

ACADEMY BRIEFING No. 4

The International Code of Conduct for Private Security Service Providers

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Introduction

Academy Briefings are prepared by staff at the Geneva Academy of International Humanitarian Law and Human Rights (the Geneva Academy), together with selected outside experts, to inform government officials, officials working for international organizations, non-governmental organizations (NGOs), and legal practitioners, about the legal implications of important contemporary issues.

This Briefing reviews the International Code of Conduct for Private Security Providers (ICoC or 'the Code'),¹ a multi-stakeholder initiative convened by the Swiss government that aims to clarify international standards for the private security industry, especially when it operates in complex environments, and improve security companies' oversight and accountability. The Code was opened for signature on 10 November 2010. As of September 2013, 708 companies had become signatories.

The Articles of Association for the Code's oversight mechanism have also been finalized. They were launched in Geneva on 19–20 September 2013. In addition to providing the framework for overall governance of the initiative, they will introduce: a process for certifying that a company's systems and policies meet the ICoC's principles and standards; in-field monitoring of company performance; and a grievance mechanism to ensure that, should state or company mechanisms prove inadequate, individuals alleging human rights abuses involving ICoC signatories will have access to effective remedies.

This Briefing begins with an overview of the origin and context of the ICoC initiative. The remainder of the Briefing analyses each of the Code's sections:

- Preamble and Definitions.
- Implementation, General Provisions and General Commitments.
- Specific Principles Regarding the Conduct of Personnel.
- Specific Commitments Regarding Management and Governance and Review.

Throughout the text, the Code and the newly adopted Articles of Association are referenced where relevant. The term 'Articles of Association' refers to the Articles of Association of the ICoC's oversight mechanism.

The Briefing concludes by reflecting briefly on key provisions in the Articles of Association and on the impact the ICoC initiative is likely to have as it becomes fully operational.

¹ The text of the International Code of Conduct and all related information on the initiative are available at: <http://www.icoc-psp.org/>.

The Origin of the International Code of Conduct

Debates at international level about the roles and responsibilities of private actors that engage in security and military activities are not new and have often been contentious. Within the United Nations (UN) system, governments have considered issues relating to so-called ‘soldiers for hire’ or ‘mercenary activities’ since the mid-1960s. The arguments, and normative proposals associated with them, have a complex history.² For the purposes of this Briefing, it is sufficient to say that discussions between states, and between states and other actors, have evolved significantly, and that over time they have moved gradually towards more direct consideration of the modern private security services industry, in addition to the question of mercenaries. Attention has focused particularly on the extent to which some states have employed private security companies in recent armed conflicts (like those in Afghanistan and Iraq), and the employment of private security companies by extractive companies that invest or operate in ‘high-risk’ areas.³

The origins of the International Code of Conduct for Private Security Providers (ICoC) can be traced back to the Government of Switzerland, and, in particular, a 2005 Swiss Federal Council report on private military and security companies that recommended pursuing further dialogue and action in this area.⁴ In early 2006, the Swiss Federal Department of Foreign Affairs (DFAE), in cooperation with the International Committee of the Red Cross (ICRC), organized a series of four meetings involving experts from governments, the private security services industry, and civil society. Their objective was to clarify the roles of states with respect to private security operations in situations of armed conflict. These discussions led to the adoption in September 2008 of ‘The Montreux Document on

pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict’ (hereafter, The Montreux Document).⁵

The Montreux Document defines private military and security companies (PMSCs) as:

... private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.⁶

This definition does not refer to ‘direct participation in hostilities’ or to ‘offensive’ or ‘defensive services’. In effect, the Montreux Document does not differentiate between PMSCs based on the nature of the contribution they make (or do not make) to the conduct of hostilities.⁷ (The next section of this Briefing discusses definitions in more detail.)

Seventeen states originally agreed to The Montreux Document, including, notably, Afghanistan, Iraq, the United Kingdom (UK), and the United States of America (USA). By the beginning of June 2013, the number of ‘participating states’ had grown to 46, in addition to the European Union.⁸

As its full title makes clear, The Montreux Document applies ‘during armed conflict’. It addresses a state’s obligations in the following situations: when a state issues contracts to PMSCs; when companies operate in the territory of a state; and when a state is the ‘home’ state of companies that operate abroad.

² For more information on these discussions and definitions of ‘mercenary’ in international law, see: International Alert, ‘The mercenary issue at the UN Commission on Human Rights’. At: http://www.operationspaix.net/DATA/DOCUMENT/6041~v-The_Mercenary_Issue_at_the_UN_Commission_on_Human_Rights.pdf.

³ See, for example, reports from the Voluntary Principles on Security and Human Rights initiative. At: <http://www.voluntaryprinciples.org/>.

⁴ For additional background, including on proposals for a Code of Conduct and relevant international texts, see: N. Rosemann, ‘Code of Conduct: Tool for Self-Regulation for Private Military and Security Companies’, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper No. 15, 2008.

⁵ UN doc. A/63/467-S/2008/636, 6 October 2008.

⁶ The Montreux Document, §9(a).

⁷ See, for example, James Cockayne, ‘Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document’, *Journal of Conflict & Security Law*, Vol. 13, No. 3 (2009), pp. 401–28.

⁸ The list of participating states is as follows: Afghanistan, Albania, Angola, Australia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Chile, China, Costa Rica, Croatia, Cyprus, Denmark, Ecuador, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Iraq, Italy, Jordan, Kuwait, Liechtenstein, Lithuania, the former Yugoslav Republic of Macedonia, the Netherlands, Norway, Poland, Portugal, Qatar, Sierra Leone, Slovenia, South Africa, Spain, Sweden, Switzerland, Uganda, the UK, Ukraine, Uruguay, and the USA.

It contains reaffirmations of existing international legal obligations and includes over 70 examples of 'good practice' for states that contract or regulate PMSCs. It should be noted that The Montreux Document contains no new legal obligations.

Part I, Section E of The Montreux Document addresses PMSCs directly. It sets out the following expectations:

- PMSCs are obliged to comply with international humanitarian law (IHL) and with international human rights law (IHRL) when these are imposed on them by applicable national law, as well as with other applicable national law, including criminal law, tax law, immigration law, labour law, and specific legal regulations regarding private military or security services.
- PMSC personnel are obliged to respect the relevant national laws of the state in which they operate, in particular its criminal law, and also, when applicable, the law of the state of their nationality.
- The status of PMSC personnel under IHL is determined on a case-by-case basis, taking into account their circumstances and the nature of the functions they undertake.
- Where PMSC personnel are considered civilians under IHL, they may not be the object of attack, unless and for such time as they participate directly in hostilities.
- The personnel of PMSCs:
 - a) Are obliged, regardless of their status, to comply with applicable IHL.
 - b) Are protected as civilians under IHL, unless they are incorporated into the regular armed forces of a state or are members of organised armed forces, groups, or units under a command responsible to the state, or otherwise lose their protection as determined by IHL.
 - c) Are entitled to 'prisoner of war' status (in an international armed conflict) if they are persons accompanying the armed forces and meet the requirements of Article 4A(4) of 1949 Geneva Convention III.

- d) Must comply with the state's obligations under IHRL to the extent that they exercise governmental authority.
- e) Are subject to prosecution if they commit acts that are recognized as crimes under applicable national or international law.⁹

The private security industry welcomed The Montreux Document when it was adopted. However, key NGOs who were involved in the process, while praising some aspects of the text, raised certain concerns. Amnesty International stated that some relevant and well-established propositions of IHRL were not fully reflected in the text, including the state's obligation to protect and apply the standard of 'due diligence'.¹⁰ There was concern too that, even though The Montreux Document refers regularly to human rights obligations, it focuses on the application of IHL to PMSCs in situations of armed conflict. In fact, PMSC companies are likely to be at least as active in post-conflict situations, in which law enforcement-type activities replace combat operations. In such situations, the application of international human rights principles becomes highly relevant, especially if state and judicial oversight is weak.¹¹

Amnesty International also pointed out at the time that The Montreux Document failed to reference UN Human Rights Council Resolution 8/7 of June 2008, which unanimously endorses a policy framework on business and human rights. The 'Protect, Respect, and Remedy' framework was developed between 2005 and 2011 by the UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises, Professor John Ruggie. It affirms three overarching principles: the state's 'duty to protect', the corporate 'responsibility to respect human rights', and the need to provide 'access to effective remedies' to victims of corporate-related human rights abuses. (The ICoC, which took form shortly afterwards, does reference the UN framework.)

The UN business and human rights framework confirms that a state's duty to protect includes obligations with respect to human rights abuses that involve private actors such as companies. The UN Human Rights Committee, the expert body that monitors implementation of the 1966 International

⁹ The Montreux Document, Part I, Section E, §§22–6.

¹⁰ Amnesty International, 'Public Statement on the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to the Operations of Private Military and Security Companies during Armed Conflict', 14 October 2008. At: <http://www.amnesty.org/ar/library/asset/IOR30/010/2008/en/5bca5962-99de-11dd-bf88-f59215f3db50/ior300102008en.pdf>.

¹¹ Nigel D. White, 'The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group's Draft Convention', *Human Rights Law Review*, Vol. 11, No. 1 (2011), pp. 133–51.

Covenant on Civil and Political Rights (ICCPR), has clarified the nature and extent of these duties.¹²

The Montreux Document does say that states are obliged 'in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel'.¹³

In 2013, in advance of the fifth anniversary of its adoption, several regional events were organized to raise awareness of The Montreux Document and discuss efforts by states to implement good practices that it recommends.¹⁴ A 'Montreux + 5' review conference is planned for December 2013.

The success of the 'Montreux process' led leading PMSC companies to call for the development of more detailed guidance, specifically for companies operating in difficult contexts. Companies, several governments and selected civil society actors participated in a series of multi-stakeholder workshops and a drafting process. Once again sponsored by the Swiss Federal Department of Foreign Affairs, the process was facilitated by the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the Geneva Academy. The text of the ICoC was finalized in September 2010.

Major clients of PMSC companies have already begun to reference the ICoC in their contracts. For example, the UN Security Management System's 'Guidelines on the Use of Armed Security Services from Private Security Companies', which the UN Chief Executives Board for Coordination approved in late 2012, state that armed Private Security Companies 'must be a member company to the International Code of Conduct for Private Security Providers'.¹⁵

States are also beginning to incorporate the ICoC into national legislation. The Swiss Parliament considered a Draft Federal Act on Private Security Services Provided Abroad in 2013.¹⁶ The Draft Act, formally proposed in January 2013, requires companies that provide security services abroad from a base in Switzerland, as well as companies contracted by Switzerland, to sign the ICoC.

The sections that follow look in detail at the ICoC text, and at references to the Code in its Articles of Association. The analysis considers each provision of the Code in terms of existing international standards and norms.

Annex I includes the full text of the Articles of Association. Annex II summarizes recent developments in this field within the UN.

Excerpts from the Code are highlighted in red.

12 Human Rights Committee, General Comment 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN doc. CCPR/C/21/Rev.1/Ad d.13, 26 May 2004, §8. That document states, for example, that '[t]here may be circumstances in which a failure to ensure Covenant rights as required by article 2 [of the ICCPR] would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities'.

13 See The Montreux Document, Part I, §§4, 10 and 15.

14 For more information, see: <http://www.dcaf.ch/Project/Raising-Awareness-of-the-Montreux-Document-on-PMSCs>.

15 UN Department of Safety and Security, *Guidelines on the Use of Armed Security Services from Private Security Companies*, UN Security Management System: Security Management Operations Manual, 8 November 2012, §25(a). At: <http://www.unsceb.org/content/action-safety-and-security>.

16 At: <http://www.ejpd.admin.ch/content/dam/data/sicherheit/gesetzgebung/sicherheitsfirmen/entw-e.pdf>.

A. Preamble

The Preamble of the ICoC consists of eight paragraphs that set out the context for the initiative and the purpose of the Code, and underline the commitment of Signatories to respect the Code and applicable laws.

1. Private Security Companies and other Private Security Service Providers (collectively “PSCs”) play an important role in protecting state and non-state clients engaged in relief, recovery, and reconstruction efforts, commercial business operations, diplomacy and military activity. In providing these services, the activities of PSCs can have potentially positive and negative consequences for their clients, the local population in the area of operation, the general security environment, the enjoyment of human rights and the rule of law.

In the opening paragraph of the Preamble, the terminology used to refer to the private security industry departs from that used in The Montreux Document. Whereas The Montreux Document refers throughout to ‘Private Military and Security Companies’ (PMSCs), the ICoC adopts the term Private Security Companies and other Private Security Service Providers (collectively, PSCs).¹⁷ The paragraph does refer to ‘military activity’ among other illustrative roles played by the industry but the decision to remove references to ‘military’ when describing the industry shows that the Code generally aims to avoid association with such activities. Indeed, the entire Code makes only one other independent reference to the word ‘military’.¹⁸ Security industry representatives made plain their unease at being associated with the activities of companies involved in military operations, for example the interrogation of enemy fighters or training or provision of specific military skills.¹⁹

2. *The Montreux Document On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict* recognizes that well-established rules of international law apply to States in their relations with private security service providers and provides

for good practices relating to PSCs. The “Respect, Protect, Remedy” framework developed by the Special Representative of the United Nations (UN) Secretary-General on Business and Human Rights, and welcomed by the UN Human Rights Council, entails acting with due diligence to avoid infringing the rights of others.

Paragraph 2 references The Montreux Document, recognizing the close links between those involved in each process and its relevance to the subject of the Code. The paragraph also references the UN ‘Protect, Respect, and Remedy’²⁰ framework on business and human rights adopted in 2008. It makes clear that the UN business and human rights framework requires all companies to act ‘with due diligence to avoid infringing the rights of others’. The concept of due diligence was further elaborated in the Guiding Principles for implementation of the UN Protect, Respect and Remedy framework on business and human rights (unanimously endorsed by the UN Human Rights Council in June 2011).²¹

3. Building on these foundations, the Signatory Companies to this International Code of Conduct for Private Security Service Providers (the “Code”) endorse the principles of the Montreux Document and the aforementioned “Respect, Protect, Remedy” framework as they apply to PSCs. In so doing, the Signatory Companies commit to the responsible provision of Security Services so as to support the rule of law, respect the human rights of all persons, and protect the interests of their clients.

In accordance with Paragraph 3, Signatory Companies to the Code ‘endorse the principles’ of The Montreux Document and the UN ‘Protect, Respect, and Remedy’ framework. Signatories further undertake to provide security services in a responsible manner that will support the rule of law, respect human rights, and ‘protect the interests’ of their clients.

4. The Signatory Companies affirm that they have a responsibility to respect the human rights of, and fulfil humanitarian responsibilities towards, all those affected by their business activities, including

¹⁷ Section A, §1.

¹⁸ See §49, which concerns access to prior employment records of Signatory Company staff members.

¹⁹ See ‘Report of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies on its second session’, UN doc. A/HRC/22/41, 24 December 2012, §34.

²⁰ The text of the ICoC refers to ‘Respect, Protect, Remedy’.

²¹ UN Human Rights Council Resolution 17/4, adopted without a vote on 16 June 2011, endorsed the Guiding Principles for implementation of the UN ‘Protect, Respect, and Remedy’ framework on business and human rights. The text of the Guiding Principles is available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

Personnel, Clients, suppliers, shareholders, and the population of the area in which services are provided. The Signatory Companies also recognize the importance of respecting the various cultures encountered in their work, as well as the individuals they come into contact with as a result of those activities.

The commitment to human rights is elaborated in Paragraph 4. Also drawing on UN framework language, Signatories affirm that they have ‘a responsibility to respect human rights’. In this respect, Principle 12 of the Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council, affirms:

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

In turn, the Commentary on Guiding Principle 12 explains that:

An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. These are the benchmarks against which other social actors assess the human rights impacts of business enterprises. The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.

Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous

peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.

The reference to fulfilment of humanitarian responsibilities means that personnel must respect, not only the rights of those who may be in their custody or who they have apprehended in violent situations, but also all those with whom they may come into contact. This could include protestors at demonstrations; those seeking access to premises or persons being guarded by the PSC; those providing commercial services to the company and its personnel, pedestrians, drivers, and so on. The corporate responsibility to respect human rights as set out in the UN Guiding Principles is defined broadly and derived from the inherent dignity of all human beings.

5. The purpose of this Code is to set forth a commonly-agreed set of principles for PSCs and to establish a foundation to translate those principles into related standards as well as governance and oversight mechanisms.

