



Expert Meeting of Governmental and Other Experts on Private Military and Security Companies, 13-14 November 2006, Montreux, Switzerland

Chair's Summary

22 July 2007

Executive Summary

On 13 and 14 November 2006, the Swiss Federal Department of Foreign Affairs, in cooperation with the International Committee of the Red Cross (ICRC), convened a meeting in Montreux of governmental and other experts as well as industry representatives on the topic of private military and security companies (PMCs/PSCs) operating in conflict areas. The meeting followed a first international expert workshop on the same topic in January 2006 in Zurich. Both meetings are part of an initiative launched by Switzerland, in cooperation with the ICRC, to promote respect for international humanitarian law (IHL) and human rights law by PMCs/PSCs operating in conflict situations. Further meetings will be convened. The present Chair's Summary reflects the discussions at the Expert Meeting of 13/14 November 2006.

With regard to the initiative's objective to reaffirm and, as far as necessary, to clarify the existing obligations of States in their relationships with PMCs/PSCs operating in conflict situations, three different scenarios were examined at the Meeting:

- 1) States that hire PMCs/PSCs
- 2) States on whose territory PMCs/PSCs operate
- 3) States of "nationality" of PMCs/PSCs¹

The discussion showed that certain well-established rules of international law apply with regard to the relationship between States and PMCs/PSCs which can be summarized as follows:

- States remain bound by existing obligations under international law in general and IHL and human rights law in particular when they hire PMCs/PSCs or when such companies operate on or from their territory.
- States cannot circumvent their obligations regarding the prohibition of the use of force according to the UN Charter by resorting to PMCs/PSCs.
- When a mission or mandate executed by a PMC/PSC is as such in conformity with international law, the operations of the company must respect IHL and human rights law, as applicable.
- States have to ensure that their obligations under international law with regard to PMCs/PSCs are put into effect. To that end, they may have to undertake appropriate regulatory/administrative and/or judicial measures at the domestic level.
- The rules of international responsibility of States apply to acts of PMCs/PSCs that are attributable to particular States.

The Expert Meeting furthermore discussed possible practical steps States may take to ensure respect of IHL and human rights law. With regard to States hiring PMCs/PSCs they include: company selection mechanisms, quality standards, vetting procedures, appropriate training of individual operatives, etc. Further issues considered were how to ensure appropriate monitoring and accountability, for instance by making available complaints and criminal justice mechanisms.

With regard to states in whose territory PMCs/PSCs operate, different regulatory options were discussed such as the requirement for PMCs/PSCs to obtain an operating licence prior to being allowed to provide designated military/security services.

With regard to states from whose territory military/security services are exported, participants similarly discussed different regulatory options, including requiring a general operating licence or the approval of individual contracts. One idea considered was to draw on or appropriately amend existing national regulations on arms export controls.

¹ The state of nationality of a PMC/PSC is the state where that company is incorporated or has its siege social or still another relevant criterion under the national law concerned for establishing the nationality of a company.

1. Introduction

On 13 and 14 November 2006, the Swiss Federal Department of Foreign Affairs, in cooperation with the International Committee of the Red Cross (ICRC), convened a meeting in Montreux of governmental and other experts as well as industry representatives on the topic of PMCs/PSCs operating in conflict areas. The meeting followed a first international expert workshop on the topic in January 2006 in Zurich.² Both meetings are part of an intergovernmental initiative launched by the government of Switzerland, in cooperation with the ICRC, to promote respect for international humanitarian law (IHL) and human rights law by private military and security companies (PMCs/PSCs) operating in conflict situations.³ This initiative does not aim at working out a new legally binding international instrument, but rather, firstly, to reaffirm and, where necessary, to clarify existing international legal obligations of states and other actors, in particular under IHL and human rights law. Secondly, the initiative aims at studying and developing good practices to assist states in promoting respect for IHL and human rights by PMCs/PSCs. Each state, however, retains its discretion to regulate, restrict, or prohibit security and military services on or from its territory. Also, this initiative is without prejudice to any other obligation that a state may have under international law.

