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Workshop of Governmental Experts and Industry Representatives on Private Military / Security Companies 16-17 January 2006, Zurich, Switzerland

Summary of the Chair

1 September 2006

On 16 and 17 January 2006, the Swiss Federal Department of Foreign Affairs, in cooperation with the International Committee of the Red Cross (ICRC), convened a workshop on private military / security companies (PMCs/PSCs) operating in conflict areas. Governmental experts from Austria, Canada, France, Germany, South Africa, Switzerland, Ukraine, the United Kingdom and the United States of America participated in the workshop. Also taking part were representatives of the ICRC and, on the first day of the workshop, industry representatives, namely from the United Kingdom and the United States industry associations and two companies, as well as two independent experts. Participants expressed their views in their personal capacity.

The workshop constituted a first step of the inter-governmental initiative launched by Switzerland, in cooperation with the ICRC, to promote respect of international humanitarian law and human rights law with regard to PMCs/PSCs operating in conflict situations. As stated in the annexed Outline, the objectives of this initiative are:

1. to contribute to an inter-governmental discussion on the issues raised by the use of PMCs/PSCs;
2. to reaffirm and clarify the existing obligations of states and other actors under international law, in particular under international humanitarian law and human rights law;
3. to study and develop options and regulatory models as well as other appropriate measures at the national and possibly regional or international level and
4. to develop, on the basis of existing obligations, recommendations and guidelines for states to assist them in meeting their responsibility to respect and ensure respect for international humanitarian and human rights law, including by national or regional regulation.

Format of the Meeting

The workshop was intended to be an informal occasion for governmental experts to engage in a dialogue among themselves and with representatives of the industry, to share experiences and to discuss possible ways of promoting respect for international law with regard to the operation of PMCs/PSCs in conflict situations. On the basis of the above-mentioned objectives of the initiative, the meeting also aimed at identifying issues that may need to be addressed.

The first day of the workshop was devoted to a general presentation of the phenomenon and of the existing national and international legal framework in which PMCs/PSCs operate (see the annexed Agenda). Industry representatives then outlined steps they were taking, either individually or through industry associations, to promote "best practices". The second day was a forum reserved for government representatives to discuss issues that had been raised

on the previous day; means by which they could be addressed; possible and meaningful elements of national regulation and model contracts; and possible ways forward at the national, regional and/or international level.

Relevant International Law

At the beginning of the workshop, several speakers outlined relevant areas and rules of international law (see presentations annexed). One central conclusion of the discussion on the applicable law was that international legal obligations cannot and must not be circumvented by states through the use of PMCs/PSCs.

Relevant international legal rules which cannot be circumvented by hiring PMCs/PSCs include for instance the prohibition of the use of force against another state, a cornerstone of international law. States also have the duty not to intervene in the internal affairs of any other state. While some states are bound by the AU Convention of 1977 for the Elimination of Mercenarism in Africa and the UN Convention of 1989 against the Recruitment, Use, Financing and Training of Mercenaries, there is no universal prohibition of mercenarism. Most staff of PMCs/PSCs do not fit the definition of “mercenaries” contained in Article 47 of the 1977 Additional Protocol I to the Geneva Conventions. Since the issue of mercenarism thus relates only to a small part of the contemporary phenomenon of PMCs/PSCs, there was general agreement that it should not be the focus of the initiative. States however remain free (subject to other international obligations) to outlaw certain activities of PMCs/PSCs.

The speakers furthermore underlined the obligation of states to respect and ensure respect of international humanitarian law and international human rights law. This obligation is relevant not only for states contracting PMCs/PSCs, but also with regard to states on whose territory PMCs/PSCs operate and states in which PMCs/PSCs are incorporated.

States that contract PMCs/PSCS have some clear responsibilities: first, they cannot absolve themselves of their obligations under international law by hiring PMCs/PSCs; secondly, they must ensure respect for international law by the PMCs/PSCs they contract; thirdly, they are responsible for violations of international law committed by the PMCs/PSCs that can be attributed to them; and, finally, like all states, they must investigate and, if warranted, prosecute violations of, most particularly, international humanitarian law alleged to have been committed by the staff of PMCs/PSCs – an obligation that applies *a fortiori* if they have hired the company.

International law traditionally regulates inter-state relations and does not typically address private actors. However, certain rules of international law, not least in armed conflict situations, are of direct relevance to the activities of the staff of PMCs/PSCs. International humanitarian law as well as international criminal law establish clear obligations for individuals, including employees of such companies. However, international humanitarian law only applies in situations of armed conflict, be it of an international or non-international character. International human rights law (e.g. the UN Covenant on Civil and Political Rights of 1966) and soft law standards (e.g. the UN Code of Conduct for Law Enforcement Officials of 1979 or the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials of 1990) may also be of relevance to the activities of PMCs/PSCs. Moreover, individuals who commit serious violations of international humanitarian law or gross violations of human rights may incur criminal responsibility directly under international law and may be prosecuted by national or international tribunals.