Paragraph 5 states that the overall purpose of the Code is to set out commonly agreed principles for PSCs and establish a foundation for translating those principles into standards as well as governance and oversight mechanisms. The references to ‘related standards’ and ‘governance and oversight mechanisms’ are discussed in more detail in later sections. The governance and oversight mechanisms contained in the Articles of Association can be found in Annex I.

6. Signatory Companies commit to the following, as set forth in this Code:

- a) to operate in accordance with this Code;
- b) to operate in accordance with applicable laws and regulations, and in accordance with relevant corporate standards of business conduct;
- c) to operate in a manner that recognizes and supports the rule of law, respects human rights, and protects the interests of their clients;
- d) to take steps to establish and maintain an effective internal governance framework in order to deter, monitor, report, and effectively address adverse impacts on human rights;
- e) to provide a means for responding to and resolving allegations of activity that violates any applicable national or international law or this Code; and

- f) to cooperate in good faith with national and international authorities exercising proper jurisdiction, in particular with regard to national and international investigations of violations of national and international criminal law, of violations of international humanitarian law, or of human rights abuses.

Under Paragraph 6, Signatories agree to: operate in accordance with the Code, applicable laws and regulations, and relevant corporate standards of business conduct, and do so in a manner that recognizes and supports the rule of law, respects human rights, and protects the interests of their clients; 'take steps' to establish and maintain an effective internal governance framework designed to prevent, monitor, report on, and address adverse impacts on human rights; establish a mechanism that will respond to and resolve alleged acts that violate applicable national or international law or the Code; and cooperate in good faith with 'national and international authorities exercising proper jurisdiction', notably when they investigate alleged violations of national and international criminal law, IHL, and human rights.

Sub-paragraph (a) states that signatories will conduct operations in accordance with the Code.

Under sub-paragraph (b), this commitment extends to respect for the law of: the state where the company is operating; the state of nationality of personnel; and the state where the company is incorporated. Furthermore, individuals in a PSC may be bound by international criminal law, including *inter alia* crimes against humanity, genocide, war crimes, piracy, and aggression.

It may be noted that, under a proposed amendment to the Statute of the African Court of Human Rights and Justice,²² companies may become liable for international crimes before that court, including the crime of mercenarism. Under the proposed amendment:

1. For the purposes of this Statute:
 - a. A mercenary is any person who:
 - i. Is specially recruited locally or abroad in order to fight in an armed conflict;
 - ii. Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation;

- iii. Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- iv. Is not a member of the armed forces of a party to the conflict; and
- v. Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

- b. A mercenary is also any person who, in any other situation:

- i. Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 1. Overthrowing a legitimate Government or otherwise undermining the constitutional order of a State;
 2. Assisting a government to maintain power;
 3. Assisting a group of persons to obtain power; or
 4. Undermining the territorial integrity of a State;
- ii. Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation;
- iii. Is neither a national nor a resident of the State against which such an act is directed;
- iv. Has not been sent by a State on official duty; and
- v. Is not a member of the armed forces of the State on whose territory the act is undertaken.

2. Any person who recruits, uses, finances or trains mercenaries, as defined in paragraph (1) (a) or (b) above commits an offence.

A mercenary, as defined in paragraph (1) (a) or (b) above, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence.

Whether or not this amendment enters into force, many states have adopted or may adopt similar legislation, creating an offence of mercenarism under national law.

²² At: www.africancourtcoalition.org/images/docs/legal-texts/draft_protocol_-_court_of_justice_and_hr_-_en_-_final_midrand_consensus.pdf.

The undertaking in 6(c) to operate in a manner that ‘recognizes and supports the rule of law’ is framed broadly. No international legal definition of the concept of the rule of law has been agreed, although a 2004 report by the UN Secretary-General contains useful language:

[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.²³

The undertaking in sub-paragraph (d) to establish and maintain an effective internal governance framework is specifically linked to the need to prevent and address ‘adverse impacts’ on human rights. It implies that a coherent management system and a complaint mechanism must be established in each Signatory Company, to enable the company to ensure that human rights are respected and provide redress when they are not respected.

Under sub-paragraph (e), Signatory Companies are required to provide a means for responding to and resolving alleged violations of national or international law or the Code. Again, this implies the establishment of an appropriate internal management system and a complaint mechanism.

The duty to cooperate with national and international authorities under sub-paragraph (e) has important implications when serious violations of national or international law are investigated. Such violations would include allegations that personnel from a Signatory Company had committed torture, trafficking, war crimes, or crimes against humanity.

7. Those establishing this Code recognize that this Code acts as a founding instrument for a broader initiative to create better governance, compliance and accountability. Recognizing that further effort is necessary to implement effectively the principles of this Code, Signatory Companies accordingly commit to work with states, other Signatory

Companies, Clients and other relevant stakeholders after initial endorsement of this Code to, within 18 months:

- a) Establish objective and measurable standards for providing Security Services based upon this Code, with the objective of realizing common and internationally-recognized operational and business practice standards; and
- b) Establish external independent mechanisms for effective governance and oversight, which will include Certification of Signatory Companies’ compliance with the Code’s principles and the standards derived from the Code, beginning with adequate policies and procedures, Auditing and Monitoring of their work in the field, including Reporting, and execution of a mechanism to address alleged violations of the Code’s principles or the standards derived from the Code;

and thereafter to consider the development of additional principles and standards for related services, such as training of external forces, the provision of maritime security services and the participation in operations related to detainees and other protected persons.

Paragraph 7 confirms that the Code is a ‘founding instrument’, a key element of a ‘broader initiative to create better governance, compliance and accountability’. Signatories undertake to elaborate a governance and oversight mechanism within 18 months.

The references in sub-paragraph (a) to ‘objective and measurable standards’ and to the ‘objective of realizing common and internationally-recognized operational business practice standards’ make clear that the Code itself is not detailed enough to permit Signatory Companies to measure their performance. It provides the foundation on which more operational standards will be developed.

References in sub-paragraph (b) to ‘external independent mechanisms’ including ‘Certification’, ‘Auditing and Monitoring’, ‘Reporting’, and the ‘execution of a mechanism to address alleged violations of the Code’s principles’, provide specific indications of what Signatories undertake to do to implement the ICoC effectively. Each of these issues was considered when the ICOC’s oversight mechanism was negotiated; they are discussed later in this Briefing.

²³ Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies, UN doc. S/2004/616, 23 August 2004, §6.

The final clause in this paragraph states that, following negotiation of the oversight mechanism, Signatories will develop 'additional principles and standards for related services'. The services in question specifically include training of external forces, maritime security services, and operations relating to detainees and other 'protected persons'. To date, the ICoC initiative has not developed such additional principles. However, the General Assembly of the new Association is expected to consider these and other issues when it is constituted.

8. Signature of this Code is the first step in a process towards full compliance. Signatory Companies need to: (1) establish and/or demonstrate internal processes to meet the requirements of the Code's principles and the standards derived from the Code; and (2) once the governance and oversight mechanism is established, become certified by and submit to ongoing independent Auditing and verification by that mechanism. Signatory Companies undertake to be transparent regarding their progress towards implementing the Code's principles and the standards derived from the Code. Companies will not claim they are certified under this Code until Certification has been granted by the governance and oversight mechanism as outlined below.

Paragraph 8 of the Preamble commits Signatories to several specific actions. The first is to 'establish and/or demonstrate' that they have put in place internal processes that meet the requirements of the Code's principles, as well as standards derived from the Code. Second, upon the establishment of a governance and oversight mechanism, Signatories undertake to become certified by it and to submit to its independent auditing and verification procedures. Signatories further undertake to report transparently on their progress in implementing the Code's principles and standards derived from it; and will not claim they are certified under the Code until Certification has been granted by the mechanism.

The first commitment essentially reaffirms the content of Paragraph 6(d). It is discussed in more detail later. The reference to certification and independent auditing and verification by the ICoC oversight mechanism is in line with Paragraph 7(b); it too is discussed in more detail below. (See Articles of Association.)²⁴

The final clause was inserted to ensure that Signatory Companies could not say that signature implied independent approval of their record and procedures. Signature merely indicates that the company in question has made a commitment to be bound by the ICOC. At present, the ICOC initiative has no explicit criteria for determining eligibility to sign. When the Association is established, the status of 'signatory' will be eliminated. From that point companies will have the status of 'members' or 'provisional members awaiting certification'. Provisional membership may last for up to one year. This issue and Article 3.3.1 of the Articles of Association are also discussed below. (See 'Signatory Companies' in the section on Definitions).

²⁴ See Annex I. At: http://www.icoc-psp.org/uploads/ICoC_Articles_of_Association.pdf.

B. Definitions

Section B of the Code is an alphabetized list of 13 terms. Each is defined for the purpose of the Code. The opening sentence of the section makes clear that the definitions are only applicable in the context of the Code.

Auditing – a process through which independent auditors, accredited by the governance and oversight mechanism, conduct on-site audits, including in the field, on a periodic basis, gathering data to be reported to the governance and oversight mechanism which will in turn verify whether a Company is meeting requirements and if not, what remediation may be required.

The definition makes clear that the ICoC's oversight mechanism will need to develop a system of accreditation by independent auditors and that auditing procedures will cover both headquarters and performance 'in the field'. Several references to auditing in the Articles of Association should be noted. Article 8.1.6, setting out the oversight and governance mechanism, states that the Board of Directors will be responsible for overseeing 'arrangements for external audits'. Article 6.4.5 states that the responsibilities of the Association's General Assembly include 'Review and approval of financial statements, including external audits'. Article 11.1, which describes responsibilities for certification under the Code, states that companies will undergo 'monitoring, auditing, and verification, including in the field' during the certification process.

Certification – a process through which the governance and oversight mechanism will certify that a Company's systems and policies meet the Code's principles and the standards derived from the Code and that a Company is undergoing Monitoring, Auditing and verification, including in the field, by the governance and oversight mechanism. Certification is one element of a larger effort needed to ensure the credibility of any Implementation and oversight initiative.

The procedures relating to certification under the Code are set out in Article 11 of the Articles of Association. Paragraph 2.1 of that provision states that the Board will be responsible for defining

certification requirements 'based on national or international standards and processes that are recognized by the Board as consistent with the Code'. These must specify what additional information relevant to the human rights and humanitarian impact of operations 'the Board deems necessary' to assess whether a company's systems and policies meet the requirements of the Code and its readiness 'to participate in the Association'.

Other sub-paragraphs in Article 11 stipulate that companies will be required to 'provide evidence of certification under a standard recognized by the Board'; that the certification process will not duplicate other recognized national or international Standards; that certification by the Association is valid for a period of three years; and that the Association must maintain a registry of certified companies.

Since many companies became signatories to the Code before the oversight mechanism was adopted, Article 3.3.1 of the Articles of Association permits companies that commit to the Articles of Association and meet the obligations of membership to 'enjoy on a provisional basis the rights of membership prior to certification under Article 11 until one year following the approval of certification procedures under Article 11'.

Client – an entity that hires, has formerly hired, or intends to hire a PSC to perform Security Services on its behalf, including, as appropriate, where such a PSC subcontracts with another Company.

Clients of PSCs may include states, inter-governmental organizations, humanitarian organizations, and other companies. The Code refers to clients a number of times.²⁵ It is recognized that the actions of PSCs may have 'potentially positive and negative consequences' on clients,²⁶ for example, and that Signatories have a duty to protect 'the interests of their clients'.²⁷ The Code also states that Signatories will adhere to the Code whether or not the Code is 'included in a contractual agreement with a Client'.²⁸ Signatories are required to report the occurrence of serious incidents to clients,²⁹ and to agree rules on the use

²⁵ By contrast, the Articles of Association make only one reference to clients, in Article 3.4 concerning observer status participation in the initiative for 'non-state clients'.

²⁶ ICoC, Paragraph 1.

²⁷ ICoC, Paragraphs 3 and 6(c).

²⁸ ICoC, Paragraph 19.

²⁹ ICoC, Paragraphs 24 (with reference to Paragraph 22), 34, 37, and 63.

of force.³⁰ The Code states that a Signatory has responsibilities to clients, ‘to the extent consistent with reasonable security requirements and the safety of civilians’, when it identifies personnel and registers vehicles and hazardous materials.³¹

Company – any kind of business entity or form, such as a sole proprietorship, partnership, company (whether public or private), or corporation, and “Companies” shall be interpreted accordingly.

All PSCs are by definition ‘companies’. Accordingly, it was necessary to define ‘company’ for the purposes of the Code. The Code adopted a broad definition in order to include both state-owned companies and sole proprietorships.

Competent Authority – any state or intergovernmental organization which has jurisdiction over the activities and/or persons in question and “Competent Authorities” shall be interpreted accordingly.

Signatory Companies are obliged to report to ‘Competent Authorities’ in broadly the same circumstances that they are obliged to report to ‘Clients’ (see above).³² In addition, Companies must report to or involve the Competent Authority whenever incidents occur or individuals are ‘apprehended’.³³ Since a PSC generally complements and does not assume the responsibilities of a Competent Authority, the Articles of Association emphasize the continuing role and responsibility of Competent Authorities. Although the references are to state authorities, Competent Authorities could include local authorities where the police and prisons, or other services, are run at provincial or municipal level. The reference to intergovernmental organizations covers the exceptional situation where an international organization, typically the UN, establishes an authority with powers that extend over a territory. (Recent examples include Timor Leste and Kosovo.)

Complex Environments – any areas experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflicts, where the rule of law has been substantially undermined, and in which the capacity of the state authority to handle the situation is diminished, limited or non-existent.

‘Complex Environment’ covers a wide variety of situations. It includes any ‘areas’ as opposed to ‘territories’, which suggests that the Code should apply to the provision of security services on the high seas.

In terms of relevant existing standards, the UN Guiding Principles on Business and Human Rights refer to state and business responsibilities in ‘conflict affected areas’, although the term is not precisely defined.³⁴ The Organization for Economic Co-operation and Development (OECD) adopted the notions of ‘conflict-affected’ and ‘high-risk’ areas in its *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*.³⁵

It defines ‘conflict-affected’ areas as:

Areas identified by the presence of armed conflict, widespread violence, including violence generated by criminal networks, or other risks of serious and widespread harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non-international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars.³⁶

It defines ‘high-risk’ areas as:

... those where there is a high risk of conflict or of widespread or serious abuses as defined in paragraph 1 of Annex II of the Guidance. Such areas are often characterized by political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure, widespread violence and violations of national or international law.³⁷

Paragraph 1 of Annex II, which is intended to provide a common reference for all actors throughout the entire mineral supply chain, states:

1. While sourcing from, or operating in, conflict-affected and high-risk areas, we will neither tolerate nor by any means profit from, contribute to, assist with or facilitate the commission by any party of:
 - i) any forms of torture, cruel, inhuman and degrading treatment;

³⁰ ICoC, Paragraph 29.

³¹ ICoC, Paragraph 43.

³² ICoC, Paragraphs 24 (with reference to Paragraph 22), 37, 38, 39, 41, 63, 67(a), and 67(d).

³³ ICoC, Paragraph 34.

³⁴ See UN Guiding Principle 7 (concerning the role of States) and Guiding Principle 23 (concerning businesses).

³⁵ OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2013), p. 66, Supplement on Gold. At: <http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf>.

³⁶ *Ibid.*

³⁷ *Ibid.*

- ii) any forms of forced or compulsory labour, which means work or service which is exacted from any person under the menace of penalty and for which said person has not offered himself voluntarily;
- iii) the worst forms of child labour;
- iv) other gross human rights violations and abuses such as widespread sexual violence;
- v) war crimes or other serious violations of international humanitarian law, crimes against humanity or genocide.³⁸

These prohibitions are consistent with the provisions of Section F of the ICoC (Specific Principles Regarding the Conduct of Personnel, discussed below). The ICoC does not adopt the concept of ‘high-risk areas’. However, the inclusion of situations involving natural disasters in the definition indicates that ‘Complex Environments’ should be interpreted broadly.

