



UN LIBRARY TALK Programme

Discussion on the Evolution of Warfare

The Respect of International Humanitarian Law by Private Military and Security Companies

5th December 2018, UNOG, Geneva



Summative Report



UN LIBRARY TALK

Discussion on the Evolution of Warfare

Date: 5 December, 2018, 12:30- 14:00

Venue: UN Library, Geneva, Switzerland

Organiser: Centre for Socio-Eco-Nomic Development (CSEND)

Co-sponsor: UN Library Talks Geneva

Panellists and their Topics:

Raymond Saner, Director, Diplomacy Dialogue, Geneva. Topic: Introduction - the PMSC Industry.

Valentin Zellweger, Ambassador & Permanent Representative of Switzerland, to the United Nations and other International Organization in Geneva. Topic: International standard setting for PMSCs: a model for other areas?

Kelisiana Thynne, Legal Advisor, Advisory Services on International Humanitarian Law International Committee of the Red Cross (ICRC), Geneva. Topic: PMSC & International Humanitarian Law: the need for implementation.

Jamie A. Williamson, Executive Director, International Code of Conduct for Private Security Service Providers' Association (ICoCA), Geneva. Topic: The International Code of Conduct for Private Security Providers' Association.

Moderator: Dr Lichia Yiu, President, CSEND, Geneva

Number of Participants: Around 50 people.

Welcome Remarks were conveyed to the participants by Sigrun Habermann, Chief, Cultural Diplomacy, UNOG Library, Geneva



Summary of the Discussions:

Introduction by Dr Raymond Saner, Director, Diplomacy Dialogue, Geneva. Topic: Introduction - the PMSC Industry.

Thank you very much and it's pleasure to be here and to share the one and a half hours with you to talk about a topic that's maybe not well understood or known my most of you. I will just be giving an introductory speech giving you background on the industry of the private military and security companies. We have the expert panel who will address the issue of what it means for international humanitarian law, for human rights, as well as topics that you the audience will bring to the table. Before starting, Let me just summarize a few points.

Just to give you an example, the Kingdom of Saudi Arabia makes use of well-known Private Security Companies and also of Private Military Companies. They provide different services to the government as well as to the armed forces of Saudi Arabia. Another example is in East Timor, when East Timor gained independence, Australians troops present in East Timor also used Private Security Companies just to give you a few initial examples. There's a distinction to be made between Private Military Companies and Private Security Companies. The Private Military Companies provide their services to the armed forces, but if a Private Military Company is engaged in offensive combat-related activities, most experts would classify that company as providing mercenaries. Staff of Private Security Companies might for instance guard buildings



of humanitarian organizations and provide protection of the humanitarian organization's staff. However, there's a fluidity to these two terms because some of the companies do both and some have subsidiaries in different parts of the world. It's difficult to get reliable data on PMCs and PSCs but some data is publically available.

What kind of services do they provide? I have grouped their activities by category namely: advising/consulting, armed protection, technical support, military training, surveillance, intelligence, and cyber-security by the ten biggest Private Security Companies to give you an idea what they actually do and what services they provide.

It is difficult to get a good overview of this particular industry. Some industry experts value the PMCs-PSCs market as being worth US\$400 billion. Some of these companies employ locals, so there are also millions of staff working for the companies, the majority of the companies are registered in the U.S. and the U.K., but there are also some companies headquartered in Sweden and Spain. A more detailed assessment is provided in my publication mentioned at the end of this summary.



Private military industry actors



Private Military Company (PMC)

- Is a private company providing armed combat or security services such as guarding military bases or disposing of explosive ordinance. If involved in offensive combat, considered unlawful combatants (Geneva Convention)
- Private Security Company (PSC)
 - Is a private company which provides armed and unarmed security services and expertise to private and public clients mostly deals with security consulting and investigative services
- => **Lines between PMCs and PSCs are not always clear cut**, since both types of companies at times offer services in the two subfields -



Comments by the Moderator, Dr Lichia Yiu, President, Centre for Socio-Economic Development (CSEND):

I would like to look at what the legal and regulatory instruments are available and whether they are fit for purpose, and if yes, why, and if not, what needs to be improved?

