



Working towards an International PMSC Code of Conduct

Report from the National and International Standard-Setters workshop organized by DCAF
in partnership with the Swiss Department of Foreign Affairs

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Geneva, Switzerland

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"*¹ 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 third workshop in the first phase of the project to elaborate an international Code of Conduct for PMSCs. It gathered representatives of national and international standard-setting organizations 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 and a second workshop for academic research institutions and civil society was held in Geneva on 17 April, giving the opportunity for participants to clearly articulate their needs and concerns regarding the provision of PMSC services in accordance with international human rights standards and international humanitarian law.² The overall aim of these workshops was to assemble a collection of the elements most essential to each of the stakeholders in regards to

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

² For more information, please see the reports from these workshops, available on request from a.duplessis@dcaf.ch.

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. Participants discussed the merits of both **national legislation** and an **international CoC**, noting that that due to the international and multi-jurisdictional nature of PMSCs, national legislation, while indispensable, alone could not fulfil the objective of holding them accountable and for that reason an international CoC was one important option.
2. Not being subject to national laws, **intergovernmental organizations** bring a slightly different aspect to the discussion on applying standards and enforcing them.
3. Participants representing entities that contract PMSCs indicated that they were looking for **an international CoC that could provide the benchmark for PMSC services provided**, raising standards across the board. Several participants also expressed hope that an international CoC would become the benchmark by which all other **key buyers and suppliers of PMSC services** would be covered.

Session II: Effective Accountability Mechanisms for PMSC and related services

1. A potential distinction was drawn by participants between a body that would administer an international CoC (potentially an **international secretariat**) and a body that would arbitrate on it (potentially an **arbitration panel**).
2. A central, public **register or database** of PMSCs in compliance with an international CoC would be an indispensable tool for many organizations contracting PMSCs.
3. A crucial distinction should be made between **criminal and civil liability**, with the former remaining within the purview of States.

III. Discussions

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

In an initial discussion about the process of the current series of workshops, participation in them and communication of their outcomes, the following points were raised: the process should continue as an industry-driven process, with strong ownership by key buyers and suppliers; a code of conduct should pave the ground for an industry standard; the legal debate on the definition of mercenaries should be seen as a separate debate from that regarding an international industry standard for private military and security service providers; intergovernmental organisations, including relevant bodies of the UN, should participate in the process; and the facilitation of meetings and the implementation of agreed recommendations and follow-up should be done on an impartial basis.

Several representatives noted that regulation at the national level should be the primary method of accountability for PMSCs, including through the implementation of national legislation. One participant commented that due to the international and multi-jurisdictional nature of PMSCs, national legislation alone would not fulfil the objective of holding them accountable and for that reason a CoC was a preferred option. Another participant suggested that regulation and control of PMSC activities should take place at the national, regional and international levels. Participants took note of the current public consultation on PMSCs taking place in the United Kingdom. It was observed that reference had been made to a process elaborating an international CoC and that the UK government's recommended package included support for creating such internationally-agreed benchmark standards.

Participants discussed the feasibility and desirability of being able to hold contracting parties responsible for the conduct of their agents. In this context, representatives of some intergovernmental organizations raised the issue that legally there was no national law that applied to them, and that this should be taken into consideration. The issue in respect of struggling or failed states, where it was almost impossible practically to apply national law on the ground, was also noted. In this respect, the value of an international CoC applying to a PMSC regardless of location was considered.

Participants generally believed that the standards contained within an international CoC should aspire to be at a very high level.

Several representatives noted the distinction that should be made between the armed forces of States and PMSCs and their personnel. One representative observed that private armed security personnel were not, and should not be, replacements for soldiers. In particular, the value of international humanitarian law was acknowledged, particularly in respect of the standards set-out in the Montreux Document, but it was also noted that many IHL standards were military-force specific and not directly transferable to PMSC personnel.

There was some discussion on the use of the word "mercenary" in the current wider debate, with several participants noting that they did not equate PMSCs with mercenaries, but rather considered them to be an important and legitimate part of security provision. Within this context, one participant noted that the UN Human Rights Council, aware of the difficulties of applying the international definition of "mercenary" to PMSC personnel, had requested the Working Group on the Use of Mercenaries to consult with stakeholders on the content and scope of a possible draft convention on PMSCs.

In respect of the question as to which functions could or should be outsourced to the private sector, one participant highlighted that the United Nations Working Group on the Use of Mercenaries had engaged in a process of consultations open to Member States of the UN which may lead to the holding of a high-level meeting to discuss the role of the State as holder of the monopoly of the use of force.

Some representatives that represented entities that contracted PMSCs noted that they were looking for a CoC that could provide the benchmark for services that they were contracting, whether compliance with such a code would be a contractual term or part of the procurement process more generally. Beyond that, some participants expressed hope that a suitable international CoC would become the benchmark by which all key buyers and suppliers of PMSC services would be covered. Others commented that their own organizations currently had no central policy on the standards to be applied in selecting PMSCs and that they would welcome an international CoC that they could reference in their procurement practice.

It was noted that some key buyers of PMSC services – such as the extractive industry and some humanitarian organizations – were not at the workshop, and that due account should also be taken of their views in establishing such a CoC.

One participant emphasized the distinction between establishing a CoC which would reference standards, and setting standards themselves, emphasizing that the current project needed to ensure it focussed on the former; setting standards themselves was outside its scope.

