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Private Military/Security Companies, immunities and state responsibility:

A case for the International Court of Justice

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Focus

Where immunities preclude the prosecution of ordinary crimes committed in armed conflict, the question must be asked whether the state(s) granting immunity have committed an international wrongful act under the law of state responsibility. Referring the Blackwater case to the ICJ by special agreement, would demonstrate the willingness to take international responsibility for the incident.

New York Times,
Dec. 31st, 2009

On September 16th, 2007, employees of the US private military/security company (PM/SC) Blackwater Worldwide killed 17 Iraqi civilians on Bagdad's Nisur Square. They acted according to their own statements in self-defence while protecting a convoy of US Diplomats. Both the US and the Iraqi government immediately started separate investigations. However, since Blackwater was granted immunity from local prosecution, Iraqi investigations could not result in an Iraqi indictment of the shooters. Based on FBI and State Department investigations, however, an US grand jury charged the defendants with voluntary manslaughter and weapons violations on December 4th, 2008. On December 31st, 2009, Judge Ricardo M. Urbina, judge at the US District Court for the District of Columbia dismissed the indictment, because "the trial has compromised the constitutional rights of the accused". The Judge found in particular that the defendants "immunized testimonies" "played a critical role in the indictment". The ruling not only questions the US practice of "immunized testimonies", but also the general status of employees of private military companies in armed conflict and the immunity from "local prosecution" more in particular.

In an armed conflict, three sets of rules apply to individuals: (1) the national criminal rules of the states engaged in the conflict, (2) international humanitarian law and (3) international criminal law. The application of (1) national and (2) international criminal law may be hampered by (A) international humanitarian law, (B) immunities and (C) the lack of jurisdiction of the ICC.

The use of force by PM/SCs employees in armed conflicts is first of all to be determined on the basis of the rules of humanitarian law, in particular Common Article 3 and Additional Protocol I (1977), *i.e.* by the question whether the employees of PM/SCs are combatants or civilians. The answer to that question lies in the determination of the term "direct participation" of article 43 (2) of Additional Protocol I. If they are not classified as "combatants" they must be treated like civilians, which however does not free them from liability under national or international criminal law.

In the Blackwater case, the employees have been given "double immunity": quasi diplomatic immunity from the Iraqi jurisdiction to prosecute and "constitutional immunity" from prosecution in the US. Since neither Iraq nor the US are State Parties to the Statute of the ICC and since it is doubtful that the UN Security Council will refer the case to the ICC, an investigation into the incident in terms of the crimes listed in the Rome Statute is unlikely.

Were national and international criminal proceedings are likely to fail and therefore prevent justice from being done to the victims, the only possibility left at the international level would be a formal judgement by the ICJ, that the US bears state responsibility for the incident. As neither the US nor Iraq have accepted the compulsory jurisdiction of the ICJ, the conclusion of a Special Agreement would appear most appropriate. It requires the willingness of the US to have its responsibility as a state to be put to the ultimate legal test: that of the ICJ. Such willingness would behove any democratic and internationally responsible state.

Verantwortung

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