Valentin Zellweger, Ambassador & Permanent Representative of Switzerland, to the United Nations and other International Organization in Geneva. Topic: International standard setting for PMSCs: a model for other areas?

It's a great pleasure to be here. So, thank you very much for choosing the topic of PMSC because it has not exactly been in the limelight these days. But you will remember that in 2003 when the Iraq War started, this was being discovered as one of the big topics. Although it was known that many military services, or armies, really cooperated with private military and security companies, in the Iraq War, we saw this type of activity on a larger scale. There was also an argument that these companies might not be covered by the classical instruments of the laws of war. I chose this topic because I think the approach that was chosen by states to regulate the activities of PMSC could be an interesting one for other areas. I'm not sure whether international law is entirely up to the task of regulating new technologies and challenges. We still have rigid and slow mechanisms to create law. And this is something that hurts us increasingly because it is so difficult to create a legal framework for all of these new phenomena that we see.

One possibility may be to look at the methodology that was chosen in the context of PMSC. As mentioned, in 2003, there was an argument that some of these PMSC were acting in a legal void. And this of course was a very difficult proposition for many of us to accept. The ICRC (International Committee of the Red Cross) and Switzerland chose to come up with a proposal to unite different groups of states. They invited territorial states where these companies are active, contracting states that contract these companies and host states, to come together to look at the existing law. This was done because while there was already a law in place, it needed to be clarified and we needed to make sure it was being applied.

This group comprised 17 countries that eventually signed the so-called Montreux Document. Its first part consists of the existing body of law regulating the activities of PMSC, consisting of human rights law, international humanitarian law, and general international law. The second part contains best practices that it was possible to agree upon. The document was signed in 2008 and



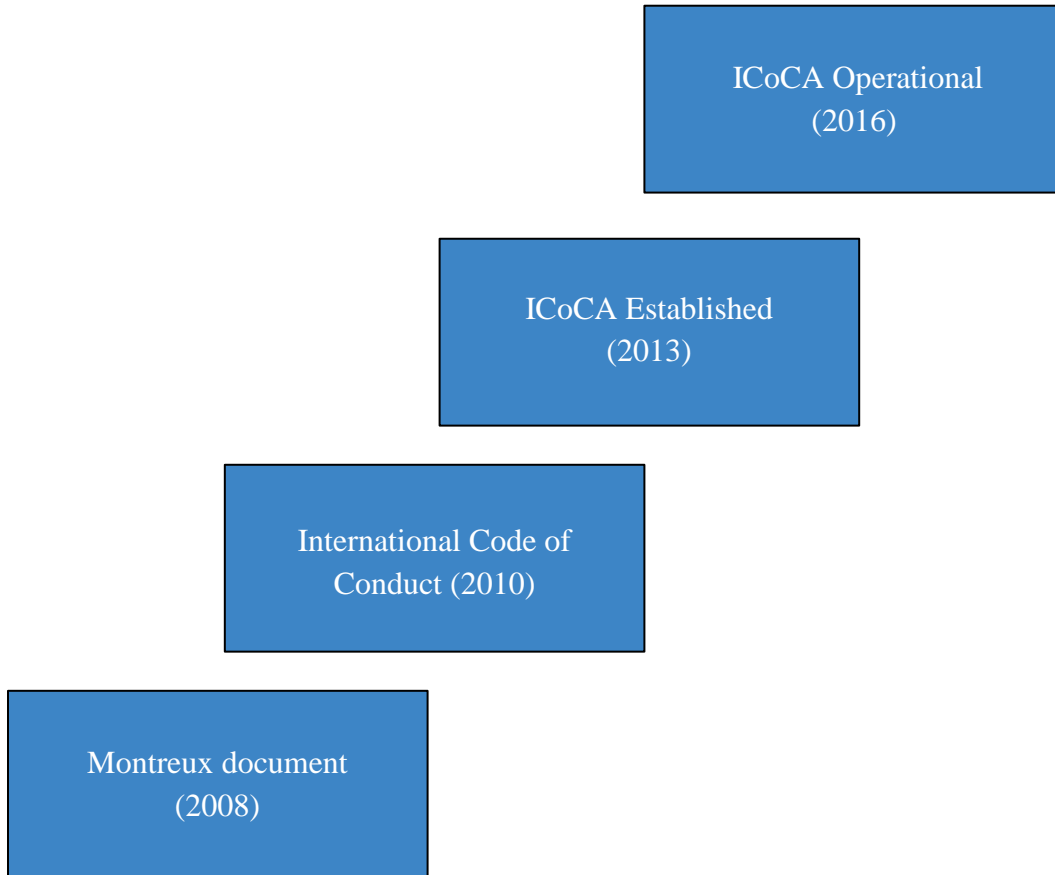
found widespread support. Today we have 54 states that signed it plus three international organizations (EU, NATO, and OSCE). It is an uncontested fact that the Montreux Document reflects the state of current international law relating to PMSC.

