

Briefing Memo

The New Trend of the Regulation and Administration of Private Military and Security Companies (PMSCs) – Toward the Establishment of a “Global Code of Conduct”

(an English translation of the original manuscript written in Japanese)

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After the 2003 Iraq War, strong criticism emerged from the international community over the fact that private military and security companies (PMSCs) involved in the post-war reconstruction and development, and stabilization efforts had violated international humanitarian law and international human rights law, furthermore that the punishment for those violations was ambiguous, and additionally, that a large number of business ethics problems such as bill-padding had surfaced. At the same time, PMSCs also came to recognize that in the interests of staying in business, there was a need to improve the situation. Then, in January 2006, at the initiative of the Swiss government and the International Committee of the Red Cross (ICRC), PMSC representatives and the governments of nine nations, including the United States, the United Kingdom, Germany, France and Canada, met in Zurich to discuss the creation of regulatory guidelines for PMSCs. Subsequently, following four meetings the Montreux Document was adopted (September 2008) by 17 countries (Japan was not one of them), and this represented the first international guidelines concerning the regulation of PMSCs. The Montreux Document was chiefly directed at governments, but following on from this, moves are surfacing particularly among the US, UK, Swiss and other governments to formulate a “Global Code of Conduct.” In January this year a draft version (parts of which are not yet complete) was announced. This article will provide an overview of new developments such as this that relate to the administrative regulation of PMSCs.

1. A brief overview of the Montreux Document

The Montreux Document is made up of a general section, Part 1, and a more detailed exposition, Part 2. Part 1 first differentiates between three governments (contracting states, territorial states and home states) and then presents items that each state should fulfill in its relationships with PMSCs. It chiefly spells out matters such as making an effort to ensure that PMSCs comply with international humanitarian law and international human rights

law; preparing the environment to achieve that, including the legal framework; and the duty to make reparations for things done by PMSCs, including compensation for damages. Part 2 lists 73 Good Practices, which could be called a specific code of conduct that governments should adopt in order to carry out the duties that are pointed out in Part 1 (refer to Table 1).

The fact that a definite international agreement was created with regard to the regulatory administration of PMSCs was in itself groundbreaking, and following the conclusion of the Montreux Document, the Swiss government presented and introduced the document to the North Atlantic Treaty Organization (NATO), the Organization for Security and Cooperation in Europe (OSCE), the Organization of American States (OAS) and the United Nations. Furthermore, the ICRC also held seminars on the Montreux Document in regions worldwide in conjunction with the Swiss government. The number of countries participating in the Montreux Document is also increasing, and as of February 2011 participating countries numbered 36 (Japan is yet to join).

In this way, the Montreux Document is becoming the international standard on PMSC regulation, and PMSCs are also acknowledging its significance. For example, in the case of Aegis Defence Services, a major PMSC that is based in London, the company is indicating it will encourage the U.K. government to achieve each of the items in the Montreux Document. The U.S.' International Peace Operations Association (IPOA), a PMSC industry organization, drew up a Code of Conduct for its member companies in 2001. The Code lists matters relating to ensuring legitimacy (complying with international law, ensuring transparency and accountability, entering contracts only with legitimate customers, ensuring morality and lawfulness, and the standards when entering secrecy agreements), matters concerning fundamental ideas on management (building good relationships with customers, cooperating with the civilian sector, including international institutions and non-government organizations, and securing good quality personnel), and matters relating to the use of weapons (the rules of engagement, and the administration of weapons). Currently, the 12th version, which was drawn up in February 2009, is in use, and this also cites the Montreux Document under the international laws and regulations that member companies should adhere to.

Table 1: Good practices that should be adopted by governments that are presented in Part 2 of the Montreux Document:

Good practices that should be adopted by governments	Contracting states	Territorial states	Home states
Determination of services to be contracted	○	○	○
Procedure for the selection and contracting of PMSCs	○		
Criteria for the selection of PMSCs	○		
Terms of contract with PMSCs	○		
Authorization to provide military and security services		○	
Procedure with regard to authorizations		○	○
Criteria and terms for granting an authorization		○	○
Rules on the provision of services by PMSCs		○	
Establishment of an authorization system			○
Monitoring compliance and ensuring accountability (legislative development)	○	○	○

2. The challenges of the Montreux Document

The Montreux Document set nonbinding targets to be addressed by governments, and in broad terms it indicated that the nonbinding duty of the home states and territorial states was to prepare the environment for using PMSCs, while it is the responsibility of the contracting states to select good PMSCs. However, this is simultaneously one of the challenges of the Montreux Document. Certainly, Part 1 states that PMSCs have a duty to comply with laws, but Part 2 does not cover the specific methods for doing so. The PMSCs of today are giant, multinational corporations, and as the U.K. Foreign Office points out, even if something is designated as the responsibility of the home state, PMSCs' bases are in themselves fluid. Executive Outcomes had been headquartered in the Republic of South Africa, but after running into regulatory problems there in 1998 it transitioned to a number of companies based outside South Africa. In addition, there are also PMSCs that are effectively headquartered in London or Washington, convenient locations for their operating activities, but which are registered in tax havens such as the Bahamas or the Cayman Islands in order to avoid taxation. Furthermore, even when it comes to territorial states, in the types of countries in which PMSCs are active the national infrastructure itself

is in many cases fragile, and in more than a few cases the legal system and law enforcement agencies are not functioning either. Conversely, there are instances in which PMSCs are involved in rebuilding law enforcement agencies, such as the police. The Montreux Document is not armed with the answers for problems such as these.

