

Switzerland, The End of Private Armies

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N.B. As per the disclaimer ^[1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. Swiss-based “private armies” face ban

[Source: "La fin des 'armées privées' établies en Suisse", *Le Temps*, 24 January 2013, available at: <https://www.letemps.ch/suisse/fin-armees-privees-etablies-suisse> ^[2], unofficial translation]

[...]

[1] The Swiss Federal Council wants to end the involvement of private security companies in armed conflicts on foreign soil and to require that companies that provide security services, logistical support or personal protection obtain authorization to operate in crisis or conflict zones. According to Minister of Justice Simonetta Sommaruga, the recently adopted draft bill, which will now make its way through parliament, “aims to safeguard [our] neutrality, ensure respect for international law and preserve Switzerland’s image abroad”.

[2] [...] The bill, which is likely to affect around 20 businesses, not only forbids the direct participation, recruitment, training and deployment of mercenaries in armed conflict, but also outlaws any activity that might facilitate serious human rights violations. [...]

[3] Companies that are not participating in hostilities but are providing security services, logistical support, provision of supplies, transport or personal protection, must be declared to the authorities to ensure they are not in breach of the law. This applies in particular to companies that contribute directly to the war effort of armed or security forces. The Federal Council opted for a case-by-case review rather than a blanket authorization or a licensing system.

[4] Companies must also abide by the code of conduct for private security-service providers drawn up by Switzerland, with the help of the United States and Great Britain, in 2010. Personnel must refrain from any use of force that is not strictly necessary to counteract a threat. Weapons may only be employed against individuals in cases of self- defence, defence of others or to prevent a crime from being committed.

[5] The law allows the Federal Council to hire private companies to protect its embassies or staff abroad. In principle and except in situations they are threatened or in crisis situations,

private security staff may be armed and use force only as a last resort.

[6] It was the arrival in Switzerland of the British-owned Aegis Defence Services, in the summer of 2010, that set off alarm bells. Aegis Defence Services, one of the largest private security companies to be deployed alongside regular U.S. troops in Iraq and Afghanistan, was attracted to Switzerland less on account of the tax benefits it could enjoy there than by the legal vacuum governing the activities of private security companies.

[...]

B. Federal Act on Private Security Services provided Abroad

[Source: Federal Act on Private Security Services provided Abroad, Federal Assembly of the Swiss Confederation, 27 September 2013, available at: <https://www.admin.ch/opc/en/classified-compilation/20122320/index.html> ^[3]]

Art. 2 Scope of application

This Act applies to legal entities and business associations (companies) that engage in any of the following activities:

1. provide, from Switzerland, private security services abroad;
2. provide services in Switzerland in connection with private security services provided abroad;
3. establish, base, operate, or manage a company in Switzerland that provides private security services abroad or provides services in connection therewith in Switzerland or abroad;
4. exercise control from Switzerland over a company that provides private security services abroad or provides services in connection therewith in Switzerland or abroad.

[...]

Art. 4 Definitions

In this Act:

a. *private security service* means, in particular, the following activities carried out by a private company:

1. the protection of persons in complex environments,
2. the guarding or surveillance of goods and properties in complex environments,
3. [...]
4. [...]
5. guarding, caring for, and transporting prisoners; operating prison facilities; and assisting in operating camps for prisoners of war or civilian detainees,
6. operational or logistical support for armed or security forces, insofar as such support is not provided as part of a direct participation in hostilities as set out in article 8,
7. operating and maintaining weapons systems,
8. advising or training members of armed or security forces,
9. intelligence activities, espionage, and counterespionage;

b. *service in connection with a private security service* means:

1. recruiting or training personnel for private security services abroad,
2. providing personnel, directly or as an intermediary, for a company that offers private security services abroad;

c. *direct participation in hostilities* means:

direct participation in hostilities abroad in the context of an armed conflict within the meaning of the Geneva Conventions and the Protocols I and II.

[...]

Art. 7 Accession to the International Code of Conduct for Private Security Service Providers

Companies subject to Article 2 paragraphs 1, [...] must become signatories to the International Code of Conduct for Private Security Providers, in the version dated 9 November 2010 (Code of Conduct).

[...]

Section 2 Prohibitions

Art. 8 Direct participation in hostilities

It is prohibited:

1. to recruit or train personnel in Switzerland for the purpose of direct participation in hostilities abroad;
2. to provide personnel, from Switzerland, directly or as an intermediary, for the purpose of direct participation in hostilities abroad;
3. to establish, base, operate, or manage, in Switzerland, a company that recruits, trains, or provides personnel, directly or as an intermediary, for the purpose of direct participation in hostilities abroad;
4. exercise control, from Switzerland, over a company that recruits, trains, or provides personnel, directly or as an intermediary, for the purpose of direct participation in hostilities abroad.

Persons who are domiciled, or have their habitual place of residence, in Switzerland and are in the service of a company that is subject to this Act shall be prohibited from directly participating in hostilities abroad.

[...]

Discussion

1. (*Document A, paras. 1 – 3 and 6; Document B, Arts. 2 and 4*) Which activities of private security companies are banned according to the new Swiss law? Would activities that involve direct participation in hostilities be prohibited by IHL? [See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* ^[4]]

2. (*Document A, para. 1; Document B, Art. 4*) In general, does the protection of persons or buildings in armed conflicts imply direct participation in hostilities? What about operational or logistical support to the armed forces or to security forces? On what might your answer to the above questions depend? Can you give a practical example of a situation where operational or logistical support to the armed forces or to security forces would not constitute direct participation in hostilities?

3. (*Document B, Art. 4*) Does the running or maintenance of a weapons platform involve direct participation in hostilities? Training armed forces?

4. (*Document B, Arts 4 and 8*) Following the logic of the Swiss legislation, what – in your opinion – is the status of private military security personnel from companies that comply with it? If private military security personnel engaged in activities involving espionage, could they be considered spies under IHL? (HR, Arts. 29 ^[5] – 31 ^[6]; P I, Art. 46 ^[7])

5. Is it easy to differentiate between activities that amount to direct participation in hostilities and those that do not? When does direct participation in hostilities begin? End? What are the dangers of relying on an unclear/blurry definition of direct participation?

6. (*Document A, para. 3; Document B, Arts. 4 and 8*) In light of question n. 5, how does the Swiss law seek to ensure that private security companies will not engage in activities that amount to direct participation in hostilities? In your opinion, what are its chances of success?

7. (*Document A, para. 3; Document B, Art. 7*) Does the fact that Article 7 of the Swiss legislation foresees the applicability of the International Code of Conduct provide any additional guarantees for successful implementation of this prohibition? Why/Why not? [See, **Case, Private Military Security Companies** ^[8], Document B, International Code of Conduct for Private Security Service Providers]

8. (*Document A, paras. 1 and 6*) In general, what do you think of the Swiss legislation? Considering Switzerland's position as a neutral State? Do you think that Switzerland's example will be followed by other countries?

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