We now knew what the responsibilities and obligations of the states are, but we thought we also had to involve the other actors. So we brought together industry, governments, and civil society. Together they came up with the “International Code of Conduct” that reflects the rights and obligations of all involved actors. It was signed in 2010 and unites around 700 PMSC. I was later combined with a specifically created an association that provided it with a certification and monitoring mechanism (“International Code of Conduct Association”, ICoCA). So you see there are different layers of regulation, all pertaining to soft law.

In Switzerland, we added an additional layer. When legislating on PMSC, the Swiss parliament decided to prescribe in the law that all PMSC concluding a contract with the Swiss government have to be a part of the Code of Conduct Association. So they have to submit themselves to certification and also to the monitoring mechanism. All PMSC that have their headquarters in Switzerland also have to subscribe to the Code.

This is interesting in the sense that we have this soft international law. But by prescribing mandatory rules in the Swiss code, we made the whole system mandatory, at least for Switzerland. If other countries followed the same approach, you can change the international soft law regime into a comprehensive mandatory system on a regional or global scale.

This multi-layered approach may also work for other areas of international law. In cyber-space for example. Some people posit that there is also a legal void, but many governments do not agree with this. To clarify positions, it may be possible to have a similar process for cyber-space or other new phenomena.





Kelisiana Thynne, Legal Advisor, Advisory Services on International Humanitarian Law International Committee of the Red Cross (ICRC), Geneva. Topic: PMSC & International Humanitarian Law: the need for implementation.

The Montreux Document is relative effective, and it gathers together a number of existing laws and the many ways that governments need to implement these principles when they hire or register the private military and security companies (PMSC) or have them acting in their territory. There are humanitarian issues that arise from PMSCs when these companies operate without clear rules on the use of force; if they lack adequate training on international humanitarian law and other applicable law; if they conduct activities which should be within the remit of governments exclusively; and if states involved do not ensure effective accountability for possible violations of such companies of either international humanitarian law or domestic law, during times of war and conflict.

In 2016, the Common Article 1 to the Geneva Conventions, states that parties ‘undertake to respect and to ensure the present Convention [and IHL] in all circumstances.’ This means that states need to take responsibility for the PMSCs they register and hire to ensure that principles that adhere to the International Humanitarian Law are followed. There should be dissemination of the Geneva Conventions (GC) and IHL. Any legislation necessary should be enacted to provide effective penal sanctions for persons committing, or ordering to be committed, any breaches to the GC. This should be expanded to a broader range of war crimes and any necessary



measures should be taken to suppress all acts contrary to the provisions of the GCs, other than grave breaches. There is no legal void.

The Montreux document is needed to clarify and underline the fact that under existing international law, states have obligations with respect to the operations of PMSCs. There is a set of good practices on how to regulate the activities of PMSCs in national law the different groups of states; the territorial states, contracting state, or post states.