The UN Inter-Agency Standing Committee (IASC, the primary mechanism for coordinating humanitarian assistance by UN and non-UN agencies) uses the concept of ‘Complex Emergency’ and defines it as follows:

Complex emergencies are typically characterized by: extensive violence and loss of life, massive displacements of people, wide-spread damage to societies and economies, need for large-scale, multi-faceted humanitarian assistance, hindrance or prevention of humanitarian assistance by political and military constraints and significant security risks for humanitarian relief workers in some areas.³⁹

The American National Standard (adopted in 2012) does not presume that the standard applies to companies operating in Complex Environments as defined in the ICoC. It merely ‘recognizes that PSCs operate in high-risk environments that are inherently unstable and dangerous. The Standard provides principles and requirements to manage risk associated with operating in regions of weakened

governance, where the rule of law has been undermined by human or naturally caused events.’⁴⁰

Implementation – the introduction of policy, governance and oversight mechanisms and training of Personnel and/or subcontractors by Signatory Companies, necessary to demonstrate compliance with the Code’s principles and standards derived from this Code.

The definition of ‘implementation’ is broad. It focuses on the means through which Signatories demonstrate compliance with the Code’s principles and with standards derived from it.

The term ‘policy’ is not separately defined but its meaning can be inferred from specific references to policies elsewhere in the Code. It mentions policies in the context of ‘internal control and compliance systems’;⁴¹ the ‘suitability of applicants, or Personnel, to carry weapons as part of their duties’;⁴² the ‘nature and scope of services [Signatory Companies] provide, on hiring of Personnel and other relevant Personnel reference materials such as Personnel contracts’;⁴³ ‘procedures for management of weapons and ammunitions’;⁴⁴ ‘hazardous materials and munitions’;⁴⁵ and ‘a safe and healthy working environment’.⁴⁶

The definition contains the first reference in the ICoC to the term ‘subcontractor’ (though the definition of ‘Client’ refers to situations in which a PSC ‘subcontracts’). Its inclusion is significant and is in line with the UN Guiding Principles, which affirm that companies have a responsibility to respect human rights, including in their ‘business relationships’.⁴⁷ Subsequent sections of the Code make clear that Signatories will ensure that ‘all subcontractors or other parties carrying out Security Services under Signatory Company contracts, operate in accordance’⁴⁸ with the principles contained in the Code; will carry out ‘due diligence in the selection, vetting and ongoing performance review of all subcontractors performing Security Services’;⁴⁹ and will ensure that ‘vetting and training

³⁸ *Ibid.*, pp. 20–1.

³⁹ IASC, *Operational Guidance for Coordinated Assessments in Humanitarian Crises*. At: <http://www.humanitarianinfo.org/iasc/downloaddoc.aspx?docID=6246&type=pdf>.

⁴⁰ ANSI/ASIS PSC.1-2012, ‘Management System for Quality of Private Security Company Operations- Requirements with Guidance’, p. 33.

⁴¹ ICoC Paragraph 44.

⁴² ICoC, Paragraph 48.

⁴³ ICoC, Paragraph 52.

⁴⁴ ICoC, Paragraph 58.

⁴⁵ ICoC, Paragraph 62.

⁴⁶ ICoC, Paragraph 64(d).

⁴⁷ See UN Guiding Principles 13, 17, 18, and 19 and their respective commentaries.

⁴⁸ ICoC, Paragraph 16.

⁴⁹ ICoC, Paragraph 50.

of subcontractor's Personnel⁵⁰ is conducted in accordance with the Code.

Monitoring – a process for gathering data on whether Company Personnel, or subcontractors, are operating in compliance with the Code's principles and standards derived from this Code.

The brevity of this definition appears to create uncertainty about whether 'monitoring' refers only to processes that Signatory Companies conduct internally, or also to processes involving external 'third parties'. However, Paragraph 6 of the ICoC affirms that Signatories will 'establish and maintain an effective internal governance framework in order to deter, monitor, report, and effectively address adverse impacts on human rights', and Paragraph 7(b) says that Signatories will establish 'external independent mechanisms for effective governance and oversight ... beginning with adequate policies and procedures, Auditing and Monitoring of their work in the field'. It may be inferred that 'monitoring' should be understood to cover both internal and third party processes.

Several paragraphs in the Articles of Association refer specifically to monitoring. Article 6.4.7 makes clear that the ICoC's General Assembly will have the power to approve decisions by the Board of Directors concerning 'Reporting, Monitoring and Assessing Performance Procedures'. Article 11.1 states that the Association is responsible for certifying 'that a company is undergoing monitoring, auditing, and verification, including in the field'. Article 12.1 affirms that the Association is responsible for 'exercising oversight of Member companies' performance under the Code, including through external monitoring', while sub-paragraph 2 states that the Board 'shall develop procedures for this Article'. Article 12.2.3 confirms that the Executive Director for the ICoC 'may initiate a field based review, unless the Board decides otherwise, (i) where the review of available information or a human rights risk assessment has identified a need for further monitoring within an area of one or more Member companies' operations, or (ii) on request from a Member of the Association. In each case such field base review shall be aimed at improving performance or addressing specific compliance concerns.'

Personnel – persons working for a PSC, whether as employees or under a contract, including its staff, managers and directors. For the avoidance of doubt, persons are considered to be personnel if they are connected to a PSC through an employment contract (fixed term, permanent or open-ended)

or a contract of assignment (whether renewable or not), or if they are independent contractors, or temporary workers and/or interns (whether paid or unpaid), regardless of the specific designation used by the Company concerned.

This definition makes clear that references to personnel should be read to include all individuals connected to a PSC by a contract, even if they would not be considered 'personnel' in the ordinary meaning of the word. The aim was to include PSC management and directors, as well as those working for the company on a temporary or *ad hoc* basis.

Private Security Companies and Private Security Service Providers ("PSCs") – any Company (as defined in this Code) whose business activities include the provision of Security Services either on its own behalf or on behalf of another, irrespective of how such a Company describes itself.

As noted in the context of the Preamble, the word 'military' is absent from the definition of PSCs, whereas The Montreux Document referred to 'Private Military and Security Companies' (PMSCs). Industry representatives did not wish to be associated with activities proper to military operations, including interrogations of enemy fighters, and training in and provision of specifically military services. On the other hand, the Code clearly applies fully to any private military company that has signed it.

Reporting – a process covered by necessary confidentiality and nondisclosure arrangements through which companies will submit to a governance and oversight mechanism a written assessment of their performance pursuant to a transparent set of criteria established by the mechanism.

The ICoC Articles of Association indicate clearly that the Board has responsibility for developing procedures for Signatories to report on their performance. The definition stipulates that reporting will be subject to 'necessary confidentiality and nondisclosure arrangements' and that reports will be submitted to the 'governance and oversight mechanism'. There is no indication that Signatory Company reports will be made public. Paragraph 8.1.2 of the Articles of Association states that the Board has a responsibility to 'provide an annual report on the activities of the Association and the implementation of the ICoC to the General Assembly'. Paragraph 12.2.9 of the Articles of Association is also relevant because it confirms

⁵⁰ ICoC, Paragraph 51.

that, 'following consultations with relevant parties, the Board may issue a public statement on the status or outcome of the Association's review of a Member company'.

In this context, it is useful to cite the following extract from the UN Guiding Principles on Business and Human Rights.

In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

- (a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;
- (b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;
- (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.⁵¹

The Commentary on this provision in the UN Guiding Principles acknowledges that communication can take a variety of forms, 'including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports'. It goes on:

Formal reporting by enterprises is expected where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts. The reporting should cover topics and indicators concerning how enterprises identify and address adverse impacts on human rights. Independent verification of human rights reporting can strengthen its content and credibility. Sector-specific indicators can provide helpful additional detail.

Given that the ICoC applies in conflict-affected and other high-risk environments, where the human rights impacts of company operations may be severe, it seems safe to assume that the ICoC Board will need to consider how it will ensure that its global report on the activities of the initiative, as well as individual reports by Signatories, reflect the

UN Guiding Principles' provisions with respect to 'formal reporting'.

Security Services – guarding and protection of persons and objects, such as convoys, facilities, designated sites, property or other places (whether armed or unarmed), or any other activity for which the Personnel of Companies are required to carry or operate a weapon in performance of their duties.

The definition focuses on security-related activities, including activities in which Signatory personnel are unarmed as well as activities in which personnel are required to carry or operate a weapon. The numerous provisions in the Code that address this subject are discussed below. Provisions that refer to weapons are found in paragraphs 30, 31, 32, 48, 57, and 58 of the Code.

Signatory Companies – are PSCs that have signed and agreed to operate in compliance with the Code's principles and the standards derived from the Code and "Signatory Company" shall be interpreted accordingly.

While the ICoC refers throughout to 'Signatory Company' or 'Signatory Companies', the Articles of Association make no reference to either term. Instead, they refer to 'Membership' of the Association and state that PSCs shall be eligible for membership upon certification. In addition, as noted, companies that formally endorse the Articles of Association will 'enjoy on a provisional basis the rights of membership prior to certification', provided they meet the obligations of membership.⁵²

⁵¹ UN Guiding Principle 21.

⁵² Articles of Association, Article 3, Membership, 3.3.1

C. Implementation

Having set out the purposes of the initiative and provided definitions, Section C of the Code covers implementation, general provisions, and general commitments. It consists of four paragraphs.

9. In recognition of the additional steps to be taken to support the Implementation of this Code – in particular the development of standards based on the Code (“standards”) and an independent governance and oversight mechanism (“the mechanism”) as outlined in the Preamble – Signatory Companies intend to, along with other interested stakeholders, convene regularly to review progress toward those steps.

Paragraph 9 recognizes that efforts additional to the ICoC are necessary to support its implementation. These include, among other things, the establishment of a multi-stakeholder temporary Steering Committee (discussed below in the context of Paragraph 11). With support from DCAF, the Steering Committee led the preparation of the Articles of Association, which were adopted in February 2013.

Signatories signal their intention, ‘along with other interested stakeholders’, to meet regularly to review progress on implementation.

10. Upon signature of the Code, Signatory Companies and other stakeholders will undertake to work with national standards bodies as appropriate to develop standards, with the intent that any national standards would eventually be harmonized in an international set of standards based on the Code.

The reference to ‘standards’ in Paragraphs 9 and 10 should be read in conjunction with Paragraph 7(a), which states that Signatory Companies will establish ‘objective and measurable standards for providing Security Services based upon this Code, with the objective of realizing common and internationally-recognized operational and business practice standards’, and in conjunction with later references to ‘standards derived from the Code’.⁵³

References to standards in the ICoC Articles of Association occur exclusively in the context of certification. Article 11.2.1 states that the Board is responsible for defining certification requirements, ‘based on national or international standards and

processes that are recognized by the Board as consistent with the Code’. Article 11.2.4 states that the certification process ‘shall operate in a manner that is complementary to, and not duplicative of, certification under Board-recognized national and international standards’. Finally, Article 11.4 says that the Association will collectively promote ‘the development and harmonization of standards in accordance with the Code’.

In the context of national standards, it should be noted that, following the adoption of the ICoC, the American National Standards Institute (ANSI) and ASIS International (an organization of security industry professionals)⁵⁴ embarked on a process to develop a management system for private security providers. This led in March 2012 to the adoption of the ANSI-endorsed *Management System for Quality of Private Security Company Operations – Requirements with Guidance*.⁵⁵ This document makes clear that its standard:

builds on the Montreux Document and the International Code of Conduct (ICoC) for Private Security Service Providers to provide requirements and guidance for a management system with auditable criteria for Quality of Private Security Company Operations, consistent with respect for human rights, legal obligations and good practices related to operations of private security service provider companies in conditions where governance and the rule of law have been undermined by conflict or disaster....

It goes on to say that the Standard:

provides a means for PSCs, and their clients, to implement the recommendations of the Montreux Document and to provide demonstrable commitment, conformance, and accountability to respect the principles outlined in the ICoC.

The ICoC did not participate in the elaboration of the ANSI endorsed Standard and its interpretations of the Code is not authoritative, though it may provide useful advice on good practice.

11. Upon signature of the Code, Signatory Companies and other stakeholders will appoint a multi-stakeholder steering committee of 6-9 members who will function as a “temporary

⁵³ See, for example, ICoC, Paragraphs 7(b), 8, and 51.

⁵⁴ At: <http://www.ansi.org/> and <https://www.asisonline.org>.

⁵⁵ The Standard, known as ANSI/ASIS PSC.1-2012, may be purchased at: http://webstore.ansi.org/Record_Detail.aspx?sku=ANSI%2FASIS+PSC.1-2012-UYeV3yvrLM.

board". This steering committee will be responsible for developing and documenting the initial arrangements for the independent governance and oversight mechanism, including by-laws or a charter which will outline mandate and governing policies for the mechanism. The Steering Committee will endeavour to complete a work plan for constituting the mechanism before the end of March 2011, and further to develop the bylaws/charter by the end of July 2011 and an operational plan before the end of November 2011.

Paragraph 11 sets out the arrangements for establishing the 'multi-stakeholder steering committee' which has functioned as a 'temporary board' for the initiative. The paragraph confirms the responsibilities of the steering committee and set out a timeframe for completing its mandate. As explained above, the Articles of Association have been finalized. They are reproduced in Annex I.

12. After the independent governance and oversight mechanism has been constituted (by the adoption of bylaws/charter), the governance and oversight mechanism shall accept responsibility for maintenance and administration of the Code, and shall determine whether and how it is appropriate for the mechanism and standards to be reflected in the text of the Code itself.

Paragraph 12 confirms that, once constituted, the governance and oversight mechanism (as set out in the Articles of Association) will maintain and administer the Code and will determine 'whether and how it is appropriate' for the new mechanism and standards to be reflected in the text of the Code and, if so, how to amend it.

With respect to amending the Code's text, Article 6.4.1 of the Articles of Association states that the General Assembly has responsibility for 'Amendments to the Code'. Article 6.5 sets out the procedure for such amendments.

D. General Provisions

This brief section contains three short but important paragraphs.

13. This Code articulates principles applicable to the actions of Signatory Companies while performing Security Services in Complex Environments.

Paragraph 13 contains the only reference to the concept of ‘Complex Environments’ in the Code (other than in the Definitions section). It states that the Code contains principles that apply to Signatory Companies when they deliver security services in Complex Environments. This is a reminder that companies operating in such environments should bear the Code constantly in mind. It provides a level of specificity for such environments that other codes of conduct do not. However, nothing suggests that the Code is not relevant to other contexts. Indeed, many of its provisions contain norms of general application.

14. This Code complements and does not replace the control exercised by Competent Authorities, and does not limit or alter applicable international law or relevant national law. The Code itself creates no legal obligations and no legal liabilities on the Signatory Companies, beyond those which already exist under national or international law. Nothing in this Code shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

Paragraph 14 makes clear that the Code does not replace the duties of ‘Competent Authorities’. It does not create any new legal obligations, or limit the application of relevant national or international laws.

15. This Code may be modified in accordance with procedures to be established by the governance and oversight mechanism.

As noted previously, Article 6.5 of the Articles of Association outlines procedures for amending the Code. It sets a high bar for amendments, both of the ICoC and the Articles of Associations, by requiring ‘a vote of not less than two-thirds of the Members present and eligible to vote in each of the three stakeholder pillars’. Article 6.8 states that ‘Proceedings of the General Assembly may not be convened at less than thirty (30) days’ notice’. Article 8.1.3 confirms that the Board is authorized to put to the General Assembly proposed amendments to the ICoC or its Articles of Association. The Articles of Association do not explicitly mandate any other body to make such proposals.

E. General Commitments

The twelve paragraphs on ‘General Commitments’ compose the first of three sections that set out the nature and scope of the commitments that Signatories accept.

16. Signatory Companies agree to operate in accordance with the principles contained in this Code. Signatory Companies will require that their Personnel, and all subcontractors or other parties carrying out Security Services under Signatory Company contracts, operate in accordance with the principles contained in this Code.

Under Paragraph 16, Signatory Companies undertake to operate in accordance with the principles contained in the Code and to require their Personnel, ‘and all subcontractors or other parties carrying out Security Services under Signatory Company contracts’, to do likewise. The paragraphs that follow provide more detail on how this commitment, to operate in accordance with the ICoC’s principles, should be implemented in practice.

17. Signatory Companies will implement appropriate policies and oversight with the intent that the actions of their Personnel comply at all times with the principles contained herein.

Signatories will implement ‘appropriate policies and oversight’ with the aim of making sure that their personnel comply at all times with the Code’s principles.

18. Signatory Companies will make compliance with this Code an integral part of contractual agreements with Personnel and subcontractors or other parties carrying out Security Services under their contracts.