At the first workshop in January 2006, participants welcomed the initiative and expressed their interest in continuing inter-governmental exchange on the relevant international law and in compiling good practices and regulatory options to assist states.

The November 2006 meeting therefore build on the discussions and results of the January 2006 workshop. It was intended to provide a forum for governmental experts to engage in an informal dialogue on the subject. The meeting brought together mainly government experts from states with experience relevant to the private military and security industry operating in conflict situations, that is, in particular, from states on whose territories such companies operate, states that contract such companies, and states of nationality of the companies (e.g. states where a PMC/PSC is incorporated or has its headquarters) or whose nationals are employed by these companies. Participants at the November meeting included government experts from Afghanistan, Angola, Australia, Austria, Canada, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, Ukraine, the United Kingdom and the United States of America, and representatives of the ICRC. A small number of representatives from industry associations and companies, as well as independent academic, NGO and other experts attended parts of the meeting.

The first part of the meeting, held in plenary, focused on the phenomenon of the private security sector, its use not only by states but also by humanitarian actors, its impact on local populations, and some recent developments in terms of national regulation.

The meeting then broke up into three working groups for more focused discussions on specific issues. The first working group considered existing international legal obligations, especially those under IHL and international human rights law. The deliberations of this group are summarized in section 2 below. The second working group studied steps that states that hire PMCs/PSCs could take to promote respect for IHL and human rights by these companies (see section 3). The third working group discussed options for, and possible elements, of national regulatory frameworks for the states of nationality of PMCs/PSCs and for those states in whose territory they operate (see section 4).

While the good practices discussed in the framework of the initiative are primarily addressed to states, some may also be of interest and provide useful guidance to other actors, including clients other than states that enter into contracts with PMCs/PSCs and to the industry itself. The participants generally agreed that the multi-faceted issues regarding PMCs/PSCs operating in conflict areas need to be addressed by the different actors involved, including states, other clients, and, last but not least, the industry itself.

2. Pertinent International Obligations under IHL and Human Rights Law

Participants re-iterated the view expressed at the January 2006 Expert Workshop⁴ that it would be helpful to identify and compile a list of the main existing international legal obligations - especially those under IHL

² See Workshop of Governmental Experts and Industry Representatives on Private Military / Security Companies, 16-17 January 2006, Zurich, Summary of the Chair (1 September 2006), available at www.eda.admin.ch/psc.

³ See the outline of the Swiss initiative, available at www.eda.admin.ch/psc.

⁴ For a reflection of aspects of international law discussed at that meeting, please refer to the Summary of the Chair of the January 2006 meeting, see footnote 1 above.

and human rights - of states with regard to the operation of PMCs/PSCs, as well as the obligations of the personnel in the companies.

Existing International Obligations of States

The basic premise is that states have obligations under IHL and international human rights law that also govern their relationships with PMCs/PSCs. All states must respect, and ensure respect for, IHL and international human rights law. Further, all states must repress and prevent war crimes and other violations of IHL.

There were separate discussions on the different obligations of those *states that resort to the services of PMCs/PSCs*, those states on whose territory PMCs/PSCs operate, states of nationality of PMCs/PSCs, and those states whose nationals are PMC/PSC employees, since states' obligations vary depending on the nature of their relationship to these companies. The following points emerged:

- First, states that employ the services of PMCs/PSCs must not use these companies to violate the customary prohibition on the threat or the use of force as reflected in the UN Charter.
- Secondly, they cannot evade their international legal obligations by hiring PMCs/PSCs.
- Thirdly, states that hire PMCs/PSCs may incur responsibility for violations of IHL and HR committed by the personnel of these companies that are attributable to these states according to the international rules on state responsibility. This is particularly the case if the PMCs/PSCs or their personnel are organs of the state (e.g. if they are incorporated into the armed forces of the state), if they are empowered to exercise elements of governmental authority, or if they are acting on the instructions of the state or under its direction or control.

States on whose territory companies operate have, firstly, the basic IHL obligations of all states to respect and ensure respect for IHL and to repress and prevent violations. Secondly they, have a responsibility to respect and ensure human rights, including bringing to justice the personnel of PMCs/PSCs who are suspected of violations of human rights when this is required either under national or international law.