There are three main obligations of states:

- States may not contract private contractors for tasks that international humanitarian law explicitly assigns to states; for example, detention.
- States have to ensure respect for international humanitarian law by PMSCs and give effect to human rights law
- States have to investigate and, if required or appropriate, prosecute, extradite or surrender persons suspected of having committed international crimes, in particular war crimes

Better domestic implementation is needed in every state where PMSCs are present.





Jamie A. Williamson, Executive Director, International Code of Conduct for Private Security Service Providers' Association (ICoCA), Geneva. Topic: The International Code of Conduct for Private Security Providers' Association.

Allow me to take over from where Valentin left off and provide a few more details about the association and the work that we've been carrying out for the past year. Also, allow me to thank the organizers for putting together this panel to discuss these issues. A first question I would like to address is my motivation for being involved with the ICoCA, a fairly new endeavor with opportunities and challenges in terms of implementation

In my previous two careers, with international tribunals in Sierra Leone, former Yugoslavia, and Rwanda, and with the ICRC for nearly ten years, I have seen both ends of the spectrum of implementation of the international law, from prevention to accountability, and have engaged directly with the actors involved in those combative environments—the battlefields, where violations of international norms can occur. And this is very much where the ICoCA presents itself as a useful tool, by being able to engage directly with those private security actors that are involved in these environments.

In terms of evolution in the past ten years or so—post-Iraq and Afghanistan, we have clearly seen a growth in this industry, operating in complex environments. The Association, and the code of conduct, look beyond the operations of private security companies in armed conflicts, to consider all relevant operations along the conflict spectrum and in fragile environments.

The Code of Conduct and the work of the association builds on the Montreux document, and builds also on the UN Guiding Principles, through direct implementation and by addressing the question of “how do we engage directly with those individuals involved in environments where there might be human rights abuses?” How do we bring matters to the table in an impactful and effective manner, to ensure the respect of humanitarian law, human rights law, and other national laws?

The way that the ICoCA is set up is innovative as it brings together all of the main stakeholders. First, there are governments, with the legislative and regulatory perspective, and at present, we have seven ICoCA government Members. This is insufficient, and with 54 Montreux Document signatories, it should be feasible to have more countries at the table. Second, we have private security companies, with over 90 members, operating in over 30 countries. The third set of actors is civil society organizations. They are the ones who will ultimately see the effects of security companies' operations in a variety of contexts. Nearly 30 CSOs work with ICoCA in terms of monitoring the actions of security companies.



The Board members represent all three pillars and the Secretariat is based in Geneva. The functions of the Association are threefold, Monitoring, Certification and Complaints, being implemented in an integrated manner. The aim is to raise companies' standards through industry and ICoCA certification processes. With the monitoring piece, ICoCA oversees the operations of companies to assess what exactly is happening and actual conduct.

And finally, individuals can submit complaints to the association in regard to allegations of wrong doing by member security companies in different parts of the world. And ideally, all these functions come together by raising standard, creating oversight and transparency, and by providing remedies.

A couple of last points. In addressing the action of private security companies, Clients have a major responsibility to ensure accountability. Given the nature of most supply chains, there are questions regarding responsibility for the actions of subcontractors. Ensuring access to an effective grievance mechanism can be challenging the more complex the supply chain. Lastly, if we look at the writing on and monitoring of actions of PMSCs of the past few years, most of writing on this topic focused on the actions of companies during the Iraq war. The landscape today is fundamentally different—the footprint is international and countries are not just talking about the U.K. and the U.S. There has been a marked growth of the security industry in Latin America, Asia, and Africa and with such initiatives as ICoCA we are at the start of the process of raising security standards.





Comments by the Moderator: How can you increase the impact of what your organization is doing? What are the enabling conditions that need to be provided or secured to really make a dent in this field, which involves almost everybody?