Under Paragraph 18, Signatories are further required to include compliance with the Code in all contracts with personnel and ‘subcontractors or other parties carrying out Security Services under their contracts’. This requirement is consistent with the UN Guiding Principles, which state that the responsibility to respect human rights requires business enterprises to seek to:

prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.⁵⁶

It is also consistent with relevant Commentary from the UN Guiding Principles:

Just as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, policies and procedures that set financial and other performance incentives for personnel; procurement practices; and lobbying activities where human rights are at stake.⁵⁷

It is important to note that the ICoC’s Articles of Association also call on state and intergovernmental organizations that become members of the Association to ‘promote compliance with the ICoC in their contracting practices and policies’.⁵⁸

19. Signatory Companies will adhere to this Code, even when the Code is not included in a contractual agreement with a Client.

This paragraph makes clear that Signatories must comply with the Code at all times, even when a particular contract does not mention the need to comply with it.

20. Signatory Companies will not knowingly enter into contracts where performance would directly and materially conflict with the principles of this Code, applicable national or international law, or applicable local, regional and international human rights law, and are not excused by any contractual obligation from complying with this Code. To the maximum extent possible, Signatory Companies will interpret and perform contracts in a manner that is consistent with this Code.

Signatories undertake not to enter ‘knowingly’ into contracts whose implementation would directly or substantially conflict with the principles of the Code, with applicable national or international law, or with applicable local, regional, or international human rights law. Contractual obligations do not provide a justification for not complying with the Code.

Signatories also undertake to interpret and perform contracts in a manner consistent with the Code ‘to the maximum extent possible’.

21. Signatory Companies will comply, and will require their Personnel to comply, with applicable

⁵⁶ UN Guiding Principle 13(b).

⁵⁷ Commentary on UN Guiding Principle 16.

⁵⁸ Articles of Association, Article 3.3.2.

law which may include international humanitarian law, and human rights law as imposed upon them by applicable national law, as well as all other applicable international and national law. Signatory Companies will exercise due diligence to ensure compliance with the law and with the principles contained in this Code, and will respect the human rights of persons they come into contact with, including, the rights to freedom of expression, association, and peaceful assembly and against arbitrary or unlawful interference with privacy or deprivation of property.

Signatories undertake to require their personnel to comply with all applicable international and national laws (in addition to complying themselves as corporate entities). The paragraph refers specifically to international humanitarian and human rights law. Signatories and their personnel are required to exercise ‘due diligence to ensure compliance with the law’ and with the principles contained in the Code and are to respect ‘the human rights of persons they come into contact with’. This last phrase recognizes that the company is not the holder of human rights obligations for the whole population, as territorial states are. On the other hand, companies (and individuals) must respect the rights of those people with whom they come into contact.

This paragraph marks the first occasion on which the ICoC refers to specific human rights standards (namely, freedom of expression, association, and peaceful assembly, and the rights to privacy and property). The word ‘including’ indicates that this list is not exhaustive. In the context of the UN Protect, Respect, and Remedy framework and the UN Guiding Principles on Business and Human Rights, the corporate responsibility to respect human rights applies to all internationally recognized rights ‘understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work’.⁵⁹

The specific rights mentioned in this paragraph are summarized below:

- Freedom of expression – includes the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media regardless of frontiers.⁶⁰

- Freedom of association – includes the right to form and join trade unions.⁶¹
- Right to peaceful assembly – international law states that no restrictions may be placed on the exercise of this right other than those necessary in the interests of national security or public safety, public order, the protection of public health, etc.⁶²
- Protection against arbitrary or unlawful interference with privacy or property – includes protection under the law against arbitrary or unlawful interference with ‘family, home or correspondence’.⁶³

22. Signatory Companies agree not to contract with, support or service any government, person, or entity in a manner that would be contrary to United Nations Security Council sanctions. Signatory Companies will not, and will require that their Personnel do not participate in, encourage, or seek to benefit from any national or international crimes including but not limited to war crimes, crimes against humanity, genocide, torture, enforced disappearance, forced or compulsory labour, hostage-taking, sexual or gender-based violence, human trafficking, the trafficking of weapons or drugs, child labour or extrajudicial, summary or arbitrary executions.

Paragraph 22 requires Signatories to refrain from acting in a manner that infringes UN Security Council sanctions or is complicit in any way in national or international crimes. A number of crimes (torture, sexual and gender-based violence, human trafficking, forced labour, and child labour) are discussed in greater detail below, because they are addressed in Paragraphs 39 and 40 of Section F, which consider the conduct of Signatory personnel.

This paragraph is the only one that refers specifically to international crimes, including war crimes, crimes against humanity, and genocide, as well as extrajudicial, summary, or arbitrary executions, hostage-taking, and trafficking of people, weapons or drugs.

War crimes include attacks or other acts of violence against persons protected by IHL, such as civilians or prisoners, or sick or wounded fighters who are *hors de combat*, whether in situations of international armed conflict⁶⁴ or non-international

⁵⁹ UN Guiding Principle 12.

⁶⁰ 1948 Universal Declaration of Human Rights (UDHR), Article 19.

⁶¹ 1966 International Covenant on Civil and Political Rights, Article 22; see also UDHR, Article 23; and ILO standards, including the ILO Declaration on Fundamental Principles and Rights at Work.

⁶² ICCPR, Article 21.

⁶³ ICCPR, Article 17.

⁶⁴ See 1949 Geneva Convention I, Article 50; 1949 Geneva Convention II, Article 51; 1949 Geneva Convention III, Article 130; 1949 Geneva Convention IV, Article 147; and 1977 Additional Protocol I, Article 85.

armed conflict.⁶⁵ Such acts of violence include murder or other wilful killing, mutilation, cruel treatment, torture, rape or other sexual violence, and hostage taking. To constitute war crimes,

such acts must occur in connection with an armed conflict. For a non-exhaustive list of war crimes, see Article 8 of the 1998 Rome Statute of the International Criminal Court⁶⁶ (Box 1).

Box 1. The Rome Statute

Article 8: War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, “war crimes” means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
 - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
 - (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

⁶⁵ For example, serious violations of Common Article 3 to the four 1949 Geneva Conventions.

⁶⁶ As of March 2013, a total of 122 states were party to the Rome Statute.

- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
 - (xii) Declaring that no quarter will be given;
 - (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
 - (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
 - (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
 - (xvi) Pillaging a town or place, even when taken by assault;
 - (xvii) Employing poison or poisoned weapons;
 - (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
 - (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
 - (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
 - (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
 - (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
 - (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) Taking of hostages;
 - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;
 - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.
3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Crimes against humanity include acts such as murder, extermination, enslavement, forced deportation, imprisonment, torture, rape, and other acts of violence or cruelty committed as part of a

widespread or systematic attack directed against a civilian population. For a definition of crimes against humanity, see Article 7 of the 1998 Rome Statute (Box 2).

Box 2. The Rome Statute

Article 7: Crimes against humanity

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 - (a) Murder;
 - (b) Extermination;
 - (c) Enslavement;
 - (d) Deportation or forcible transfer of population;
 - (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - (f) Torture;
 - (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
 - (i) Enforced disappearance of persons;
 - (j) The crime of apartheid;
 - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
 - (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
 - (b) “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
 - (c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
 - (d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
 - (e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
 - (f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

- (g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
 - (h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
 - (i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.

Genocide encompasses acts of violence or cruelty committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.⁶⁷ For the definition of genocide, see Article 6 of the 1998 Rome Statute (Box 3).

Enforced Disappearances are prohibited at all times. The UN Convention for the Protection of All Persons from Enforced Disappearance (2006) contains two injunctions. One forbids ‘the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law’.⁶⁸ The second requires states party to the treaty

to ‘take appropriate measures to investigate acts defined [in the prohibition just outlined] committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice’.

An enforced disappearance can amount to a crime against humanity (whether committed by a state or non-state actors) when it takes the form of a systematic or widespread attack on the civilian population. In this context the crime is defined as ‘the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time’.

Box 3. The Rome Statute

Article 6: Genocide

For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁴ Insert text of Article 6, 1998 Rome Statute.

⁶⁷ Convention on the Prevention and Punishment of the Crime of Genocide, Article 2.

⁶⁸ 2006 Convention for the Protection of All Persons from Enforced Disappearance, Article 2.

In addition to being a war crime when connected with an armed conflict, **hostage-taking** is a crime under the 1979 International Convention against the Taking of Hostages, to which 170 states are party. According to the definition set out in Article 1(1) of this treaty:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the 'hostage') in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ('hostage-taking') within the meaning of this Convention.

Furthermore, any person who attempts to commit an act of hostage-taking, or participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking, commits an offence under the treaty (Article 1(2)).

Sexual or gender-based violence is discussed under Paragraph 38 below.

Trafficking of narcotic drugs is prohibited, *inter alia* under the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁶⁹

Weapons trafficking. The 2001 Firearms Protocol seeks to prevent, combat, and eradicate the illicit manufacture or trafficking of firearms, their parts and components, and ammunition.⁷⁰ The recently adopted 2013 UN Arms Trade Treaty (ATT) requires states parties to establish a formal national control system to regulate conventional arms transfers and lays down criteria for refusing requests to authorize the export or transfer of weapons, components and ammunition.⁷¹

Extrajudicial, summary or arbitrary executions violate the inherent right to life, in particular the prohibition on its arbitrary deprivation. The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions state that:

Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences

under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority.⁷²

Further relevant principles include Principle 4, which affirms that states must guarantee effective protection through judicial or other means to individuals and groups who are in danger of extra-legal, arbitrary or summary executions, including those who receive death threats.

Child labour. Certain forms of child labour are prohibited under the 1989 UN Convention on the Rights of the Child (CRC). Under Article 32(1), states party to the Convention 'recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development'. The CRC has been almost universally ratified. The ILO Convention on the Worst Forms of Child Labour is discussed in the section on Paragraph 41. Its key provisions are reproduced in Box 6.

23. Signatory Companies will not, and will require that their Personnel do not, invoke contractual obligations, superior orders or exceptional circumstances such as an armed conflict or an imminent armed conflict, a threat to national or international security, internal political instability, or any other public emergency, as a justification for engaging in any of the conduct identified in paragraph 22 of this Code.

Paragraph 23 clarifies that Signatories and their personnel may not justify illegal conduct described in Paragraph 22 on any basis, including on the

69 At: http://www.unodc.org/pdf/convention_1988_en.pdf.

70 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime. At: http://www.unodc.org/pdf/crime/a_res_55/255e.pdf.

71 For a detailed analysis of the UN Arms Trade Treaty, see *Academy Briefing*, No. 3.

72 Annexed to ECOSOC Resolution 1989/65 of 24 May 1989. See also ICCPR, Articles 6, 14, and 15; and the work of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions (at <http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx>). For a useful site on this topic, see: <http://www.extrajudicialexecutions.org/>.

grounds that there was a public emergency or armed conflict, or that they were subject to contractual obligations or the orders of a superior.

24. Signatory Companies will report, and will require their Personnel to report, known or reasonable suspicion of the commission of any of the acts identified in paragraph 22 of this Code to the Client and one or more of the following: the Competent Authorities in the country where the act took place, the country of nationality of the victim, or the country of nationality of the perpetrator.

Signatories are obliged to report, and must require their personnel to report, if they know or have reason to suspect that acts identified in Paragraph 22 have been committed.⁷³ The report must be made to the client *and* to the competent authorities in at least one of the following: the country in which the act took place, the country of nationality of the victim, or the country of nationality of the perpetrator.

There is a *requirement* to report to the client and to one or more of these addressees. In addition, it may be appropriate to report such acts to the United Nations High Commissioner for Human Rights, regional human rights organizations, non-governmental organizations, or the Prosecutor of the International Criminal Court.

In all such cases, personnel should have in mind the potential risks that reporting such acts may impose on witnesses, victims, perpetrators and others. While the obligation to report incidents remains, companies will need to exercise judgement when they report serious incidents because they have a duty to avoid endangering others.

25. Signatory Companies will take reasonable steps to ensure that the goods and services they provide are not used to violate human rights law or international humanitarian law, and such goods and services are not derived from such violations.

The Signatory undertakes to take 'reasonable steps' to ensure that the goods and services it provides are not used to violate human rights or IHL, and are not derived from such violations. For example, if a Signatory or its personnel know, or should reasonably have known, that they are providing protection for a mine or other worksite in which people are forced to work, or in which children are engaged in hazardous forms of labour, they should decline to continue unless the violations are addressed.

26. Signatory Companies will not, and will require that their Personnel do not, consistent with applicable national and international law, promise, offer, or give to any public official, directly or indirectly, anything of value for the public official himself or herself or another person or entity, in order that the public official act or refrain from acting in the exercise of his or her official duties if such inducement is illegal. Signatory Companies will not, and will require their Personnel do not, solicit or accept, directly or indirectly, anything of value in exchange for not complying with national and international law and/or standards, or with the principles contained within this Code.

Under Paragraph 26, the Signatory undertakes that the company will not engage in corrupt practices with any public official, either by giving or receiving illegal inducements, and will require its personnel to respect the same standards of conduct, consistent with national and international law.

27. Signatory Companies are responsible for establishing a corporate culture that promotes awareness of and adherence by all Personnel to the principles of this Code. Signatory Companies will require their Personnel to comply with this Code, which will include providing sufficient training to ensure Personnel are capable of doing so.

Paragraph 27 requires Signatories to develop a 'corporate culture' that promotes awareness of the ICoC and adherence to the Code's principles. Companies must instruct their personnel to comply with the Code and provide sufficient training to enable them to do so.

⁷³ With respect to the duty to report suspected acts of torture, see also Paragraph 37.

F. Specific Principles Regarding the Conduct of Personnel

Having set out general provisions and commitments in the previous sections, Section F addresses in detail specific principles regarding the conduct of Signatory Company personnel. The 16 paragraphs in this section are divided into the following sub-sections:

- General conduct.
- Rules on the use of force.
- Use of force.
- Detention.
- Apprehending persons.
- Prohibition of torture or other cruel, inhuman or degrading treatment or punishment.
- Sexual exploitation and abuse or gender-based violence.
- Human trafficking.
- Prohibition of slavery and forced labour.
- Prohibition on the worst forms of child labour.
- Discrimination.
- Identification and registering.

When discussing these issues, the text references relevant international standards.

General conduct

28. Signatory Companies will, and will require their Personnel to, treat all persons humanely and with respect for their dignity and privacy and will report any breach of this Code.

The sub-section on general conduct consists of one sentence which states that Signatories will treat all persons ‘humanely and with respect for their dignity and privacy’ and will require their personnel to do likewise. They also undertake to report any breach of the Code. The text does not specify to whom companies should report breaches. However, Paragraphs 6, 7, and 24 discuss reporting requirements, and the term ‘reporting’ is included in the definitions section of the Code.

Paragraph 28 also contains the only reference to ‘dignity’ in the Code. The notion of ‘dignity’ is at the heart of the international human rights regime. The opening paragraph of the Universal Declaration of Human Rights refers to:

... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family

It is evident that ideas of human dignity have changed over time and that people from different backgrounds and traditions may understand it differently. Human rights standards are nevertheless widely perceived to create the legal and political conditions in which a life of dignity can be realized. Their exercise protects the worth of each person.⁷⁴

The word ‘privacy’ is also used in Paragraph 21. References to privacy in the Code should be considered carefully by Signatories, given the growing reliance of security providers on information and communication technologies (ICT). Companies in the ICT sector are working to address a range of privacy-related concerns, and these may also apply to companies providing technology-related security services. The provision of personal data to governments is evidently sensitive, for example, because it may enable states to harass, arrest, or arbitrarily detain human rights defenders, political dissidents, or members of particular ethnic groups or minorities.⁷⁵

Rules for the use of force

29. Signatory Companies will adopt Rules for the Use of Force consistent with applicable law and the minimum requirements contained in the section on Use of Force in this Code and agree those rules with the Client.

This sub-section consists of one sentence. It states that Signatories will adopt rules governing the use of force by its personnel, and that these rules will be consistent with applicable law and with the minimum requirements contained in the section of

⁷⁴ See, for example, Jack Donnelly, ‘Human Rights and Human Dignity’, Swiss Initiative to commemorate the 60th Anniversary of the UDHR, June 2009. At: http://udhr60.ch/report/donnelly-HumanDignity_0609.pdf.

⁷⁵ For information on applying the UN Guiding Principles on Business and Human Rights to ICT sector operations, see, for example, the European Commission’s Human Rights Sector Guidance Project. At: http://www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/ICT/EC-Guide_ICT.pdf.

the Code on use of force (see below).⁷⁶ The rules a Signatory adopts should be agreed with the Client.

