



## Working towards an International PMSC Code of Conduct

Report from the Civil Society and Research Institutions workshop organized by DCAF in partnership with the Swiss Department of Foreign Affairs

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### I. Background Information

The recent boom in the private security service sector that has significantly shifted the provision of security from the public to the private sector has not been adequately accompanied by a parallel shift of effective accountability mechanisms applying to these private actors. Building on the successful conclusion of the *“Montreux Document”*<sup>1</sup> and the emerging consensus on the need to fill normative and accountability gaps through a coordinated industry-driven PMSC standard setting process, the Swiss Department of Foreign Affairs has partnered with DCAF to support the development of an international Code of Conduct (CoC) that lays down clear operational guidelines, establishing international PMSC industry norms and standards for the provision of private security services.

This workshop was the second workshop in the first phase of the project to elaborate an international Code of Conduct for PMSCs. It gathered representatives of civil society and research institutions to focus on best practices in regards to standards and accountability mechanisms for regulating PMSCs and related services. The aim of the workshop was to identify the elements essential to an effective international CoC from the perspective of the stakeholders attending.

The first workshop, aimed at leading international PMSCs and industry associations, was held in London on 10 March<sup>2</sup> and a further workshop for standard setters and clients of PMSCs is due to be held on 8 May, giving the opportunity for participants to clearly

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<sup>1</sup> For more information, please log on to : <http://www.eda.admin.ch/psc>

<sup>2</sup> For more information, please see the report from this workshop, available on request from [a.duplessis@dcaf.ch](mailto:a.duplessis@dcaf.ch).

articulate their needs and concerns regarding the provision of PMSC services in accordance with international human rights standards and international humanitarian law. The overall aim is to assemble a collection of the elements most essential to each of the stakeholders in regards to PMSCs, identifying consensus themes across the groups as well as any conflicts that need to be addressed and ultimately resolved by the eventual international CoC.

This draft of perceived fundamental elements of an eventual PMSC Code of Conduct will be presented at the Wilton Park Conference (WPC) scheduled for June 2009. This conference will serve as the official launching of the second phase of the process of the International PMSC Code of Conduct by convening together for the first time all of the aforementioned stakeholders in order to begin the process of framing and elaborating the structure of an international CoC.

## **II. Discussion on Essential Elements**

### **Session I: Identifying standards and good practices for PMSC and related services**

1. Whilst **human rights** and **international humanitarian law** were broadly accepted as providing an appropriate set of core standards, it is still crucial to determine the **scope** of an international CoC, in particular what types of PMSCs it should cover, what the exact breadth and depth of standards it should have and what activities it should cover.
2. The Montreux Document was mentioned as a useful standard for a CoC to build on, though the CoC should cover PMSC activities in all contexts, and not just in armed conflict.
3. There is a risk that an international CoC could create **two tiers of PMSCs** – legitimate PMSCs willing and able to adhere to the CoC versus those not. Those actors falling outside the CoC may actually be those that need to be held accountable to its standards more.

### **Session II: Effective Accountability Mechanisms for PMSC and related services**

1. Recent efforts by national courts to apply laws meant for state agents to civilian contractors have not been wholly effective and have resulted in some confusion, leading to the conclusion that **uniform international PMSC standards** could make a critical contribution to effective industry regulation.
2. The interests of **victims** were represented as including both **reparations and judicial remedies**.
3. Models of **oversight and accountability mechanisms** were discussed, with a clear preference for an **international oversight body** expressed. At the minimum, the body should be **mandated to receive complaints from people affected by the conduct of PMSCs**. Additionally, the body should **oversee whether PMSCs respect the CoC**. The role of the **State as Contractor** and its capacity to incorporate international PMSC CoC standards in its procurement practices was also highlighted. It was also pointed out that while many clients of PMSCs are not States, the State nonetheless has a role to play in regulation.

### **III. Discussions**

#### **1. Identifying standards and good practices for PMSC and related services**

There was some discussion on how to make a CoC effective on the ground with contractors, with suggestions on how to make it accessible both in terms of size, complexity and language of an international CoC. A number of participants suggested that an international CoC could itself be a longer, more complex document with perhaps a shorter manual (a 'one-pager') targeted at PMSC personnel being prepared after its adoption.

Whilst some participants questioned the professional culture and capacity of some PMSCs to bring about change in their practices even with an international CoC, in particular those smaller PMSCs not based in Western Europe or North America, others highlighted that PMSCs in many jurisdictions have internal legal and other resource capacity to make such changes. Subsequent discussion considered whether an international CoC would create a two-tier system of PMSCs – those operating within the ambit of an international CoC and those not. Whilst legitimate PMSCs may be willing and able to adhere to the CoC, those less-able (or willing) actors falling outside the CoC are actually those that may need to be held accountable to its standards more.

Questions were raised as to the scope of an international CoC including what types of PMSCs it should cover, what standards it should include and what activities it should cover. In particular, participants considered how broad the scope of human rights and International Humanitarian Law covered should be, with some questioning whether it should be limited to so-called "core" civil and political human rights or whether it also should extend to issues, such as discrimination, sexual exploitation and labour rights. They also considered whether some activities – such as detainee interrogation - were of such a nature (i.e., "inherently governmental") that the CoC should prohibit them from being carried-out by PMSCs altogether.

One participant noted that an eventual future international CoC could make use of and draw on existing codes of conduct for armed forces. However, it was emphasized by others that the rules on the use of force would need to be clearly differentiated, as PMSC personnel are usually civilians not meant to participate in hostilities.

Civil Society was encouraged to be vigilant during the current international CoC elaboration process, setting human rights law benchmarks by which the standards elaborated could be judged.