While the existing legal framework addresses many issues raised by PMCs/PSCs, a key challenge remains to ensure respect of the relevant international humanitarian law and human rights standards by all relevant actors as a matter of practice.

Measures Taken by the Industry to Promote Respect for International Humanitarian Law and Human Rights

Industry representatives presented measures taken by their companies to ensure and promote respect for international law, including vetting procedures and modalities in the recruitment process, training in human rights and international humanitarian law, adoption of clear operating procedures and rules of engagement, internal disciplinary systems, and the rejection of contracts that might involve illegal activities. Industry associations are currently working on establishing standards and procedures to self-regulate the provision of private security services.

Deliberations

General Aspects

The workshop was welcomed by participants as the first time governmental experts were brought together to discuss issues relating to PMCs/PSCs and respect for international humanitarian law and human rights.

During the first session of the workshop, it was underlined that the use of PMCs/PSCs in conflict situations as well as in post-conflict situations and in states lacking effective security sector institutions) is not a new phenomenon. What is new, are their numbers as well as the nature of their activities. Today, companies are being used for typical security functions such as the protection of personnel and property of governments, international organisations, non-governmental organisations, and, not least, other private industry and business in high-threat environments, including international and non-international armed conflict. In addition, they have provided tasks such as setting up military logistics, servicing weapons' systems, collecting intelligence, manning check-points, protecting military convoys and other services that may result in direct participation in hostilities, whether intended or not. Participants agreed that PMCs/PSCs are likely to remain a reality on the ground and that the phenomenon is likely to increase in importance.

When identifying the issues to be discussed and the standards to be respected and ensured by a particular company, participants did not focus much on whether a specific firm could be labelled as a "private military company" or a "private security company", but rather on what services the company provided. Several participants reflected on how to define the services for which standards and potential regulation should be discussed.

While several participants pointed out that the delegation of certain tasks in conflict situations to private military and security companies may be beneficial to the communities and nations affected by the conflict, it was also mentioned that the use of private companies for the provision of military or security services may lead to a loss of accountability and political legitimacy and weaken the state's control over the legitimate use of force. The delegation of typical state functions to private actors may in some cases weaken state-building efforts and state institutions and more generally undermine the notion of security as a public good. Such adverse effects should be considered and limited as much as possible. Also, private actors have been resorted to at times to carry out prohibited activities such as the unlawful use of force against another state by proxy. Several participants underlined that the delegation of tasks that may involve the use of deadly force or weapons to private actors requires particular attention and needs to be regulated and controlled to ensure proper conduct and accountability. Yet, many states concerned by the phenomenon do not have any national regulation on PMCs/PSCs.

Some participants pointed out that reliable empirical facts and studies on the phenomenon still are scarce and that further empirical research would be useful. Also, few studies had

been carried out on the effects of the use of such companies and on their conduct on the ground, including with regard to the affected population and respect of international humanitarian law and international human rights law. One particular issue raised in this respect was that the affected population is frequently unable to identify the staff of the PMCs/PSCs, which makes it difficult to complain about alleged misbehaviour and elucidate facts. A further question identified by some participants as a useful topic for further research was the applicability of international human rights law and standards and potential state responsibility for violations of international standards by PMCs/PSCs. Some participants also raised the idea of developing model contracts and study “best practices” of companies as well as states and possibly other actors contracting such companies (international and non-governmental organisations, companies).

Regulation

The need for regulation of the private military and security industry was extensively debated, with participants emphasizing the potential for enhancement of the governmental control over the activities of PMCs/PSCs. The adoption of appropriate national (and possibly regional) regulation with regard to the operation of PMCs/PSCs in conflict situations was identified as a possible means helping states to comply with their obligations under international law and in particular the obligation to respect and ensure respect for international humanitarian law and international human rights law.

Regulation may be considered more particularly by states that contract such companies, states on whose territory they operate, and states in which such companies are incorporated. Yet, only few states have relevant legislation regulating the provision of private military or security services abroad and/or laying down procedures for licensing or authorizing PMCs/PSCs to operate. However, several governments currently contemplate regulating the industry. Also, governments as well as other clients of transnational private military or security services reflect on appropriate standards for contracting PMCs/PSCS. Presentations by experts from states with relevant national regulation and from states that are considering the adoption of regulations provided an opportunity to exchange experiences and views.

A preliminary question any regulator will need to address is how to define the services to be addressed by regulation and whether the provision of certain services should be excluded. Another issue raised was how to ensure appropriate accountability and monitoring (by what body, what to monitor, how should affected individuals be enabled to file complaints and identify wrongdoers).