States of nationality of the companies also have obligations under international law. Again, these states must adhere to the basic IHL obligations binding on all states (to respect and ensure respect for IHL and repress and prevent violations). However, participants felt that the obligations of states of nationality under human rights law needed to be further explored, especially the circumstances in which the conduct of a PMC/PSC would trigger legal obligations for its state of nationality.

Existing Obligations of the Staff of a PMC/PSC and of the PMC/PSC Itself

In addition to the obligations of states, the first working group also considered the legal obligations of the employees of a PMC/PSC and their superiors and, insofar as these exist, the legal obligations of the companies themselves. In this regard, national law, especially the law of the state in which the companies operate, but possibly also the law of the state of nationality of the PMC/PSC or even of the contracting state is of particular relevance. Both the PMCs/PSCs themselves and their personnel must respect the obligations imposed upon them by the relevant national law.

With regard to international law, the personnel of a PMC/PSC whose conduct takes place in the context of, and is associated with, an armed conflict must respect IHL. Insofar as these personnel can be considered agents of a state, they must also respect international human rights law.

In addition, personnel may incur individual criminal responsibility directly under international law if they commit violations of IHL or human rights that are crimes under international law. They may also face criminal prosecution for violations of human rights that are recognized as criminal under either national or international criminal law. Individuals in senior positions, such as directors or managers of PMCs/PSCs and military commanders, may become criminally responsible for crimes under international law committed by subordinates who are under their effective authority and control as a result of their failure to exercise proper control over them.

3. Good Contracting Practices

The second working group studied steps that could be taken by states that hire PMCs/PSCs to promote respect for IHL and human rights by these companies and their employees. Participants recognized the key role of the hiring state in terms of accountability. The discussion touched on such issues as how to select a company, what terms to include in the contract, monitoring and accountability/compliance issues, and legislative measures that might be considered.

Prior to discussing the practical steps that can be taken when hiring PMCs/PSCs, participants briefly highlighted the fact that governments may first need to determine which, if any, activities may or may not be contracted out to PMCs/PSCs. Although this policy question was considered fundamental, its discussion was deemed to be beyond the scope of the meeting.

Participants considered that *appropriate company selection* may contribute to promoting standards to be respected by PMCs/PSCs and their personnel. It was stated that the contracting government needs to apply due diligence with regard to choosing a company. This could include an examination of its prior track record and possible ties to criminal activities, as well as perhaps checking the background of employees. A company should not be selected only on the basis of cost. Quality criteria to consider may include aspects as diverse as good internal company governance and compliance mechanisms, vetting procedures, accurate employee records, training, how standards have been implemented in the past, and the financial situation of the company, including adequate insurance cover for the company and for its employees. In order to facilitate an informed decision on awarding contracts, the company could be required to provide specific information and documents. Some governments have developed a questionnaire that PMCs/PSCs have to complete when applying for contracts.

Participants agreed that states hiring PMCs/PSCs should require them to meet certain *minimum requirements* and that an effective way to do so is to include appropriate stipulations in the *contract*.

- A first requirement discussed was that the companies and their personnel should undertake to *respect applicable national and international law*. With regard to national law, the applicable national legislation, including criminal law, and regulations of the state in whose territory the PMCs/PSCs operate must be respected. For instance, PMCs/PSCs and/or operatives performing the contract may have to be registered or licensed to operate in that state's territory. Moreover, the hiring state usually will require that its own regulations and laws are respected. In some cases, laws of other states such as the state of nationality of the company, may need to be considered.
- Among the practical steps to be taken by companies to promote proper conduct, participants mentioned *background screening* of prospective private military or security operatives, and checking, for instance, potential employees' criminal records, including whether they have been involved in breaches of international law, especially serious violations of international human rights law or IHL, or whether they have been dishonorably discharged from armed forces. Accurate employee records facilitate more effective state oversight.
- Participants agreed that PMCs/PSCs should be required to ensure that the operatives to which private military or security services are entrusted have been adequately *trained*, both generally and in a task- and context-specific manner appropriate to each specific contract, including on human rights and, where appropriate, IHL. Armed operatives must be trained in the use of weapons, and the contracting state, as well as the PMC/PSC, should ensure that they receive clear and adequate guidelines on how to behave in any given situation, including standard operating procedures/rules of engagement consistent with the applicable law. Especially in cases where the operatives come from abroad, training in matters such as religious, cultural and also gender issues may be particularly relevant.