Additionally, there is a strong possibility that a situation known in microeconomics as “asymmetric information” will develop between contracting states and PMSCs. In other words, because PMSCs possess more plentiful information concerning the content of their services (business costs and quality) than the contracting states, contractual details tend to favor PMSCs. Furthermore, contracting states (governments and government institutions) do not operate for the purposes of commercial gain, while PMSCs are profit-oriented enterprises. As long as contracting states are interested in quantitative expansion of business rather than preserving consumer surplus, PMSCs will be provided with excess profits. While this type of asymmetric information situation exists, there will be limits to the regulation of PMSCs (the party with information superiority) by the state (the party with information inferiority).

3. Toward the establishment of a “Global Code of Conduct”

Because the Montreux Document was primarily a guideline for governments (contracting states, territorial states and home states), it is very natural that there were calls for guidelines to be formulated covering PMSCs themselves. The PMSC industry, specialists, and the governments of the United States, the United Kingdom and other nations involved in creating the Montreux Document have been pursuing the creation of a draft version of a “Global Code of Conduct.” In January 2010 this was announced by the Swiss government as the draft of the “Global Code of Conduct for Private Security Companies and Private Military Companies” (hereafter the “Global Code of Conduct”). The Global Code of Conduct (draft) is positioned as a document for complementing the laws and the regulations applied in regions in which PMSCs and their employees are registered and are active. Broadly speaking, this draft is made up of three parts: regulations that PMSCs should comply with, the establishment of an International Accountability Mechanism (IAM), and details of the supervisory functions of the IAM. However, at the present point in time only the initial part has been published.

To begin with, the initial portion dealing with regulations that should be complied with cites 10 items – shown in Table 2 – as general obligations that PMSCs should respect.

What is important here is the existence of an IAM that will be set up in order to ensure the effectiveness of the Global Code of Conduct. As an independent third-party institution the IAM will possess reviewing and monitoring functions relating to compliance with the Global Code of Conduct, and will work concurrently on seeing that private security and military companies conform to that code. Additionally, the IAM will see that the Global Code of Conduct reflects any lessons that are learned, and will function to make the code something that is applied in practice. The features shown in Table 3 are cited in the Global Code of Conduct (draft) as roles to be performed by the IAM.

Table 2: Global Code of Conduct (draft): Regulations that PMSCs should comply with:

Appropriate use of force and weapons (use of force and weapons is a last resort)
Unable to exercise force until the point of unavoidable danger to the lives of oneself or others
Respect humanity, dignity and privacy
Prohibit use of force and weapons against non-violent activities
Prohibit acts of retaliation
Prohibit illegal activities that inflict physical, sexual or psychological harm on local citizens
Respect property rights and prohibit the acceptance of non-permitted gifts
Prohibit bribery
Mandatory reporting of cases in which above regulations are violated
Complying to orders from superiors is not to be accepted as a reason for violating regulations

The British Association of Private Security Companies (BAPSC), which was launched in the United Kingdom in 2005 as a PMSC industry organization, is actively embarking on self-regulation of its member PMSCs by cooperating with the Foreign Office and the Ministry of Defence. This is aimed at maintaining the credibility of the industry and improving the quality of the services PMSCs offer. One outcome of this is a strict member-qualification system, and of the BAPSC's 24 member companies, only five are official members that have satisfied all the procedures set down by the BAPSC. Furthermore, in the event the Foreign Office, the Ministry of Defence or other government-affiliated

institutions use PMSCs, they are being asked to utilize participating companies and BAPSC member companies that have passed through its screening.

The items that are emphasized in the member-qualification screening are self-assessed, and the items that are evaluated cover matters relating to business management (business strategies and policies and so on), matters relating to business resources (composition of finances, human resources development), and matters relating to relationships with stakeholders (accountability to shareholders and customers, awareness of social responsibilities, etc.), and these are published on the BAPSC's website. The Global Code of Conduct's viewpoint is to entrust functions such as these into the hands of a highly neutral third-party institution, rather than have them performed by an industry body (and it would also be desirable to ensure that this institution is not a party with information inferiority).

Table 3: Roles to be performed by the IAM that are presented in the Global Code of Conduct (draft):

As an independent third-party institution it will possess independent reviewing and monitoring functions relating to compliance with the Global Code of Conduct

It will fulfill responsibilities with regard to violations of the Global Code of Conduct, via sanctions and compensation

It will review the list of PMSCs that participate in the Global Code of Conduct

It will undertake advocacy, and education and training

It will accept and evaluate complaints from third parties

It will promote projects relating to the Global Code of Conduct

It will provide judgments and advice on compliance with laws, regulations etc. relating to the Global Code of Conduct

Conclusion

PMSCs are becoming increasingly diversified, away from traditional security and guarding services to military consulting, collection and analysis of military information, the provision of education and training, and so on. This means the range of options has broadened for users, and from here on PMSCs will no doubt be used in all fields. In

addition, the main PMSC users, which include international institutions, governments and government-affiliated institutions, private-sector companies and NGOs, are accountable to taxpayers and investors. As a result, PMSCs must be entities that are capable of standing up to this kind of accountability, and the international moves to administer and regulate PMSCs, as represented by the Montreux Document, are in line with the demands of the times.

Effectiveness is always an issue in international regulatory and administrative frameworks, but in the case of the regulation and administration of PMSCs it is not enough to simply work from the outside to raise effectiveness – “self-cleansing” by the industry itself is essential. The Global Code of Conduct is a guideline for that self-cleansing, and the existence of an IAM will fulfill a role in promoting that self-cleansing. A draft concerning the details of the IAM’s structure and its monitoring function is yet to be published, but the formulation of the Global Code of Conduct and the establishment of an IAM based on that can be expected to have an impact as a new move to regulate and administer PMSCs that complements the Montreux Document.

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