Participants reflected on options of elements of regulation. With regard to states that *contract* such companies, possible steps such as the following were brought up:

- determination of which activities may or may not be outsourced;
- requiring the company by the terms of the contract:
 - o to vet its employees;
 - o to train its employees in international humanitarian and human rights law, both generally and in a context- and task-specific manner in accordance with specific contract;
 - o to adopt standard operating procedures and rules of engagement in compliance with international law and in accordance with their mandate under the contract;
 - o to provide for internal disciplinary sanctions and to take measures to allow affected persons to complain about misconduct; and
 - o to obtain the approval of the contracting state for any sub-contracting of contract tasks;

- inclusion in the contract of a reminder of accountability for violations of international humanitarian law and international human rights law;
- measures to monitor performance and enforce compliance with the contract and the law, including supervision of performance; sanctions for violation of the contract such as termination, barring from bidding again, or contract penalties; and ensuring there is a system to bring to justice alleged perpetrators of crimes, in particular international crimes.

The above elements might provide recommended elements also for the hiring of PMCs/PSCs by entities other than states, such as transnational companies, international organisations and non-governmental organisations.

With regard to states on whose territory PMCs/PSCs *operate*, options of elements of national regulation that were mentioned included:

- a requirement to obtain a *general operating licence* for companies to provide specified security/military services on the state's territory;
- determining specific activities that PMCs/PSCs can be licensed to carry out within the state's territory;
- conditions for the approval of *licenses for specific activities* (e.g. context- and task-specific training of personnel; standard operating procedures and rules of engagement in compliance with international law; permissible tasks and weapons, including provisions for the legal acquisition of weapons; internal disciplinary systems; re-affirmation that the law must be respected etc.);
- establishing systems for monitoring compliance and measures to promote transparency;
- sanctions for operating without registration or license or in violation thereof; and
- establishing mechanisms for holding perpetrators of crimes accountable under law.

Several of the above-mentioned elements with regard to territorial states were considered as potentially relevant in a regulatory framework that could be adopted by the states of incorporation of PMCs/PSCs offering services in conflict situations abroad. Such 'home states' of PMCs/PSCs are those from which private military or security services are "exported" – to other states or to international non-state clients such as transnational corporations, non-governmental organisations or international organisations. As is the case for controls established over the export of military goods and weapons, such states could establish means for controlling the international transfer of military or security services through national regulation (export controls). It was also suggested that such controls would be co-ordinated at the regional level, following models such as the European Union's Code of Conduct on the Export of Arms.

Participants also discussed the idea to further study options of regulatory models and to develop, on the basis of existing obligations, recommendations for states relating to possible elements of national (or other) regulation and contracts. How such recommendations would be implemented at the national level and how the national regulation would be conceived could in principle be left in the competence of the states.

The Swiss initiative in cooperation with the ICRC is primarily addressed to states. However, standards would also usefully be considered and elaborated for the contracting of PMCs/PSCs by entities other than states. Initiatives in this regard and other measures such as self-regulation by the industry appear to be useful complementary approaches and are currently being considered. Addressing the issues raised by PMCs/PSCs from different angles and in different fora can promote complementary and mutually reinforcing layers of control and regulation.

Conclusions

Participants welcomed the initiative and encouraged the organizers to pursue it and facilitate further inter-governmental exchange on the issue. Similar indications had been received in consultations prior to the workshop, including from governmental experts from countries on whose territories PMCs/PSCs had been or were still operating.

Participants agreed that states have obligations under international law that cannot be circumvented by the use of PMCs/PSCs. Relevant obligations include the prohibition of the use of force and the prohibition of interference in the internal affairs of another state as well as obligations under international humanitarian law and international human rights.

Participants concurred in principle that there may be a role for regulation to address current issues with regard to the transnational use of PMCs/PSCs. Appropriate regulation may help states to heed their obligations under international law and, more particularly, promote better respect of international humanitarian law and human rights. Participants expressed an interest to discuss regulatory options and possible standards on an intergovernmental basis.

Next Steps

Switzerland, in cooperation with the ICRC, will pursue its initiative on the basis of the analysis and objectives reflected in the attached outline and strive to facilitate further inter-governmental exchange on the issue. Documents and additional information are available on the initiative's website (www.eda.admin.ch/psc).

Following the workshop, consultations with interested governments as well as other stakeholders and experts will be continued and broadened, including on potential end products of the process and appropriate fora for deliberating and, possibly, adopting such products.

A meeting of governmental experts from a larger number of states is planned for November 2006.

A possible forum for discussion of certain aspects of the initiative and, possibly, their further development may be the International Conference of the Red Cross and Red Crescent Movement scheduled to take place in November 2007.

Best regards,

Paul Seger