On a practical level, the meeting highlighted the issue of trying to promote the highest possible conduct, whilst one participant mentioned that the CoC standards should not be set too high so that only a few PMSCs can comply.

There was a general discussion on whether an international CoC could actually have the perverse effect of reducing overall accountability of the industry, with a number of

participants suggesting that allowing internal policing by PMSCs will dilute the perceived need for holding them accountable by external mechanisms. All participants wanted improved accountability of the industry with the overwhelming majority of participants feeling that an international CoC should at least have a preventive effect, setting standards to encourage PMSCs to operate in accordance with human rights standards. Many also believed that it should include a mechanism with meaningful sanctions against PMSCs who don't comply. It was clear to the participants that the CoC could not and should not attempt to replace the preventive measures and accountability mechanisms that States had an obligation to establish according to international human rights and humanitarian law.

A central issue discussed by participants was how to make any CoC enforceable. All participants recognized the primary role of the State in ensuring compliance with international human rights and humanitarian law, and punishing violations, though it was recognized that how this works in practice through regulation, oversight, criminal prosecution and civil litigation varies from situation to situation. Whilst some attendees felt that an international CoC could need implementing national legislation to give it legal enforceability, others felt that an eventual international CoC could be applied principally through incorporation into PMSC contracts, with market forces then penalizing non-compliance. Some felt that the voice of the victims of human rights violations should be heard more in this debate, and that as the primary remedy for such violations should still be judicial, including criminal, accountability, they wondered how an eventual international CoC would encourage or facilitate such a process.

## *2. Identifying potential accountability, oversight and enforcement mechanisms*

In the second session, attention turned towards existing national legislation and its application to PMSCs, with particular emphasis given to the difficulties in applying laws covering public agents to PMSCs acting on behalf of the state. Using US case law as a point of reference, it was highlighted that some courts have been reluctant to review PMSC activities that are in the province of state operational decisions related to national security. Examples were offered of PMSCs benefiting from government assertions of the "State Secrets" doctrine against allegations of torture, as well as of courts awarding "combat activities" immunity to PMSCs where duties and responsibilities of PMSCs were asserted to be analagous to those of combatants (e.g., interrogations=combatant activity, etc.). Given this situation, several participants remarked on the usefulness of setting uniform international standards in order to mitigate the confusion likely to occur if these transnational actors are judged in national courts on a state-by-state basis, and to supplement available national judicial remedies.

A related discussion touched on possible rationales for states using PMSCs. Among other motives of states to hire PMSCs, some suggested that states use PMSCs in order to legally avoid international obligations, such as those contained in human rights treaties, as well as to shield themselves and their agents from direct liabilities and responsibilities. It was suggested that a number of different kinds of accountability were weakened by the use of PMSCs, including economic, political and democratic, as well as legal accountability.

The interests and perspective of victims was again raised and constituted another important theme of the workshop, with several participants proposing that victims were interested in judicial remedies and the finding or admission of guilt for wrongdoing, as well as monetary reparation. Regarding the former interest, it was suggested that a Code of Conduct would not be able to serve this interest, as judicial remedies necessitate decision by a public court. As a counterpoint to this, it was suggested that an accountability mechanism could find or assign fault, as well as directing the payment of reparations. Moreover, where there is a *de facto* legal vacuum, such as in the case of PMSCs operating in a failed state, judicial remedies can be very difficult if not impossible to obtain, while monetary reparation paid through enforcement of an international CoC could nevertheless provide some justice. A further point was made that an international CoC that can provide for some mechanisms of reparation would be an important improvement over the status quo in many jurisdictions, where actually very few cases come to trial. There was nearly unanimous agreement that the existence of an eventual international CoC need not undermine state legislative measures and/or judicial review of PMSCs, with the suggestion that clarification of international standards applicable to PMSCs could even strengthen enforcement at the national level. In this regard, some participants suggested useful effort could be spent in development of model national codes for effective implementation and enforcement of these standards.

One participant emphasized that a way should also be found to make corporations themselves accountable for not respecting human rights norms and not merely their personnel, and that provision must be made for an effective remedy assuring that the victims of human rights violations obtain justice, including ensuring investigation of the facts as well as identification and punishment of those responsible.

Finally, various models for oversight and accountability mechanisms as identified in the first industry workshop were discussed, including the clear preference of industry for an international oversight body/ombudsperson. The example of the US bar or the UK law society/bar council was also mentioned, whereby adherence to industry standards and requirements would be required for engagement in the “profession”, with the state requiring that only members in good standing could provide PMSC services. This could be further strengthened by the state also providing a mechanism for enforcement of the standards, including the authority to order effective and substantial sanctions for CoC violations. Moreover, the role of the State as contractor and its capacity to incorporate CoC standards in its procurement practices was singled out as an important enforcement leverage tool that could ensure the respect of a minimum set of rules by PMSCs. Such an arrangement could lead to the exclusion of non-compliant PMSCs from bidding procedures and provide legal contract remedies against PMSCs in cases of breach of agreement. On the point of sanctions, participants indicated that more thought needed to be given to determining appropriate sanctions for violations by PMSCs. One participant pointed out that the sanction of expelling from an industry association and/or revoking any certification of a PMSC which does not respect an international CoC, was extremely weak. The possible need for an international body to monitor and enforce standards was also discussed.

### 3. Further steps in the process of devising an International PMSC CoC

The participants in the workshop reaffirmed their general support for the process of drafting an international CoC on PMSCs, as long as it did not weaken international standards and did not present itself as an alternative to State regulation. They noted that the workshops should continue to include the broadest possible representation, including various representatives of client-states, commercial entities, NGOs, academia representatives and victims of PMSC misconduct.