, and so the thesis explores whether softer forms of international law in the form of a non-binding document (the Montreux Document) and a code of conduct (the International Code of Conduct for Private Security Providers) can fill that normative gap, and moreover, can provide for regulation of the norms they purport to contain.

The methodology is primarily doctrinal, but with any doctrinal analysis of soft law, which does not sit comfortably within the traditional sources of international law, it is necessary to look at the normative effect of soft law and to this end the thesis considers relevant conceptual discussions of norms, rules and legal orders. The story and analysis of the Draft Convention on the regulation of PMSCs provides a useful counterpoint throughout the thesis, enabling the author to point to the problems of trying to achieve a traditional form of regulation, and the advantages and disadvantages that such an approach has in comparison to softer forms of regulation.

While chapter 1 establishes the normative challenge the thesis aims to address, chapter 2 considers the phenomenon of PMSCs themselves, distinguishing them from mercenaries in a convincing manner and considering relevant methods of classification of types and functions of PMSCs. Chapter 3 lays out in impressive detail the existing international law applicable to PMSCs, in order to expose the lacunae and gaps in the normative framework and regulation of PMSCs in international law. This chapter shows a fine grasp of the rules and problems in their application, especially those of human rights law, international humanitarian law and the rules on state responsibility (from host state, home

state and contracting state perspectives), as well as institutional, individual and corporate responsibility. As a piece of sustained and comprehensive legal analysis of the current position of PMSCs under international law, this forms the heart of the book, and its comprehensive accuracy enables the author to go on to make original contribution by examining the development of soft law against this broader legal background. Chapter 3 is a detailed, rigorous and sustained piece of legal exposition, laying bare the bones of the international legal framework applicable to PMSCs and thereby exposing its weaknesses. The analysis is soundly based on traditional sources and literature, but also incorporates the latest developments and debates (for example in the area of institutional responsibility). The section on due diligence obligations also shows how the analysis considers all angles in relation to PMSCs.

Chapter 4 then explores the content and meaning of the Montreux Document and digs deeply into its layered provisions, exploring both existing obligations and good practices that exist within a non-binding document. The examination of the premises upon which the Document is constructed, and the comparison made with the Draft Convention (which has a much stronger notion of state functions) is again insightful and moves the debate forward. No aspect is left unconsidered and the section on good practices is particularly noteworthy and informative when considered alongside the due diligence obligations of states unearthed in chapter 3. The conclusion is a sober and forensic analysis of both the strengths and weaknesses of the Montreux Document, and leads nicely into chapters 5-6 on corporate social responsibility, the International Code of Conduct and the development of the Oversight Mechanism. The account of the International Code is both thorough and convincing in terms of its analysis of the general and specific commitments. John Ruggie's 'Protect, Respect and Remedy' framework for business and human rights, in particular, is deployed to critical effect. Chapter 6 includes a comparative analysis of the Oversight Mechanism and existing corporate social responsibility tools discussing potential benefits and deficiencies.

The doctrinal and evaluative elements of the thesis in chapters 1-6 are convincing in themselves, but the author shows her inquisitive side by pushing further into thinking (rather convincingly) about the normative contribution of the Montreux Document and of the International Code of Conduct. Deploying the theoretical positions of Hart and Teubner, the author shows the reader the contribution of the applicable soft law, but also introduces us to a method for evaluating how, in the future, we should judge the internalization of the norms contained in the Document and the Code. The book is then completed by an authoritative and convincing conclusion – while these soft instruments make positive steps toward filling the gaps in regulation they do not (and cannot) do that completely and, therefore, a Convention may well be necessary after all.

Overall this book contributes significantly to the growing debate and concern about the rise of corporate security and the difficulties in achieving its effective regulation.

Professor Nigel D. WHITE
University of Nottingham, UK

PREFACE

This book is the result of four years of research conducted at the University of Lucerne and the University of Nottingham. The eighteen months spent at the University of Nottingham were made possible through a fellowship for prospective researchers funded by the Swiss National Science Foundation and the kind support of Professor Nigel White. It provides an in depth analysis of international law applicable to PMSCs with a focus on the contribution of the Montreux Document and the International Code of Conduct for Private Security Service Providers. The topic is part of a wider debate under contemporary international law on business and human rights, shining a light on the content of the state duty to protect and the corporate responsibility to respect in the context of PMSCs. This was only possible through the support of many people. Many thanks to my family, Helga, Jürg and Jessica for always supporting me and to Rory, for his musical distraction, love, support and encouragement. Thank you, Thorsten, Clotilde and Isabel – you know for what. I would also like to thank Luzia and Nico for their advice regarding my proposal for Nottingham and great times on their lovely balcony. Thank you Kelly, Ana and the law PhD students at the University of Nottingham for being so welcoming and inspiring. Many thanks to Flavia for her moral support throughout this process. I would like to thank Professor Nigel White and Professor Sebastian Heselhaus for their professional advice and support. Finally, I would like to thank my team from the Health and Education Project of Usthi Foundation Switzerland in Odisha for giving me perspective and inspiration.

Keonjhar (Odisha), September 2013

Corinna SEIBERTH

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LIST OF ABBREVIATIONS

ACHR	American Court of Human Rights
AP I	Additional Protocol I
AP II	Additional Protocol II
art/arts	Article/s
BAPSC	British Association for Private Security Companies
ECHR	European Court of Human Rights
edn	Edition
ed/eds	Editor/s
CoESS	Confederation of European Security Services
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICoC	International Code of Conduct for Private Security Service Providers
ILC	International Law Commission
IO	International Organisation
ISOA	International Stability Operations Association
LNTS	League of Nations Treaty Series
NGO	Non-governmental Organisation
para/paras	Paragraph/s
PASA	Pan African Security Association
PISCAI	Private Security Company Association Iraq
PMSCs	Private Military and Security Companies
UDHR	Universal Declaration of Human Rights
UNCHR	United Nations Commission on Human Rights
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council
UNSC	United Nations Security Council
UNSRSG	UN Special Representative to the Secretary-General
UNTS	United Nations Treaty Series

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