Jamie A Williamson: I think that's the most important part—it involves everybody. The size of the market is tiny in comparison to the industry, which is a problem. Globally, I think there is very little awareness about what we are trying to do and what the industry is trying to do, so we need to raise awareness for all of the stakeholders. Too often, and this is where the Code of Conduct could be useful, we have been saying to companies, “This is what you have to do,” instead of bringing the issues and them to the table to discuss. There needs to be a level of recognition that the industry, or certain segments of the industry, are trying to do good by international law and are trying to raise their standards and learn from mistakes. The biggest stakeholders in the room ultimately are governments—they're the ones who lead by example. The Swiss and other countries at the table have done a good job of that, but globally, there are many countries that are way behind.

Moderator: What to do to ensure that this particular fundamental security and safety agenda gets higher marks at the governmental level? Besides raising awareness, what kind of concrete actions can be taken to encourage other governments to take action?

Valentin Zellweger: My first question is do we want it to be high on the agenda? Often, it is difficult to solve if it is high on the agenda, and it's much easier to solve if it is not high on the agenda. Everyone spoke about that at in the aftermath of the Iraq War. This is the way that political agendas are driven—they are driven by political events and opportunities, and I don't know whether we can influence on that, and that's my point. One thing we could do is to legislate on the national level. Why did Switzerland legislate? It is because we had a case. One of the biggest security and military companies in the world established its headquarters in Switzerland, and so we said that we have to regulate, and the company decided to leave because they did not want to be subject to regulation paid a heavy price, but my point was if there were other countries willing to regulate them, then these companies would not be allowed to do this “foreign shopping” and register wherever they want. We need to try to create an environment in which it's in the government's best interest. And I think that should be the focus of our attention. The second focus would be to strengthen the association, the industry, and the mechanisms. If we succeed in these two items, then we will have better progress.

Moderator: How do we tackle this in a diverse environment if we don't want it to be high on the agenda? Is international humanitarian law universal?



Kelisiana Thynne: Every country is a member of the Geneva Conventions, so in that sense, yes IHL is universal because the Geneva Conventions are universal.

We almost don't want it to be high on the agenda because then that would mean there are major humanitarian concerns occurring with PMSC. Thankfully these concerns have died down a lot and we see that states are starting to put regulations in place.

Valentin Zellweger: One of the interesting features of the Montreux Document is the group of countries. If you look at the group of countries, it is not the classical like-minded group of countries you would usually see. It shows there is universal interest in trying to regulate them. The Conventions are not only universal in the sense that they have more members than the UN, but they are also uncontested. I don't know of any country that would question the legitimacy of the Geneva Convention.

First round of questions:

1. Jamie Williamson spoke of the growth of the industry in Latin America. Do we see these regulatory systems in areas of conflict? Are there any practical examples?
2. The only thing missing is the perspective of the UN Human Rights Council. There is currently a process that parallels this system. Why does this not advance?
3. Are there any measures taken to protect private contractors?

Valentin Zellweger: The UNHRC system was created in the same year as the Montreux Document in 2006. Switzerland was one of the few European countries that did not have a clear-cut opposition to the process. We advocated for a while that the convention should not be too ambitious because there was a wide-sweep project. We said, "why don't we really try to regulate the hard law that we need to regulate". The mandate had to be changed to continue the discussions. One of the challenges is that it is difficult to come up with binding regulations. It is difficult to have an agreement that has a binding character and we see it in many instances. We as lawyers have to think of new approaches for standard setting on international law.

Kelisiana Thynne.

Agreed that there seemed to be a trend of growth in the industry in Latin America, but mostly in the security sector and not armed conflict. From our perspective, international humanitarian law only applies to armed conflict. Therefore the actions of PSC are covered not by IHL, but by the rules of the use of force in law enforcement and human rights law; but it remains for the states to regulate them.