Use of force

This sub-section consists of three paragraphs, each of which establishes an important principle with respect to the use of force.

30. Signatory Companies will require their Personnel to take all reasonable steps to avoid the use of force. If force is used, it shall be in a manner consistent with applicable law. In no case shall the use of force exceed what is strictly necessary, and should be proportionate to the threat and appropriate to the situation.

The first states that Signatories must require their personnel to take ‘all reasonable steps’ to avoid using force. In most national legal regimes, PSC personnel may typically only use force in self-defence or to defend others. The force they use must also be ‘reasonable’. The meaning given to ‘reasonable’ varies from state to state, however, and in practice there is no precise agreement about how much force is appropriate or in which situations it is justified. Personnel using force beyond what is deemed lawful may be liable to criminal prosecution under national law.

31. Signatory Companies will require that their Personnel not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life.

Paragraph 31 addresses any use of force that involves firearms. Any use of a firearm may result in death or serious injury. For this reason, in accordance with the 1990 Basic Principles on the Use of Force and Firearms (discussed below, see Paragraph 32), Signatories must interdict their personnel from using firearms against other persons ‘except in self-defence or defence of others against the imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life’. This means that PSC personnel will not normally be justified in using firearms to protect property from damage, even serious damage, unless the danger involves a grave threat to life or the firearms are used to defend individuals against an imminent threat of death or serious injury.

32. To the extent that Personnel are formally authorized to assist in the exercise of a state’s law enforcement authority, Signatory Companies will require that their use of force or weapons will comply with all national and international obligations applicable to regular law enforcement officials of that state and, as a minimum, with the standards expressed in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

Paragraph 32 addresses situations in which Signatory personnel are ‘formally authorized’ to assist the state or its law enforcement agencies in law enforcement or security operations. Use of the word ‘formal’ implies (but it is not explicit) that such authorization must normally be in writing.

Given, however, that the Code applies in environments ‘in which the capacity of the state authority to handle the situation is diminished, limited or non-existent’, it is not clear how such formal authorization may be given where, for example, a host state’s capacity is deemed to be non-existent. In such situations it is of course possible that the company is authorized by another state (or group of states) to exercise enforcement authority.

The paragraph states specifically that Signatory personnel should comply with the 1990 Basic Principles on Use of Force and Firearms by Law Enforcement Officials (1990 Basic Principles), as a minimum standard.⁷⁷ The 1990 Basic Principles declare (in accordance with the commentary on Article 1 of the 1979 Code of Conduct for Law Enforcement Officials⁷⁸) that ‘the term “law enforcement officials” includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention’. Although it was not foreseen that formally authorized private companies would play a role in security operations when the 1990 Basic Principles were drafted, the Principles may nonetheless be considered relevant to such companies.

Signatory personnel may be engaged and formally authorized to conduct certain aspects of a law enforcement official’s work but not others. When formal authorization does not include powers to detain or arrest, those powers may not be presumed and personnel may not presume that they have authority to use force to detain or arrest.

⁷⁶ This paragraph should therefore be read in conjunction with the following sub-section on ‘Use of force’.

⁷⁷ At: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>.

⁷⁸ At: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>.

Principle 4 of the 1990 Basic Principles states that:

Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

Principle 5 states:

Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

- a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
- b) Minimize damage and injury, and respect and preserve human life;
- c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
- d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

Signatories should consider that each of these obligations apply to the company and its personnel.

It should further be noted that the 1990 Basic Principles specifically address situations that would fall within the Code's definition of 'complex environments'. The relevant provision states that:

Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.⁷⁹

Detention

33. Signatory Companies will only, and will require their Personnel will only, guard, transport, or question detainees if: (a) the Company has been specifically contracted to do so by a state; and (b) its Personnel are trained in the applicable national and international law. Signatory Companies will, and will require that their Personnel, treat all detained

persons humanely and consistent with their status and protections under applicable human rights law or international humanitarian law, including in particular prohibitions on torture or other cruel, inhuman or degrading treatment or punishment.

Paragraph 33 addresses issues relating to individuals who are detained.⁸⁰ While it is not stated explicitly in this paragraph, where national law prohibits PSCs from guarding, transferring, or questioning detainees, it is clear the prohibition must be fully respected. Indeed, certain national legal systems forbid the use of PSC personnel to question detainees.

The general prohibition on guarding, transferring, or questioning detainees is designed to ensure that the tasks of interrogation and guarding prisoners are undertaken only at the express request of a state, and then only following appropriate training on the legal protections to which all detainees are entitled. Paragraph 33 therefore states that Signatories and their personnel will only guard, transport, or question detainees where:

- (a) the Signatory Company has been specifically contracted to do so by a state; *and*
- (b) its personnel are trained in the applicable national and international law.

Applicable human rights law includes the principles contained in Articles 9 and 10 of the International Covenant on Civil and Political Rights (ICCPR). (See Box 4.)⁸¹

The right to liberty, codified in Article 9 of the ICCPR, prohibits arbitrary detention. Detention is arbitrary when the grounds for detention are not established by law and the detention itself is not in conformity with legal standards. These standards include the right of detainees to be informed, in a language they understand, of the reasons for their detention, and for detainees to be brought 'promptly' before a judicial authority to rule on the legality of the detention.⁸²

During detention, all detainees must be: treated humanely, in accordance with the prohibition on cruel, inhuman, and degrading treatment or punishment;⁸³ provided with food and water; and

⁷⁹ 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 8. At: <http://www.unrol.org/files/BASICP-3.PDF>.

⁸⁰ The Code's first reference to 'detainees' occurs in Paragraph 7 of the Preamble, which foresees the development of additional principles and standards 'such as training of external forces, the provision of maritime security services and the participation in operations related to detainees and other protected persons'.

⁸¹ At: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

⁸² ICCPR, Article 9(4); 1950 European Convention on Human Rights (ECHR), Article 5(3); 1968 American Convention on Human Rights (ACHR), Article 7(5); and the 2004 Arab Charter on Human Rights (ArCHR), Article 14(5).

⁸³ ICCPR, Articles 7 and 10; ECHR, Article 3; ACHR, Article 5; and ArCHR, Article 8.

Box 4. International Covenant on Civil and Political Rights

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

receive medical treatment if required. National laws may create further obligations. Under German law, for example, all detainees must be brought before a judge no later than the day that follows their arrest.⁸⁴ A number of soft law instruments set out minimum standards of treatment of detainees. They include: the 1955 Standard Minimum Rules for the Treatment of Prisoners (currently being revised); the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the 1990 Rules for the Protection of Juveniles Deprived of their Liberty; and the 2010 Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders.

The UN Human Rights Committee is responsible for monitoring states' implementation of the ICCPR. It is currently completing a General Comment⁸⁵ (No. 35) on Article 9 of the Covenant (Box 4). The draft

text refers to cases in which private individuals or entities are authorized by a state party to exercise powers of arrest or detention. In such cases, the draft states:

... the State party remains responsible for adherence to article 9 ... (and) ... must rigorously limit those powers and must provide strict and effective control to ensure that those powers are not misused, and do not lead to arbitrary or unlawful arrest or detention. It must also provide adequate remedies for victims if arbitrary or unlawful arrest or detention does occur. States parties should provide in their reports descriptions of the powers they have granted to private actors and the regulations and procedures by which they ensure supervision.

⁸⁴ Germany's Basic Law, Article 104.

⁸⁵ UN Human Rights Committee, Draft General Comment No. 35, UN doc. CCPR/C/107/R.3, 28 January 2013. At: http://www2.ohchr.org/english/bodies/hrc/docs/DGC35_en.doc.

Apprehending persons

34. Signatory Companies will, and will require their Personnel to, not take or hold any persons except when apprehending persons to defend themselves or others against an imminent threat of violence, or following an attack or crime committed by such persons against Company Personnel, or against clients or property under their protection, pending the handover of such detained persons to the Competent Authority at the earliest opportunity. Any such apprehension must be consistent with applicable national or international law and be reported to the Client without delay. Signatory Companies will, and will require that their Personnel to, treat all apprehended persons humanely and consistent with their status and protections under applicable human rights law or international humanitarian law, including in particular prohibitions on torture or other cruel, inhuman or degrading treatment or punishment.

This sub-section consists of one paragraph. It discusses situations in which it may be permissible for the personnel of a Signatory Company to take or hold individuals. It indicates how personnel should go about apprehending individuals when it is lawful to do so.

The Code is careful not to refer to any right to 'arrest' persons, because power of arrest is normally restricted to law enforcement officials, whose authority to arrest is granted by the state. In reality, the personnel of private security companies do detain individuals in the course of thwarting attacks or following attempted or completed crimes. In such circumstances the Code foresees that such detainees should be handed over to the competent authorities as soon as possible.

A company is obliged to inform the Client without delay when it detains a person. When the Client is a state or an international organization, the information permits the Client to take appropriate action. For example, a state may have to inform a detainee's consular authorities. Where a detainee is a protected person (in the context of an international armed conflict, in an occupied territory or the territory of a party to a conflict), the International Committee of the Red Cross has a right of access to the detainee. A number of other rights and obligations attach to such situations.⁸⁶ It should be noted that, under international humanitarian law, states are not permitted to devolve to private

or other non-state bodies the authority of the 'responsible officer' to manage prisoner of war camps or places in which civilians are interned.⁸⁷

Prohibition of torture or other cruel, inhuman or degrading treatment or punishment

This sub-section is composed of three relatively detailed paragraphs on the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment.

35. Signatory Companies will not, and will require that their Personnel not, engage in torture or other cruel, inhuman or degrading treatment or punishment. For the avoidance of doubt, torture and other cruel, inhuman or degrading treatment or punishment, as referred to here, includes conduct by a private entity which would constitute torture or other cruel, inhuman or degrading treatment or punishment if committed by a public official.

The Code states that companies must respect the unconditional prohibition of torture and ill-treatment, and must require their personnel to do likewise. It makes clear that companies (and other parties) may not avoid their responsibilities in this regard by arguing that under international law states have the primary obligation to prevent and sanction torture. (See Box 5 for the definition of torture in the 1984 UN Convention Against Torture.) The obligation is unaffected by whether or not the Signatory might be considered a state actor, and unaffected by whether or not the state acquiesced to or colluded with the actions in question.

36. Contractual obligations, superior orders or exceptional circumstances such as an armed conflict or an imminent armed conflict, a threat to national or international security, internal political instability, or any other public emergency, can never be a justification for engaging in torture or other cruel, inhuman or degrading treatment or punishment.

Paragraph 36 confirms that there are no justifications for torture or other cruel, inhuman, or degrading treatment or punishment. Their prohibition is absolute.

⁸⁶ 1949 Geneva Convention IV on the Protection of Civilians, Arts. 27–78.

⁸⁷ See The Montreux Document, A.2: 'Contracting States have an obligation not to contract PMSCs to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner of war camps or places of internment of civilians in accordance with the Geneva Conventions'.

Box 5. 1984 Convention Against Torture

Article 1

1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

37. Signatory Companies will, and will require that their Personnel, report any acts of torture or other cruel, inhuman or degrading treatment or punishment, known to them, or of which they have reasonable suspicion. Such reports will be made to the Client and one or more of the following: the competent authorities in the country where the acts took place, the country of nationality of the victim, or the country of nationality of the perpetrator.

Under Paragraph 37, Signatories are obliged to report, and to require their personnel to report, when they know or have reason to suspect that acts of torture or other cruel, inhuman, or degrading treatment or punishment have been committed.⁸⁸ The report must be made to the client *and* to the competent authorities in one or more of: the country in which the act took place, the country of nationality of the victim, or the country of nationality of the perpetrator.

What constitutes cruel, inhuman, or degrading treatment can be ascertained from the extensive case law of regional human rights courts and UN and regional treaty bodies. Principle 6 of the 1988 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states:

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

* The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions

which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

Sexual exploitation and abuse or gender-based violence

This sub-section addresses, in a single paragraph, a range of issues relating to sexual exploitation and gender-based violence.

38. Signatory Companies will not benefit from, nor allow their Personnel to engage in or benefit from, sexual exploitation (including, for these purposes, prostitution) and abuse or gender-based violence or crimes, either within the Company or externally, including rape, sexual harassment, or any other form of sexual abuse or violence. Signatory Companies will, and will require their Personnel to, remain vigilant for all instances of sexual or gender-based violence and, where discovered, report such instances to competent authorities.

The paragraph goes beyond what may be demanded under applicable law. The statement that Signatories and their personnel will not benefit from or engage in prostitution or other forms of sexual exploitation prohibits this behaviour even when it is legal under national or local law. A blanket prohibition is appropriate because of the context in which private security companies often operate. It should also be noted that the Code specifically addresses and prohibits sexual harassment and abuse within the company.

Sexual exploitation and gender-based violence violate numerous internationally recognized human rights, including the right to life, security

⁸⁸ See also Paragraph 24.

of the person, and equal protection under the law. Relevant international instruments in this area include:

- 1989 Convention on the Rights of the Child (CRC), as well as the Optional Protocol to the CRC on the Sale of Children, Child Pornography and Child Prostitution.
- 1981 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
- 1993 UN Declaration on the Elimination of Violence against Women.
- 2005 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.
- 2000 UN Protocol to prevent, suppress and punish trafficking in persons, especially women and children.
- 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence.

See also the UN Secretary-General's Bulletin on Violence against Women.⁸⁹

Human trafficking

39. Signatory Companies will not, and will require their Personnel not to, engage in trafficking in persons. Signatory Companies will, and will require their Personnel to, remain vigilant for all instances of trafficking in persons and, where discovered, report such instances to Competent Authorities. For the purposes of this Code, human trafficking is the recruitment, harbouring, transportation, provision, or obtaining of a person for (1) a commercial sex act induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or (2) labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, debt bondage, or slavery.

In a single paragraph, this sub-section defines human trafficking for the purposes of the Code and affirms that neither Signatories nor their personnel will engage in it. It imposes an obligation to 'remain vigilant for all instances of trafficking in persons' and to report cases that are discovered to competent authorities.

The most relevant international standard in this case is the UN Convention against Transnational Organized Crime (UNTOC) and its Protocol to Prevent, Suppress and Punish Trafficking in Persons.⁹⁰ The Protocol defines an offence of trafficking under international law. Under the Protocol, trafficking includes a transnational element. In contrast, the Code does not require either a transnational element or a link to organized crime. In this area, it once again goes beyond the treaty law agreed by states and requires private security companies to abide by a higher standard. The companies themselves insisted that the Code should include strong provisions on sexual exploitation and trafficking. In these areas, given the context in which security companies operate, it sets an appropriately high standard.

Prohibitions of slavery and forced labour

40. Signatory Companies will not use slavery, forced or compulsory labour, or be complicit in any other entity's use of such labour.

This sub-section is a one-sentence paragraph in which Signatories pledge not to use slavery, forced, or compulsory labour, or to be complicit in any other entity's use of such labour.

Two International Labour Organization (ILO) conventions are the most relevant international standards in this area: Convention No. 29 (1930) on Forced or Compulsory Labour,⁹¹ and Convention No. 105 (1957) on the Abolition of Forced Labour. Though these and other standards are well-established, forced labour nevertheless remains a serious problem in many parts of the world. According to a recent ILO report, '21 million victims worldwide – men, women and children [are] coerced into jobs they can't leave, trapped in debt bondage, trafficked for sexual exploitation and even born into slavery'.⁹² Sectors with a high incidence of forced labour include domestic work, agriculture, construction, manufacturing, and entertainment.

Signatories undertake to ensure that no forced labour is used by sub-contractors or in the course of subcontracting. The Article requires companies to be vigilant with regard to this risk. Complicity includes aid, assistance, encouragement, or inducement to use slavery, forced, or compulsory labour. To avoid

⁸⁹ UN Secretary-General's Bulletin on protection from sexual exploitation and abuse (PSEA), UN doc. ST/SGB/2003/13.

⁹⁰ At: <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html>.

⁹¹ At: http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C029.

⁹² ILO, *Report for discussion at the Tripartite Meeting of Experts concerning the possible adoption of an ILO instrument to supplement the Forced Labour Convention, 1930 (No. 29)*, 11–13 August 2013.

complicity in use of forced labour, companies will need to adopt due diligence procedures consistent with the UN Guiding Principles on Business and Human Rights, notably Guiding Principle 17 which says that due diligence involves:

...assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

Human rights due diligence:

- a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

The Commentary on this Principle clarifies that:

Human rights due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.

Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.