There was some discussion on the role of civil society in particular in the current process, with recognition that the PMSC industry had encouraged the participation of those with diverging and critical positions. One participant raised concerns that notwithstanding this, the incorporation of politicized organizations into the process could jeopardize its progression towards the establishment of the international CoC.

2. Identifying potential accountability, oversight and enforcement mechanisms

In the second session, participants considered various methods of enforcing a CoC.

It was noted that currently States can use their national legal systems to bring about accountability, for example through human rights legislation and the relevant legal processes, though it was acknowledged that there were difficulties in such methods when there was a multi-jurisdictional element involved. The participants noted that some States have used their military justice system for PMSCs and/or have applied national laws extra-territorially in order to overcome such hurdles.

It was also noted by participants that good procurement and/or internal monitoring processes by organizations contracting PMSCs (whether they be intergovernmental organisations, states, corporations, humanitarian organisations etc.) can and should play an important role in holding PMSCs accountable by such clients. Clients could potentially build the CoC into their contracts with PMSCs.

On the question of how more directly an international CoC could be implemented, some PMSC-contracting participants indicated that they potentially would require PMSCs to abide by such a code.

Several participants indicated that in general they were supportive of the establishment of some kind of international secretariat, though clearly further discussion was needed to determine its nature and scope. There was some discussion on what should be the nature of any body that might administer the international CoC, as well as at what stage in the international CoC process an international body should be established – whether it should be established early-on to facilitate the elaboration of a CoC, or at a later date after the CoC’s establishment.

A potential distinction was drawn by participants between a body that would administer an international CoC (potentially an international secretariat) and a body that would arbitrate on it (potentially an arbitration panel).

On the international secretariat, some existing organizations were mentioned as being possible (professional) models of its potential structure. These included national bar councils or law societies, indicating that the role of an international body on PMSCs could be to act as a professional association upholding identified industry standards, receiving dues from members and applying a graduated scale of sanctions or even expelling non-compliant members. Some mentioned that a registry could play a pivotal role in this context, with clients of PMSCs benefiting from a registry that clarifies which PMSCs are in compliance with the CoC. IATA was also mentioned as a possible model, with one participant mentioning that the value of a “seal of approval” given by such an organization was potentially a significant element in any future international secretariat for PMSCs. Participants considered whether this international secretariat would contain a publicly-accessible list of PMSCs abiding by its standards.

At least one participant raised concerns on the legal status of such a body, highlighting the possibility of legal actions against such a body by a PMSC expelled or sanctioned by it. Participants felt that further discussion was needed on this, with discussion on what would be its legal liabilities, including whether it would be liable not only for information it published on PMSCs, but also for information which it failed to publish. The jurisdiction in which any such international body was based/incorporated was therefore an important issue to consider.

One participant felt that structurally, any body established should comprise both key buyers and key suppliers of PMSC services. Other participants also made it clear that they considered that any international secretariat should be independent of direct government control.

One participant expressed concern that expulsion from a professional association was a weak sanction when the situation concerned a violation of human rights, and that there therefore needed to be accountability under national or international judicial systems in such situations. The desirability of any international secretariat having the appropriate level of transparency was also expressed by several participants, as well as having the capacity to receive complaints.

As regards the international arbitration element of the enforcement of an international CoC, participants broadly welcomed this as a potential method of enforcement. Several participants highlighted that arbitration was a well-established and respected form of conflict resolution that PMSCs could submit to voluntarily in signing-up to the CoC. Some participants raised concerns over the transparency of arbitral proceedings, noting that other international arbitrations had been criticized widely for having “closed door” proceedings, but it was noted that this could be provided for in the contractual terms relating to the arbitration. It was further noted that the arbitration panel could potentially include experts in the relevant field, for example human rights, and that again this was something that could be provided for in the contractual terms relating to it. There was broad agreement that while such arbitration could potentially freeze civil investigations and

actions, it should not preclude criminal investigations into allegations of human rights abuses and other criminal misconduct.

There was also a related discussion on the distinction between criminal and civil liability and how it would relate to an international CoC. The question was raised as to whether an international body could or should have any role with regard to evidence-gathering, either for civil or criminal proceedings. Participants also considered whether an international CoC should require potential criminal activities to be reported to the relevant authorities, and who those authorities might be. One participant considered the situation where contractually a user of PMSC services might be required to report an individual to a State where human rights standards are not reached, such as a failure to guarantee a prohibition on torture or the death penalty. That participant wondered what moral or legal conflicts this might raise, though another participant considered that abiding by human rights standards may override contractual duties.

Related to the discussion on criminal and civil liability, participants noted that in some jurisdictions it was not legally possible to prosecute corporate entities, but only natural persons. Even in those jurisdictions where it was possible to prosecute corporations, it was noted that practically it was extremely difficult to bring about such a prosecution.

The question was also raised as to whether requiring PMSCs to be affiliated by an internationally established body or abide by an international CoC might create competition law issues at national, regional or international (specifically WTO) levels.

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 present itself as an alternative to State regulation. They noted that the workshops had included a broad stakeholder representation, including various representatives of PMSCs, client-states, intergovernmental organizations, NGOs and academic institutions. The leading-role that industry should take in the ongoing process was again reiterated, with the workshop participants noting that the next step in the process was the holding of the Wilton Park Conference in Nyon in early June 2009.