Among the administrative measures to be taken, the working group discussed the fact that any *subcontracting of duties or services* would need to be approved by the hiring state, and that the subcontractor would need to meet the same standards as the main contractor. Another way to ensure proper conduct is to require all military and security operatives to be *identifiable* (whether at distance or on demand, e.g. through a non-transferable ID) whenever they are discharging their tasks. At the same time it is important to avoid any confusion with the personnel of official authorities.

Participants also stated that there should be an appropriate and effective *complaints mechanism* for persons affected by the operations of PMCs/PSCs. Furthermore, participants stated that the hiring state should require a PMC/PSC to carry out a thorough and prompt *internal investigation* in the case of allegations of wrong-doing by its personnel, and to facilitate investigation into any criminal acts by the competent judicial authorities. Participants also discussed that the contract should provide for sanctions against a company or even individual wrongdoers for any violation of a contract.

The working group also discussed ways in which the hiring state could exercise appropriate supervision and enhance transparency in hiring PMCs/PSCs. In this respect effective cooperation with the host state was considered essential. Participants also stressed that hiring states should ensure that effective mechanisms, including cooperation with other states, are in place to make sure that the personnel of

PMCs/PSCs do not enjoy impunity for violations of human rights and IHL that constitute crimes under international law.

4. Possible Elements of Regulation by States in whose Territory PMCs/PSCs operate and States of Nationality of PMCs/PSCs

The third working group discussed steps that could be taken by states in whose territory PMCs/PSCs operate and by states of nationality of such companies. Participants agreed that it was up to individual states to decide whether they needed to adopt specific legislation to regulate the activities of PMCs/PSCs operating in their territory or the "export" of services by companies based in their territory and how that legislation should be conceived, or whether the existing national legal frameworks were sufficient, including in view of obligations under international law. The working group considered possible approaches and the types of issues that could be taken into account.

a. Possible Elements of Regulation by States in whose territory PMCs/PSCs operate

A number of different regulatory options were identified and discussed: PMCs/PSCs could be required to obtain an operating licence in order to be allowed to provide military/security services; they could also be required to obtain approval for individual operations. Furthermore, individual employees could be required to obtain operating licences.

One option that a number of participants recommended was to require all companies, both national and foreign, that provide a defined type of military/security services to apply for an *operating licence* for a fixed, renewable period of time. In contrast, some participants expressed concern that additional contract-by-contract approval would be overly cumbersome. They pointed out that the types of activities that would be permitted could be stated in the operating licences. Several participants considered "notification" of the identity of individual operatives a possible additional element.

Among the possible *criteria* and requirements that a company should meet to obtain an operating licence, participants mentioned the provision of information about the company, its owners and its employees, the posting of a bond, an undertaking to comply with local law (criminal law, immigration law, labour law, tax law, etc), the vetting of personnel, the training of personnel in national law and human rights and, where appropriate, IHL and local culture. Depending on the law of the state of nationality of the PMC/PSC, an operating licence and/or authorisation could be required. Furthermore, participants stressed that several of the elements of good contracting practices that were discussed in the respective working group could also serve as criteria for the approval of an operating license.

Participants also mentioned that the state in which the PMC/PSC is operating would usefully determine the types of activities that these companies can or cannot perform. Some participants mentioned law enforcement activities and participation in combat operations as examples of activities that could be excluded from being mandated to such companies.

The state in which PMC/PSC personnel operates could also determine whether such personnel are allowed to carry *weapons* and issue requirements relating to these, including, for example, specifying the types of weapons that PMCs/PSCs can use or import, requiring all weapons to be registered with a specified authority, requiring PMC/PSC personnel who carry weapons to obtain a local firearm licence, or requiring specific training and operating procedures in relation to the use of weapons.