Prohibition of the worst forms of child labour

41. Signatory Companies will respect the rights of children (anyone under the age of 18) to be protected from the worst forms of child labour, including:

- a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and

- forced or compulsory labour, including forced or compulsory recruitment of children for use in provision of armed services;
- b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs;
- d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.⁹³

Signatory Companies will, and will require their Personnel to, report any instances of the activities referenced above that they know of, or have reasonable suspicion of, to Competent Authorities.

This sub-section contains one paragraph that obliges Signatories and their personnel to respect the rights of children (defined as any person under 18 years of age). International legal standards on the rights of children include the 1989 UN Convention on the Rights of the Child (CRC),⁹⁴ the most widely ratified of all UN human rights instruments. The following articles of the CRC are particularly relevant to this context.

Article 32

States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

⁹³ ICoC, Paragraph 41.

⁹⁴ At: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

Box 6. ILO Convention on the worst forms of child labour

Article 3

For the purposes of this Convention, the term the worst forms of child labour comprises:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

The other key international instrument in this area is the 1999 ILO Convention on the worst forms of child labour (No. 182) (Box 6).⁹⁵ As of June 2013, 174 states had ratified this Convention, including all five permanent members of the UN Security Council.

Paragraph 41 of the ICoC closely follows the text of Article 3 of the ILO Convention. Its provisions and sub-points (a) to (d) are almost identical. Nevertheless, it sets appropriate standards for the private sector rather than minimum standards for a state's armed forces. Accordingly, sub-paragraph (a) in the Code replaces 'armed conflict' in Article 3 of the ILO Convention by 'provision of armed services'. In the same manner, the Code prohibits Signatories from recruiting children for use in armed conflict but also their use for any 'armed services'. Any use of children in the context of armed security (in armed conflict or not) is prohibited under the Code. Finally, sub-paragraph (c) omits 'as defined in the relevant international treaties', which appears in Article 3(c) of the Convention.

Under Paragraph 41, Signatories are obliged to report (and to require their personnel to report) child rights violations that they know or have reason to suspect are occurring.⁹⁶ The report must be made at least to the 'Competent Authorities'. It is implicit that these include the authorities in the country where the act took place, and might include the country of nationality of the victim, and the country of nationality of the perpetrator.

Discrimination

42. Signatory Companies will not, and will require that their Personnel do not, discriminate on grounds of race, colour, sex, religion, social origin, social status, indigenous status, disability, or sexual orientation when hiring Personnel and will select Personnel on the basis of the inherent requirements of the contract.

Paragraph 42 of the ICoC affirms the prohibition of discrimination, a core principle of international human rights law. It states that Signatories and their personnel will not discriminate on grounds of race, colour, sex, religion, social origin, social status, indigenous status, disability, or sexual orientation.

Two points are worth highlighting. First, the list of prohibited grounds for discrimination does not include nationality. This reflects the fact that in certain circumstances a company should not have to justify advertising for personnel possessing a particular nationality.

Second, the term 'inherent requirements of the contract' might appear to give companies a ground for making distinctions that would otherwise be prohibited.

In this respect, the point to make is that any distinctions on one of the grounds that are mentioned in this Paragraph would need to be reasonable in the light of the requirements of the contract. Companies may also find that distinctions on grounds that are not mentioned may be

⁹⁵ At: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C182. See also ILO, *ILO Indicators of Forced Labour*, at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_203832.pdf.

⁹⁶ See also in this regard Paragraph 24.

prohibited under national law. For example, certain forms of discrimination on grounds of age are prohibited in several national jurisdictions, and may even be prohibited by some human rights treaties.⁹⁷

Identification and registering

The final paragraph of this section does not address an international human rights principle or standard but focuses on the need to identify, register, and license personnel, vehicles, and hazardous materials properly.

43. Signatory Companies, to the extent consistent with reasonable security requirements and the safety of civilians, their Personnel and Clients, will:

- a) require all Personnel to be individually identifiable whenever they are carrying out activities in discharge of their contractual responsibilities;
- b) ensure that their vehicles are registered and licensed with the relevant national authorities whenever they are carrying out activities in discharge of their contractual responsibilities; and
- c) will ensure that all hazardous materials are registered and licensed with the relevant national authorities.

The obligations under Paragraph 43 address broad questions of accountability. First, under sub-paragraph (a), personnel should wear clear insignia or uniforms. These should not only identify the company that employs them but make it possible to identify staff *individually* by a name or number, so that any allegations of abuse can be properly reported. This rule is conditioned by circumstances in which private security personnel may be endangered by wearing a uniform.

In situations of armed conflict, members of a country's armed forces have a duty to distinguish themselves from the civilian population. Private security personnel who operate as part of the armed forces of a government or an international organization in such situations may be subject to the same duty. Private security personnel who operate as part of the armed forces of an opposition body would be in violation of national law and might commit an offence of mercenarism under international law.⁹⁸

Under sub-paragraphs (b) and (c), Signatories, their personnel, and clients, have a duty to ensure their vehicles and all hazardous materials are registered and licensed with the relevant national authorities.

⁹⁷ See, for example, the reasoning in *Love v. Australia*, a decision by the Human Rights Committee under the ICCPR. UN doc. CCPR/C/77/D/983/2001, 28 April 2003.

⁹⁸ See 1989 UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

G. Specific Commitments Regarding Management and Governance

Section G includes specific commitments on management and governance. Its 26 paragraphs make it the longest section of the Code. .

Section G has the following sub-sections:

- Incorporation of the Code into company policies.
- Selection and vetting of personnel
- Selection and vetting of subcontractors.
- Company policies and personnel contracts.
- Training of personnel.
- Management of weapons.
- Weapons training.
- Management of materiel of war.
- Incident reporting.
- Safe and healthy working environment.
- Harassment.
- Grievance procedures.
- Meeting liabilities.

Incorporation of the Code into Company Policies

44. Signatory Companies will incorporate this Code into Company policies and internal control and compliance systems and integrate it into all relevant elements of their operations.

Signatories undertake to incorporate the Code into company policies and internal control and compliance systems and to integrate it into all relevant elements of their operations. This is consistent with the UN Guiding Principles on Business and Human Rights, which make clear that:

Just as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, policies and procedures that set financial and other performance incentives for personnel; procurement practices; and lobbying activities where human rights are at stake.⁹⁹

Selection and vetting of personnel

This sub-section, in five paragraphs, addresses the appointment of personnel and performance review.

45. Signatory Companies will exercise due diligence in the selection of Personnel, including verifiable vetting and ongoing performance review of their Personnel. Signatory Companies will only hire individuals with the requisite qualifications as defined by the applicable contract, applicable national law and industry standards, and the principles contained in this Code.

Signatories undertake to exercise due diligence when selecting personnel. This implies 'verifiable' vetting followed by ongoing performance review. Signatories undertake to hire individuals only if they have the requisite qualifications as defined by the applicable contract, applicable national law, industry standards, and principles contained in the Code.

46. Signatory Companies will not hire individuals under the age of 18 years to carry out Security Services.

Signatories undertake that they will not hire children to carry out security services (defined in Paragraph 41 as persons under 18 years of age).

47. Signatory Companies will assess and ensure the continued ability of Personnel to perform their duties in accordance with the principles of this Code and will regularly evaluate Personnel to ensure that they meet appropriate physical and mental fitness standards to perform their contracted duties.

Signatories undertake to assess and ensure the continued ability of their personnel to perform their duties 'in accordance with the principles' of the Code. They undertake to 'regularly evaluate' their personnel to ensure they meet 'appropriate physical and mental fitness standards' to perform their duties.

48. Signatory Companies will establish and maintain internal policies and procedures to determine the suitability of applicants, or Personnel, to carry weapons as part of their duties. At a minimum, this will include checks that they have not:

- a) been convicted of a crime that would indicate that the individual lacks the character and fitness to perform security services pursuant to the principles of this Code;
- b) been dishonourably discharged;
- c) had other employment or engagement contracts terminated for documented violations of one or more of the principles contained in this Code; or
- d) had a history of other conduct that, according to an objectively reasonable standard, brings into question their fitness to carry a weapon.

For the purposes of this paragraph, disqualifying crimes may include, but are not limited to, battery, murder, arson, fraud, rape, sexual abuse, organized crime, bribery, corruption, perjury, torture, kidnapping, drug trafficking or trafficking in persons. This provision shall not override any law restricting whether a crime may be considered in evaluating an applicant. Nothing in this section would prohibit a Company from utilizing more stringent criteria.

Signatories undertake to establish and maintain internal policies and procedures to determine that applicants and personnel are suitable persons to carry weapons as part of their duties. 'At a minimum', this must include checks that they have not: been convicted of a serious crime;¹⁰⁰ been dishonourably discharged (i.e., from an armed force); been dismissed from another employer for acts that would violate one or more of the principles contained in the Code; or have a history of conduct that, 'according to an objectively reasonable standard', would bring into question their fitness to carry a weapon.

49. Signatory Companies will require all applicants to authorize access to prior employment records and available Government records as a condition for employment or engagement. This includes records relating to posts held with the military, police or public or Private Security Providers. Moreover, Signatory Companies will, consistent with applicable national law, require all Personnel to agree to participate in internal investigations and disciplinary procedures as well as in any public investigations conducted by competent authorities, except where prohibited by law.

With respect to personnel, the UN Guiding Principles on Business and Human Rights state that, as part of embedding the corporate responsibility to respect human rights in their operations, all companies should develop a policy statement that, *inter alia*, 'stipulates the enterprise's

human rights expectations of personnel'¹⁰¹ and is 'communicated internally and externally to all personnel'.¹⁰² The Commentary on this Principle states that companies need to establish systems of accountability and systems for training personnel in relevant business functions.

Selection and vetting of subcontractors

This sub-section consists of two paragraphs that set out a Signatory's commitments with respect to selection and vetting of subcontractors.

50. Signatory Companies will exercise due diligence in the selection, vetting and ongoing performance review of all subcontractors performing Security Services.

Signatories have a general obligation to exercise 'due diligence'¹⁰³ when they select, vet, and review the performance of all subcontractors who perform security services.

51. In accordance with principle 13 of this Code, Signatory Companies will require that their Personnel and all subcontractors and other parties carrying out Security Services under the contract, operate in accordance with the principles contained in this Code and the standards derived from the Code. If a Company contracts with an individual or any other group or entity to perform Security Services, and that individual or group is not able to fulfil the selection, vetting and training principles contained in this Code and the standards derived from the Code, the contracting Company will take reasonable and appropriate steps to ensure that all selection, vetting and training of subcontractor's Personnel is conducted in accordance with the principles contained in this Code and the standards derived from the Code.

Paragraph 51 establishes a general obligation that Signatories must require their personnel and all subcontractors, and any other parties that carry out security services under a contract, to operate in accordance with the Code's principles and the standards derived from it. As noted earlier, the requirement that subcontractors should operate in accordance with the ICoC's principles is consistent with the UN Guiding Principles. These state that the responsibility of business enterprises to respect human rights requires them to:

¹⁰⁰ As set out in the Paragraph, such crimes may include, but are not limited to, battery, murder, arson, fraud, rape, sexual abuse, organized crime, bribery, corruption, perjury, torture, kidnapping, drug trafficking, or trafficking in persons.

¹⁰¹ UN Guiding Principle 16(c).

¹⁰² UN Guiding Principle 16(d).

¹⁰³ See references to due diligence in the commentary on ICoC Paragraph 40, prohibiting slavery and forced labour.

prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.¹⁰⁴

Company policies and personnel contracts

The three paragraphs in this sub-section address company policies and procedures with regard to contracts with personnel.

52. Signatory Companies will ensure that their policies on the nature and scope of services they provide, on hiring of Personnel and other relevant Personnel reference materials such as Personnel contracts include appropriate incorporation of this Code and relevant and applicable labour laws. Contract terms and conditions will be clearly communicated and available in a written form to all Personnel in a format and language that is accessible to them.

A Signatory undertakes to ensure that policies which describe the services it provides, or its policies on hiring personnel, and other relevant reference materials (such as personnel contracts), will incorporate the Code and relevant and applicable labour laws. Contract terms and conditions are to be made clear to all personnel 'in a format and language that is accessible to them'.

53. Signatory Companies will keep employment and service and reports on all past and present personnel for a period of 7 (seven) years. Signatory Companies will require all Personnel to authorize the access to, and retention of, employment records and available Government records, except where prohibited by law. Such records will be made available to any compliance mechanism established pursuant to this Code or Competent Authority on request, except where prohibited by law.

Paragraph 53 requires Signatories to retain employment and service records of personnel for a minimum of seven years. The records must be made available to the compliance mechanism established under the Code and to any competent authority on request, except where this is prohibited by law.

54. Signatory Companies will only hold passports, other travel documents, or other identification documents of their Personnel for the shortest period

of time reasonable for administrative processing or other legitimate purposes. This paragraph does not prevent a Company from co-operating with law enforcement authorities in the event that a member of their Personnel is under investigation.

Signatories may not hold passports or other travel or identification documents for longer than is necessary for 'administrative processing or other legitimate purposes'. According to the ILO Better Work Program:

Ordinarily, workers should keep their personal documents themselves. The employer's retention of a worker's identity documents can amount to a 'menace of penalty' under Convention 29 (Forced Labour). However, in some cases, it may be acceptable for employers to hold onto workers' documents, for example, if necessary to ensure that the documents are secure. In this situation, workers should freely consent to have their documents held, and they should be allowed to access them at their discretion.

Forced labour would be indicated if workers do not have access to their documents, and they feel they cannot leave their job without risking the loss of the documents. If workers have consented to have their documents held, and they confirm that their access is adequate, the fact that the employer is holding the documents would not indicate forced labour.¹⁰⁵

Training of personnel

This sub-section contains one paragraph, which commits the Signatory to provide professional training to its personnel on matters relating to the Code.

55. Signatory Companies will ensure that all Personnel performing Security Services receive initial and recurrent professional training and are also fully aware of this Code and all applicable international and relevant national laws, including those pertaining to international human rights, international humanitarian law, international criminal law and other relevant criminal law. Signatory Companies will maintain records adequate to demonstrate attendance and results from all professional training sessions, including from practical exercises.

¹⁰⁴ UN Guiding Principle 13(b).

¹⁰⁵ 'ILO Legal Brief Underlying Better Work's Compliance Assessment Tool: Forced Labour', 21 February 2013. At: <http://betterwork.org/global/wp-content/uploads/Legal-brief-underlying-CAT-Forced-Labour-21-Feb-2013-FINAL-NORMES-CLEAN.pdf>.

Signatories undertake to ensure that all personnel that perform security services receive professional training when they begin their work and throughout the term of their service. The text makes clear that such training must make personnel ‘fully aware’ of the Code and all applicable international and relevant national laws, including those pertaining to international human rights, international humanitarian law, international criminal law, and national criminal law. Signatories undertake to maintain records that will demonstrate that staff have attended all the professional training sessions required of them, and report the results that were achieved, including the results of practical exercises.

Management of weapons

This sub-section has three paragraphs which set out Signatory Company responsibilities with respect to the possession and use of weapons.

56. Signatory Companies will acquire and maintain authorizations for the possession and use of any weapons and ammunition required by applicable law.

Signatories undertake to obtain authorizations, as required by applicable laws, for the possession and use of any weapons and ammunition, and to keep authorizations up to date. Applicable laws are likely to include the law of the state in which a company is incorporated and the law of the country in which it delivers services.

57. Signatory Companies will neither, and will require that their Personnel do not, possess nor use weapons or ammunition which are illegal under any applicable law. Signatory Companies will not, and will require that their Personnel not, engage in any illegal weapons transfers and will conduct any weapons transactions in accordance with applicable laws and UN Security Council requirements, including sanctions. Weapons and ammunition will not be altered in any way that contravenes applicable national or international law.

Signatories undertake to ensure that they and their personnel do not possess or use any illegal weapons or ammunition. They will not alter legal weapons or ammunition in any manner that causes them to contravene national or international law.

Neither Signatories nor their personnel will engage in any illegal weapons transfers. UN arms embargoes adopted as mandatory by the UN Security Council will normally be binding on all member states and national law will make such transfers illegal. In addition, even prior to the entry into force of the 2013 UN Arms Trade Treaty for a particular state, according to the customary law of state responsibility it is illegal to transfer arms where those arms will facilitate human rights violations, including crimes against humanity, genocide, or war crimes; in addition individuals may be criminally liable for their participation in such a transfer.¹⁰⁶

58. Signatory Company policies or procedures for management of weapons and ammunitions should include:

- a) secure storage;
- b) controls over their issue;
- c) records regarding to whom and when weapons are issued;
- d) identification and accounting of all ammunition; and
- e) verifiable and proper disposal.