As for practical examples of where PMSC have been subject to IHL, I could not give any specific ones, but there have been very public cases where members of PMSC have been charged with crimes committed during armed conflict. PMSC have to abide by IHL if they have continuous combat functions. Private contractors would remain as civilians under IHL unless and for such time as they directly participate in hostilities, so they would be protected under IHL generally even if they are working in armed conflict environments and should not be targeted. They get treatment the same as POW if they are captured in an international armed conflict.

Jamie A. Williamson: There are very few examples right now because there is a lack of accountability and transparency. What can we do to improve this environment? The challenge is that in many contexts, the operations of security companies are part of national security systems. In others, there is clear corruption, with sub-standard Security companies being run by a former high-ranking officials, with little if any experience in managing security businesses but nonetheless wielding noticeable local influence.

Second round of questions:

1. Is there an overlap with domestic and international humanitarian law? If so, are there long-term and short-term solutions for current problems with the system?
2. Have these issues been addressed in the code of conduct?
3. Does this incorporate gender-sensitive measures as well? What kind of civil society participates and how can they become a member? If individuals have complaints, are there successful outcomes?

Kelisiana Thynne:

There is a need for organizations to regulate themselves and ensure that they have appropriate training and enforcement measures in place. But our concern is mostly with states and their requirements to implement IHL and human rights law into domestic law. If “home”, “territorial” and “contracting” states that I spoke about in my presentation actually had the tools to prosecute PMSC and their personnel that would ensure that there would be fewer violations and prevent harm.

Jamie A. Williamson: Quite often, and from a practical perspective, we have to speak of human rights as a commodity and not just an obligation. This might be controversial for some, but if you’re able to say that to a company that your professional reputation will be damaged by failing to respect human rights, the commercial argument can have more effect than simply the legal obligations piece. It’s maybe not the best way to do it, but we need to find a balance. In a male dominated environment, there are naturally a number of gender-sensitive matters that have to be



addressed. ICoCA has received a number of allegations, many against non-member companies, but most have not reached the necessary threshold such as to require follow up action.



Moderator: From a humanitarian worker’s point of view, how would they be able to use IHL?

Kelisiana Thynne:

This is a complex scenario because it is not necessarily just PMSCs walking around carrying weapons; there are many NSAG in conflicts nowadays. From a practical perspective, ICRC’s requirements are to get access to victims of armed conflict to provide assistance and protection. Therefore, we will negotiate with any armed group or PMSC to get access to those victims. Ideally, we would have identified before that the PMSC is working for a particular state or indeed NSAG and have negotiated beforehand. But really, who the people we are talking to does not matter in this context as long as we have secure and unimpeded access. However, if PMSCs commit violations of IHL and we come across these, that’s when we do need to know who they are, who is actually hiring them. Then we would talk to who was hiring them in terms of what responsibilities they have, which increases accountability.

Jamie A. Williamson: The vast majority of security companies are clearly identifiable. Where it becomes more difficult is with military contractors because they’re closer to government entities and it can be harder to distinguish them from the regular armed forces. In some contexts, non-state groups are establishing themselves into security companies. The size of the security industry is very much premised on the levels of demand and supply. We need therefore to demand of clients of security companies that they require the minimum in terms of standards from their security contractors.



Closing Remarks by Dr Raymond Saner:

Thank you all for coming. War making is becoming increasingly privatized and lines between a countries armed forces and the PMCs and PSCs are becoming blurred. How do we get governments to live up to their responsibilities? It might be beneficial to create an observatory that would create transparency on countries' compliance with the Geneva Conventions and their use of PMCs and PSCs. This would require annual or biannual assessments. Once such data is being collected on a regular basis, the data can be made public. This would hopefully get more companies to sign up to ICOCA which in turn would increase accountability and pressure for PMSCs to respect IHL and Huma Rights.



Rapporteur

This report was prepared by Julia Lazzaroni and Helen Watson, Interns for CSEND.

The Centre for Socio-Eco-Nomic Development (CSEND) promotes inclusive, equitable, sustainable and integrated development through dialogue and institutional learning. CSEND provides policy research, capacity development and consulting services on institutional development and change processes especially in the area of institutional strengthening, human



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