Several participants expressed the view that, where practicable, a system for *monitoring compliance* with the operating licence as well as with applicable national and international law should be established. This could include, for instance, measures for identifying PMC/PSC operatives and vehicles, supervision by national or local authorities, and cooperation between the host state and the company's state of nationality. Participants also referred to the role of the media, NGOs, international organisations and others, including PMCs/PSCs themselves and their clients, in reporting violations of applicable law. In addition, it was mentioned that an easily accessible forum where persons adversely affected by the activities of PMCs/PSCs could register a complaint would be useful and important.

In terms of penalties for operating without the necessary licence, or for operating in violation of the terms of the licence, participants discussed options such as revoking the operating licence, forbidding a PMC/PSC to re-apply for an operating licence for a set period of time, forfeiting its bond, a fine, and making company directors responsible under civil or criminal law.

b. Possible Elements of Regulation by States of Nationality of PMCs/PSCs

Participants also discussed regulatory options for the states of nationality of those PMCs/PSCs that provide military and/or security services abroad. As in the case of states on whose territory such companies operate, the options ranged from a general operating licence which would allow companies to provide military or security services abroad to approval of individual contracts for providing military or security services abroad, and possibly also requiring individual employees to obtain operating licences.

Some participants raised doubts as to the practicability of licensing individual employees as they could be of several different nationalities and might never be in the company's state of nationality. An operating license permitting PMCs/PSCs to provide military or security services abroad was considered more feasible, but would not, on its own, provide a mechanism for states to scrutinize a company's particular operations abroad.

The *criteria* that a company could be required to meet in order to obtain an operating licence to provide services abroad were broadly similar to those that the "host" state could require: vetting personnel, training, but also properly audited accounts, adequate insurance covering, and a track record of professional competence.

With regard to approving individual operations or contracts, some participants pointed out that such approval processes could draw on national arms export control legislation or international instruments such as the 1998 EU Code of Conduct on Arms Transfers.

In addition, states could of course also *ban* outright the export of certain services such as direct participation in hostilities. A difficult question would be where to draw the red line.

Participants underlined that *monitoring* PMC/PSC compliance with the regulatory framework would be particularly challenging since it is difficult to monitor activities taking place in another state's jurisdiction, all the more so in the context of a conflict. The possible monitoring role of various other actors was considered, ranging from the diplomatic personnel of the company's state of nationality in the state where the services are being rendered, to NGOs, international organizations, the media or other independent bodies, including bodies specifically mandated with such a task.

In terms of sanctions for exporting military or security services without the necessary licence or for operating in violation of the terms of such a licence, participants again discussed options such as revoking the licence, forbidding the PMC/PSC to re-apply for a licence for a set period of time, a fine, and making company directors responsible under civil or criminal law.

5. Next Steps

Participants at the November 2006 Expert Meeting supported the further study and elaboration of:

- I) A list of pertinent legal obligations of states and company personnel with regard to the operation of PMCs/PSCs in conflict situations, in particular under IHL and human rights; and
- II) Good state practices, most particularly:
 - A. good (state) contracting practices;
 - B. regulatory options for states in whose territory companies operate; and
 - C. regulatory options for states of nationality of PMCs/PSCs.

In order to make further progress, additional meetings similar to the January and November 2006 Expert Meetings will be convened. To elaborate on some of the issues in more detail, some participants at the November meeting also suggested drawing on professionals who could share their specific expertise on the relevant international law or, for instance, on regulating, licensing, supervising and/or drafting contracts relating to security, military or other services.

To promote awareness and understanding of issues relating to respect for IHL and human rights with regard to the operation of PMCs/PSCs in conflict situations, the possibility was considered to present the Initiative's objectives to interested stakeholders at fora such as the International Red Cross Conference which takes place at the end of November 2007. The Initiative's website www.eda.admin.ch/psc will continue to offer information on the Initiative and on the issue more generally.

Switzerland, in cooperation with the ICRC, will continue its efforts to facilitate further meetings and dialogue among interested states and other stakeholders.