The final paragraph of this sub-section sets out elements that should be included in policies or procedures to manage weapons and ammunition. Standard 05.20 of the International Small Arms Control Standards (ISACS), issued by the UN in August 2012, covers the management of weapon stockpiles.¹⁰⁷ It notes that inadequately managed stockpiles are one of the main sources of illicit small arms and light weapons. Weapons leak from them by loss or theft into the illicit market. Effective and efficient management of weapon stockpiles is essential and requires systematic control in accordance with principles of ‘due care’.¹⁰⁸

According to the ISACS, the following principles of physical security must be applied to large-scale weapon storage areas (depots):

- a) Physical security systems must be based on a sound stockpile risk assessment.
- b) Physical security should be built into new storage facilities at the design stage.
- c) Weapons should be stored separately from ammunition.
- d) Particularly hazardous weapons should be disassembled and essential components

¹⁰⁶ See, for example, the prosecution under Dutch law of Frans Van Anraat for supplying weapons to Iraq.

¹⁰⁷ ISACS 05.20: Stockpile management: Weapons, Version 1.0, 27 August 2012. At: <http://www.smallarmsstandards.org/isacs/0520-en.pdf>. Stockpile management of weapons is the term used by ISACS to describe procedures and activities that are necessary for safe and secure accounting, storage, transportation, and handling of small arms and light weapons.

¹⁰⁸ *Ibid.*, Introduction.

- stored in different locations (unless required for current operational needs).
- e) An effective perimeter security infrastructure must be in place.
 - f) Access must be controlled at all times.
 - g) Access must be restricted to authorized personnel only.
 - h) Only trusted individuals who have received security clearance may be nominated or authorized to work within the facility.
 - i) Personnel working in a weapons storage area must receive appropriate training (including in applicable security regulations, standing operating procedures, and the security plan) and should have their training refreshed at regular intervals.
 - j) Temporary personnel should be accompanied at all times.¹⁰⁹

The security of smaller-scale depots of small arms and light weapons should be achieved by use of an armoury, a secure room or, for small locations, a secure cabinet. Such facilities should be compact, occupied 24 hours a day and 7 days a week, and should have security systems in place to control access.¹¹⁰

Under Paragraph 58, Signatory Company policies or procedures to manage weapons and ammunitions must: control their issue; record to whom and when weapons are issued; identify and account for all ammunition; and properly dispose of weapons and ammunition in a manner that is verified.

Weapons training

This single paragraph, with three relatively detailed sub-points, sets out commitments relating to weapons training of personnel.

59. Signatory Companies will require that:

- a) Personnel who are to carry weapons will be granted authorization to do so only on completion or verification of appropriate training with regard to the type and model of weapon they will carry. Personnel will not operate with a weapon until they have successfully completed weapon-specific training.
- b) Personnel carrying weapons must receive regular, verifiable and recurrent training specific to the weapons they carry and rules for the use of force.

- c) Personnel carrying weapons must receive appropriate training in regard to rules on the use of force. This training may be based on a variety of relevant standards, but should be based at a minimum on the principles contained in this Code and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), and national laws or regulations in effect in the area duties will be performed.

Signatory Companies must make it a requirement that personnel who are to carry weapons are granted authorization to do so only when they have completed appropriate training in the type and model of weapon(s) they will carry. In addition, personnel carrying weapons must receive 'regular, verifiable, and recurrent training specific to the weapons they carry' and training in the rules governing use of force.

Training in the use of force 'may be based on a variety of relevant standards', but at a minimum must include the principles contained in the Code, the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and national laws or regulations that are in effect in the area(s) in which duties will be performed.

Management of materiel of war

This sub-section, in three paragraphs, establishes commitments regarding the possession and use of war materiel, including hazardous materials and munitions.

60. Signatory Companies will, and will require that their Personnel to, acquire and maintain all authorizations for the possession and use of any materiel of war, e.g. hazardous materials and munitions, as required by applicable law.

Paragraph 60 obliges Signatories and their personnel to acquire and maintain all the authorizations required by applicable law for the possession and use of hazardous materials and munitions.

61. Signatory Companies will neither, and will require that their Personnel will neither, possess nor use any materiel of war, e.g. hazardous materials and munitions, which are illegal under any applicable law. Signatory Companies will not, and will require that their Personnel not engage in any illegal material transfers and will conduct

¹⁰⁹ *Ibid.*, Clause 9.1.

¹¹⁰ *Ibid.*, Clause 10.1.

any materiel of war transactions in accordance with applicable laws and UN Security Council requirements, including sanctions.

Paragraph 61 prohibits personnel from possessing or using any illegal materiel of war, such as hazardous materials and munitions. Applicable law would include both national legislation and international law (treaty or customary). Signatories and their personnel will not engage in any illegal transfers of such materiel. Examples of illegal materiel include anti-personnel mines, cluster munitions, expanding or exploding bullets, or chemical agents whose use is prohibited under the 1992 Chemical Weapons Convention.

62. Signatory Company policies or procedures for management of material of war, e.g. hazardous materials and munitions, should include:

- a) secure storage;
- b) controls over their issue;
- c) records regarding to whom and when materials are issued; and
- d) proper disposal procedures.

The final paragraph, whose sub-points are similar to those set out in Paragraph 58 on management of weapons, lists elements which should be included in policies or procedures for management of war materiel. The list includes secure storage, controls over the issue of materiel, records of any issue, and 'proper' disposal procedures.

Incident reporting

The sub-section on incident reporting consists of two paragraphs.

63. Signatory Companies will prepare an incident report documenting any incident involving its Personnel that involves the use of any weapon, which includes the firing of weapons under any circumstance (except authorized training), any escalation of force, damage to equipment or injury to persons, attacks, criminal acts, traffic accidents, incidents involving other security forces, or such reporting as otherwise required by the Client, and will conduct an internal inquiry in order to determine the following:

- a) time and location of the incident;
- b) identity and nationality of any persons involved including their addresses and other contact details;
- c) injuries/damage sustained;
- d) circumstances leading up to the incident; and
- e) any measures taken by the Signatory Company in response to it.

Upon completion of the inquiry, the Signatory Company will produce in writing an incident report including the above information, copies of which will be provided to the Client and, to the extent required by law, to the Competent Authorities.

Signatories undertake to prepare an incident report documenting any incident that involved its personnel and the use of any weapon. Such incidents include the firing of weapons under any circumstance (except during authorized training); damage to equipment or injury to persons; attacks; criminal acts; traffic accidents; incidents involving other security forces; and any other reporting required by the client. The Signatory must conduct an internal inquiry to determine: the time and location of the incident; the identity and nationality of any persons involved, including their addresses and other contact details; any injuries or damage sustained; the circumstances leading up to the incident; and any measures that the Signatory has taken in response.

The second paragraph stipulates that the incident report will be written, and that copies of it will be made available to 'Competent Authorities', to the extent required by law.

Safe and healthy working environment

This section of the ICoC commits Signatory Companies to address workplace safety concerns, even when local environments make doing so a significant challenge. The section consists of one paragraph with four sub-paragraphs.

64. Signatory Companies will strive to provide a safe and healthy working environment, recognizing the possible inherent dangers and limitations presented by the local environment. Signatory Companies will ensure that reasonable precautions are taken to protect relevant staff in high-risk or life-threatening operations. These will include:

- a) assessing risks of injury to Personnel as well as the risks to the local population generated by the activities of Signatory Companies and/or Personnel;
- b) providing hostile environment training;
- c) providing adequate protective equipment, appropriate weapons and ammunition, and medical support; and
- d) adopting policies which support a safe and healthy working environment within the Company, such as policies which address psychological health, deter work-place violence, misconduct, alcohol and drug abuse, sexual harassment and other improper behaviour.

Numerous international and national standards, including industry specific standards and rules, regulate workplace health and safety.¹¹¹

The Code requires Signatories to take reasonable precautions to protect staff who are involved in high-risk or life-threatening operations. The precautions specified are: to assess the risk of injury to personnel or the local population as a result of the activities of Signatories or their personnel; to provide hostile environment training; to provide adequate protective equipment, appropriate weapons and ammunition, and medical support; and to adopt policies that support a safe and healthy working environment in the company. Such policies may need to address psychological health and deter work-place violence, misconduct, alcohol and drug abuse, sexual harassment, and other improper behaviour.

Harassment

65. Signatory Companies will not tolerate harassment and abuse of co-workers by their Personnel.

The single sentence of Paragraph 65 requires Signatories to prohibit harassment and abuse of co-workers by their personnel but does not define ‘harassment’ or the behaviour that will not be tolerated. This clearly includes sexual harassment because the term is referenced in Paragraph 64(d). At international level, sexual harassment has been identified most commonly in the context of discrimination and violence against women.¹¹² ILO conventions and expert committees have also addressed sexual harassment extensively and have studied national and regional responses to the problem.¹¹³ A European Union Directive¹¹⁴ on equal treatment for men and women with respect to employment and working conditions defines such harassment as:

where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating

an intimidating, hostile, degrading, humiliating or offensive environment.

And:

where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of the person....

There is much less guidance at international level on non-sexual forms of workplace harassment. The Fair Labor Association, a multi-stakeholder initiative that promotes respect for ILO standards, states in its Code of Conduct that:

No employee shall be subject to any physical, sexual, psychological or verbal harassment or abuse.¹¹⁵

Grievance procedures

Paragraphs 66 to 68 contain key provisions on grievance procedures and effective implementation of the ICoC.

66. Signatory Companies will establish grievance procedures to address claims alleging failure by the Company to respect the principles contained in this Code brought by Personnel or by third parties.

Each Signatory undertakes to establish ‘grievance procedures’ to address claims that the company has failed to respect the Code’s principles. The procedures must allow complaints to be brought by personnel or third parties. The procedures are set out in more detail in Paragraph 67.

67. Signatory Companies will:

- a) establish procedures for their Personnel and for third parties to report allegations of improper and/or illegal conduct to designated Personnel, including such acts or omissions that would violate the principles contained in this Code. Procedures must be fair, accessible and offer effective remedies, including recommendations for the prevention of recurrence. They shall

¹¹¹ See, for example, ILO Occupational safety and health standards and guidance at: <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/occupational-safety-and-health/lang-en/index.htm>.

¹¹² See, for example, UN World Conference on Human Rights (1993), Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, §§18 and 38. At: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>.

¹¹³ For a summary see, for example, *Sexual harassment at work: National and international responses*, ILO Conditions of Work and Employment Series No. 2, 2005. At: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_travail_pub_2.pdf.

¹¹⁴ EU Directive 2002/73/EC of European Parliament and Council of 23 September 2002, amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

¹¹⁵ At: <http://www.fairlabor.org/our-work/labor-standards>.

- also facilitate reporting by persons with reason to believe that improper or illegal conduct, or a violation of this Code, has occurred or is about to occur, of such conduct, to designated individuals within a Company and, where appropriate, to competent authorities;
- b) publish details of their grievance mechanism on a publicly accessible website;
 - c) investigate allegations promptly, impartially and with due consideration to confidentiality;
 - d) keep records about any such allegations, findings or disciplinary measures. Except where prohibited or protected by applicable law, such records should be made available to a Competent Authority on request;
 - e) cooperate with official investigations, and not participate in or tolerate from their Personnel, the impeding of witnesses, testimony or investigations;
 - f) take appropriate disciplinary action, which could include termination of employment in case of a finding of such violations or unlawful behaviour; and
 - g) ensure that their Personnel who report wrongdoings in good faith are provided protection against any retaliation for making such reports, such as shielding them from unwarranted or otherwise inappropriate disciplinary measures, and that matters raised are examined and acted upon without undue delay.

Under Paragraph 67, Signatories are required to establish procedures that enable personnel or third parties to report allegations of improper or illegal conduct to specified personnel, including acts or omissions that violate principles contained in the Code. Procedures must be fair and accessible, offer effective remedies, and include recommendations to prevent recurrence. Signatories must also: publish details of their grievance mechanism on a publicly accessible website; investigate allegations promptly, impartially and confidentially; keep records of allegations, findings, and disciplinary measures, and make such records available to a 'Competent Authority on request' (provided it is lawful to do so); cooperate with official investigations, and permit witnesses, testimony, or investigations to proceed without any form of impediment by the company or personnel; and take appropriate disciplinary action (which could include termination of employment) if violations or unlawful behaviour are found to have occurred. Finally, Signatories must ensure that personnel who report wrongdoing in good faith

are protected against retaliation for making such reports; and matters raised must be examined and acted on without undue delay.

Relevant international standards with respect to grievances include the ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*. This states:

Multinational as well as national enterprises should respect the right of the workers whom they employ to have all their grievances processed in a manner consistent with the following provision: any worker who, acting individually or jointly with other workers, considers that he has grounds for a grievance should have the right to submit such grievance without suffering any prejudice whatsoever as a result, and to have such grievance examined pursuant to an appropriate procedure....¹¹⁶

The UN Guiding Principles on Business and Human Rights are also relevant. Guiding Principle 22 states:

Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

Guiding Principle 29 states:

To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

The commentary on Guiding Principle 29 states that operational-level grievance mechanisms should 'reflect effectiveness criteria set out in Guiding Principle 31'.¹¹⁷ Guiding Principle 30 states:

Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.

The ICOC's Articles of Association contain extensive additional detail with respect to grievances.

Article 13, titled 'Complaints Process', establishes 'a process to support Member companies in discharging their commitments under paragraphs 66, 67, and 68 of the Code'.¹¹⁸ First of all, the Board of the Association will prepare proposals in this area

¹¹⁶ Paragraph 58. At: http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_101234.pdf.

¹¹⁷ Article 31 states that effective non-judicial grievance mechanisms, whether state-based or not, should be: (a) legitimate; (b) accessible; (c) predictable; (d) equitable; (e) transparent; (f) rights-compatible; (g) a source of continuous learning; and (h) based on engagement and dialogue.

which will be submitted to the General Assembly for approval. Article 13.2 contains 10 sub-articles which indicate in some detail how the Board should proceed. Article 13.3 confirms that:

From time to time the Board shall publish guidance to Members on best practice and compliance with paragraphs 66, 67 and 68 of the Code, based on a review of complaints brought to the Association and claims brought to Member companies, and other relevant developments.

68. No provision in this Code should be interpreted as replacing any contractual requirements or specific Company policies or procedures for reporting wrongdoing.

This is a safeguard clause. It protects any grievance procedures, contractual arrangements, or procedures for hearing complaints and channelling reports that already exist. It confirms that these procedures will continue unaltered and will operate alongside grievance procedures established under the Code.

Meeting liabilities

69. Signatory Companies will ensure that they have sufficient financial capacity in place at all times to meet reasonably anticipated commercial liabilities for damages to any person in respect of personal injury, death or damage to property. Sufficient financial capacity may be met by customer commitments, adequate insurance coverage, (such as by employer's liability and public liability coverage appropriately sized for the scale and scope of operations of the Signatory Company) or self insurance/retention. Where it is not possible to obtain suitable insurance cover, the Signatory Company will make alternative arrangements to ensure that it is able to meet such liabilities.

This paragraph affirms that Signatories must have 'sufficient financial capacity in place' at all times to meet 'reasonably anticipated commercial liabilities' for 'damages to any person in respect of personal injury, death or damage to property'. These forms of damage may be distinguished from other types of commercial liability (libel or loss of profit, for example). In addition, Signatories are required to ensure that vindicated claimants are appropriately compensated even when the Signatory cannot obtain suitable insurance cover because its operating situation or circumstances are exceptional.

H. Review

The ICoC concludes with a paragraph, one sentence in length, in which the Swiss Government undertakes to maintain a public list of Signatory Companies and to convene a first conference to review the Code after its governance and oversight mechanisms have been developed.

70. The Swiss Government will maintain a public list of Signatory Companies and convene an initial review conference with a view to reviewing the Code after governance and oversight mechanisms (as referenced in the Preamble and Section C “Implementation” to this Code) are developed.

Conclusions and Next Steps

The International Code of Conduct for Private Security Service Providers (ICoC) marks a significant step forward, both in efforts to address the human rights responsibilities of the private security industry, and in the wider development of Multi-Stakeholder Initiatives (MSIs) that seek to advance respect for international humanitarian law and human rights standards. The Academy hopes that the commentary and analysis presented in this Briefing will assist all the actors involved to implement the Code.

This section considers the evolving governance and oversight arrangements that are being established for the Code's implementation following the adoption of Articles of Association for the ICoC Association. The new Association will be established as a legal entity under Swiss law to 'promote, govern and oversee implementation' of the ICoC and to 'promote the responsible provision of security services and respect for human rights and national and international law in accordance with the Code'.¹¹⁹

Several features of the ICoC's governance arrangements are significant.

First, it has a three pillared governance structure. The Articles of Association establish a balanced representation of governments, the private security services industry, and civil society. All decisions that require the approval of the Association's General Assembly will require a majority vote in each of these stakeholder groups.¹²⁰ Similarly, each stakeholder group will hold four of twelve seats on the Board, the Association's executive decision-making body.¹²¹ The Board has wide-ranging responsibilities and will be supported by an Executive Director. The latter is mandated to establish a Secretariat to manage the Association's activities, including field-based reviews.¹²²

Second, membership of the Association will be subject to certification. To join, a company will be obliged to show that its 'systems and policies meet the Code's principles and the standards

derived from the Code and that [it] is undergoing monitoring, auditing, and verification, including in the field'.¹²³ The Board of the Association will be responsible for developing certification procedures, which will be approved by the General Assembly.

States and intergovernmental organizations that wish to participate as members in the Association will be required to show that they support The Montreux Document and intend 'to support the principles of the ICoC and participate in the activities of the Association....'¹²⁴ The Articles of Association foresee the establishment of an 'Advisory Forum of Montreux Document Participants', open to all states that participated in The Montreux Document whether or not they are members of the Association. The Advisory Forum will provide 'advice to the Association on national and international policy and regulatory matters'.¹²⁵

Civil society organizations wishing to be members in the Association will need to demonstrate their independence and an institutional record of promoting human rights, international humanitarian law or the rule of law. In addition to the company, government and civil society member categories, the Articles of Association establish a status of non-voting observer, which will be open to other parties, 'including non-state clients, companies providing services or other support to PSCs, and other stakeholders who have demonstrated support for the principles of the ICoC and the Purpose of the Association'.¹²⁶

Third, the Articles of Association emphasise reporting, monitoring and performance assessment.¹²⁷ The Board is mandated to develop procedures in this area, for approval by the General Assembly. The overall aim will be to receive and gather information on "whether Member companies are operating in compliance with the Code" and member companies will be expected to introduce performance monitoring arrangements and to report their findings to the Association. The Articles mandate the Board to request corrective action from companies that do not comply with the Code,

¹¹⁹ Articles of Association, Article 2.2.

¹²⁰ Articles of Association, Article 6.5.

¹²¹ Articles of Association, Articles 7 and 8.

¹²² Articles of Association, Article 9.

¹²³ Articles of Association, Article 11.1.

¹²⁴ Articles of Association, Article 3.3.2.

¹²⁵ Articles of Association, Article 10.

¹²⁶ Articles of Association, Article 3.4.

¹²⁷ Articles of Association, Article 12.

and to initiate suspension proceedings against any member companies that do not respond positively to such requests.¹²⁸

Finally, the Articles of Association require member companies to establish grievance procedures, as foreseen in the Code. As noted earlier, paragraph 66 of the Code requires Signatories to “establish grievance procedures to address claims” brought by personnel and by third parties. The Articles of Association are particularly detailed in this area.¹²⁹ The Board is again charged with developing procedures.

The Articles of Association state that the Secretariat and the Board will both have a role in facilitating access to grievance procedures, and that these may offer effective remedy as well as provide mediation or other arrangements. The Articles of Association make clear that the Association ‘shall not impose a specific award on the parties’ in specific cases. However, the Board is mandated to take action, to the point of suspending or terminating membership, if it determines that a Member company has ‘failed to take reasonable corrective action’ or ‘cooperate in good faith in accordance with this Article’.¹³⁰

In conclusion, the Articles of Association provide a solid foundation for establishing legitimate and effective governance mechanisms for the ICoC’s implementation. In the short term, two key challenges for the Association are to select an experienced and representative Board, and to secure the support and resources that the Association’s operations will require.

It is too early to judge how the ICoC initiative will complement and interact with other national and international efforts in this field. It is nevertheless safe to say that the ICoC initiative will be an essential point of reference for the private security services industry and all stakeholders who seek to ensure that private security companies and their clients respect human rights and international humanitarian law.

128 *Op.cit.*

129 Articles of Association, Article 13.

130 Articles of Association, Article 13.2.7.

Annexes

Annex I. Articles of Association

Article 1

Name and Registered Office

1.1 The International Code of Conduct for Private Security Service Providers' Association (alternatively known as the Association) is a multi-stakeholder initiative established as a non-profit Association in accordance with Articles 60 *et. seq.* of the Swiss Civil Code and with these Articles of Association. This Association is an independent legal entity with legal capacity governed by Swiss law. Its duration is unlimited.

1.2 The Association has its seat in the Canton of Geneva.

1.3 The official language of the Association is English.

Article 2

Purpose

2.1 The Association has no profit motive.

2.2 The purpose ("Purpose") of the Association is to promote, govern and oversee implementation of the International Code of Conduct for Private Security Service Providers (hereinafter "ICoC" or "Code") and to promote the responsible provision of security services and respect for human rights and national and international law in accordance with the Code.

2.3 The Association may engage in all activities and take all actions necessary and appropriate to carry out this purpose in accordance with these Articles.

Article 3

Membership

3.1 Membership in the Association shall be divided into three membership categories reflecting stakeholder pillars: the Private Security Companies and Private Security Service Providers (collectively "PSCs") pillar (hereinafter PSC pillar), the civil society organization (CSO) pillar, and the government pillar.

3.2 Within six (6) months of adoption of these Articles, the Board shall propose for approval by

the General Assembly membership requirements for each of the three stakeholder pillars.

3.3 In determining membership requirements for each stakeholder pillar, the Board shall observe the following:

3.3.1 PSCs shall be eligible for membership upon certification under Article 11 of these Articles. As a transitional matter, companies that formally endorse these Articles, and meet the obligations of membership, shall enjoy on a provisional basis the rights of membership prior to certification under Article 11 until one year following the approval of certification procedures under Article 11.

3.3.2 States and intergovernmental organizations that have communicated their support of the Montreux Document and who communicate their intent to support the principles of the ICoC and participate in the activities of the Association as specified in these Articles are eligible for membership. States and intergovernmental organizations may indicate on becoming a Member where legal requirements may prevent them from undertaking a specified organizational responsibility set forth in these Articles. In becoming a Member, such States and intergovernmental organizations commit to provide information related to their implementation of the Montreux Document and the Code, including the development of their domestic regulatory framework for PSC activities, and to promote compliance with the ICoC in their contracting practices and policies.

3.3.3 Civil society Members shall be independent, non-profit organizations with a demonstrated institutional record at the local, national, or international level of the promotion and protection of human rights, international humanitarian law or the rule of law. Independence shall be assessed by reference to relationships with other stakeholder pillars, such as via specific, relevant or substantial funding, or through active working relationships. Civil society Members commit to promote the Purpose of the Association.

3.4 In addition to the Member categories described above, the Board shall adopt procedures for approval by the General Assembly in accordance with these Articles to grant non-voting observer status to other parties, including non-state clients, companies providing services or other support to PSCs, and other stakeholders who have demonstrated support for the principles of the ICoC and the Purpose of the Association.

Article 4

Liability

4.1 The Association's financial obligations shall be satisfied only from its assets. Members of the Association shall not be personally liable for any acts, omissions, obligations or debts of the Association. The Association shall adopt appropriate procedures to address the indemnification of Members of the Board of Directors, Secretariat and the Executive Director.

Article 5

Association Bodies

5.1 The bodies of the Association are: the General Assembly; the Board of Directors; the Secretariat operating under the supervision of an Executive Director; and such other bodies that may be established pursuant to these Articles.

Article 6

General Assembly

6.1 The General Assembly is the supreme governing body of the Association and consists of a gathering of the full membership and shall take place at such times as may be determined by the Board of Directors, or by the request of at least 20 percent of the membership, but in no case shall meet less than once a year.

6.2 The General Assembly shall provide a forum for voting on matters as required under these Articles and for multi-stakeholder dialogue and discussion related to the ICoC and shall consider such agenda items as may be provided by the Board of Directors or, with the approval of the Board of Directors, proposed by the membership.

6.3 The General Assembly supervises the Association's other corporate bodies. The right of supervision includes the right to dismiss other corporate bodies at any time.

6.4 The General Assembly shall also have the power to approve decisions by the Board of Directors in the following areas before such decisions will enter into force:

- 6.4.1 Amendments to the Code;
- 6.4.2 Amendments to these Articles of Association;
- 6.4.3 Requirements for membership and observer status in the Association as well as withdrawal from the Association;

6.4.4 Establishment of membership dues;

6.4.5 Review and approval of financial statements, including external audits;

6.4.6 Certification Procedures;

6.4.7 Reporting, Monitoring and Assessing Performance Procedures;

6.4.8 Complaints Process Procedures.

6.5 Each Member shall have one vote on matters before the General Assembly. Ratification of amendments to the ICoC or to these Articles of Associations shall require a vote of not less than two-thirds of the Members present and eligible to vote in each of the three stakeholder pillars. Election and dismissal of a Board Director shall require a majority vote of Members present and eligible to vote; only Members from a given stakeholder pillar shall be eligible to vote on election and dismissal of a Board Director representing that pillar. All other decisions taken pursuant to this Article shall require a vote of the majority of the Members present and eligible to vote in each of the three stakeholder pillars.

6.6 The chair of the Board shall chair proceedings of the General Assembly and shall propose rules of procedure, including proxy voting and virtual meeting procedures, for the conduct of the General Assembly.

6.7 Powers not specified in these Articles shall be reserved to the Board of Directors.

6.8 A quorum for proceedings of the General Assembly shall be established by the participation in the meeting of at least twenty-five percent of the Members in each of the three stakeholder pillars. Proceedings of the General Assembly may not be convened at less than thirty (30) days' notice.

Article 7

Board of Directors

7.1 The Board of Directors (alternatively "the Board") is the executive decision-making body of the Association. The Board manages the affairs of the association in accordance with the provisions of these Articles. In so doing it seeks to represent the interests of the Association Members as a whole.

7.2 The Board shall be composed of twelve Directors, with four seats allocated to each of the stakeholder pillars. Each Board Director shall be committed to the Purpose of the Association and shall fairly represent the views of the stakeholder pillar he or she represents. Board Directors shall be selected in accordance with the requirements

set forth in this Article and under nomination procedures to be established by each stakeholder pillar. Directors shall be selected with regard for the need for a high level of competency, commitment to participation, and diversity of experiences, insights and perspectives related to the Purpose of the Association. The Board shall maintain a record of the nomination procedures adopted by each stakeholder pillar. Election and dismissal of Board Directors shall be approved by the General Assembly in accordance with Article 6.5.

7.3 Except as otherwise provided for the initial Board in the Instrument of Adoption of these Articles, Board Directors shall serve three year terms. The Board shall provide for the staggered re-election of Board Directors as their terms expire and for the replacement of Board Directors when vacancies occur. No Board Director shall serve for more than two consecutive terms.

7.4 The Board may select a Chairperson from among its membership or select an additional non-voting Independent Chairperson. The Chairperson is responsible for convening and chairing Board meetings and otherwise managing the Board's business. The Chairperson's term shall be established upon selection, but in no case shall exceed three years or, in the case of a Board Member with less than three years remaining in his or her term, the remainder of the term.

7.5 The Board shall meet as necessary, but at least annually, in person or by other means as the Board may determine as necessary to implement its responsibilities under these Articles.

7.6 Unless otherwise provided by these Articles, decisions of the Board shall be taken by a majority of eight Board Directors, which must include a minimum of two votes from Board Directors from each of the three stakeholder pillars.

7.7 The Board shall adopt its own rules of procedure to, among other things, address the confidentiality obligations of Board Members, identify and disclose potential conflicts of interest and provide for recusal or other appropriate measures for Board Members in the event of a conflict of interest.

7.8 Board Directors shall act on an unpaid basis and be entitled only to the compensation of their effective costs and travelling expenses.

Article 8

Powers of the Board of Directors

8.1 The Board has authority and responsibility to:

8.1.1 Oversee the operations of the Secretariat, including through preparation, review and approval of an annual budget, and by approving staffing levels and staffing rules;

8.1.2 Provide an annual report on the activities of the Association and the implementation of the ICoC to the General Assembly;

8.1.3 Make recommendations to the General Assembly, including any recommendations for the amendment of the ICoC or these Articles in accordance with these Articles;

8.1.4 Develop procedures, for approval by the General Assembly, for the functions of the Association under Articles 11, 12 and 13;

8.1.5 Develop requirements for Association membership and observer status and withdrawal in accordance with these Articles including measures, which shall be separately approved by the General Assembly, for suspension, termination or other such activities;

8.1.6 Oversee the finances of the Association, including the adoption of appropriate financial controls, arrangements for external audits, and the preparation of appropriate financial statements in accordance with applicable law;

8.1.7 Recommend membership dues for approval by the General Assembly in accordance with these Articles; and

8.1.8 Establish such other committees or bodies, including an Advisory Board, as may be necessary to provide for the effective operation of the Association.

8.2 In exercising its responsibilities the Board will have due regard to the essential nature of any activity and applicable law, the budget and available resources, and the risks associated with the activity.

Article 9

Executive Director and Secretariat

9.1 The Executive Director shall be appointed by the Board and shall execute the decisions of the Board and otherwise direct the activities and administration of the Association and Secretariat subject to the authority of the Board and in accordance with these Articles.

9.2 Subject to Article 8.1.1, the Executive Director shall hire and supervise such staff as may be required to carry out the activities of the Association as prescribed by these Articles.

9.3 The Secretariat shall be responsible for maintaining records necessary for the ongoing governance of the Association (“The Archive”) that shall include, but is not limited to: a) rules; b) bylaws; c) records of votes; and d) any other records of governance.

Article 10

Advisory Forum of Montreux Document Participants

10.1 An Advisory Forum of Montreux Document Participants shall be established. The Forum will be open to all Montreux Document Participants irrespective of their membership status in the Association and will be available as a resource to the Board. The purpose of this body is to provide advice to the Association on national and international policy and regulatory matters.

Article 11

Certification

11.1 The Association shall be responsible for certifying under the Code that a company’s systems and policies meet the Code’s principles and the standards derived from the Code and that a company is undergoing monitoring, auditing, and verification, including in the field.

11.2 The Board shall develop procedures for this Article based on the following elements and submit them to the General Assembly for approval:

11.2.1 The Board shall define the certification requirements based on national or international standards and processes that are recognized by the Board as consistent with the Code and specifying any additional information relevant to the human rights and humanitarian impact of operations it deems necessary for assessing whether a company’s systems and policies meet the requirements of the Code and its readiness to participate in the Association;

11.2.2 Companies shall provide evidence of certification under a standard recognized by the Board and keep this certification current, and provide such additional information as the Board has specified under Article 11.2.1;

11.2.3 Companies shall provide a written, public declaration of their intent to adhere to the Code with such language as the Board may prescribe, and to participate fully in the Association’s activities under Articles 12 and 13; and

11.2.4 The certification process shall operate in a manner that is complementary to, and not duplicative of, certification under Board-recognized national and international standards.

11.3 Certification by the Association shall remain valid for a period of three years.

11.4 The Association shall foster and promote the development and harmonization of standards in accordance with the Code, and maintain a registry of companies certified in accordance with this Article.

Article 12

Reporting, Monitoring and Assessing Performance

12.1 The Association shall be responsible for exercising oversight of Member companies’ performance under the Code, including through external monitoring, reporting and a process to address alleged violations of the code.

12.2 The Board shall develop procedures for this Article based on the following elements and submit them to the General Assembly for approval:

12.2.1 Using established human rights methodologies, the Secretariat shall gather and receive information from public and other available sources on whether Member companies are operating in compliance with the Code.

12.2.2 Member companies shall provide to the Association a written assessment of their performance pursuant to a transparent set of criteria covered by necessary confidentiality and nondisclosure arrangements.

12.2.3 The Executive Director may initiate a field based review, unless the Board decides otherwise, (i) where the review of available information or a human rights risk assessment has identified a need for further monitoring within an area of one or more Member companies’ operations, or (ii) on request from a Member of the Association. In each case such field base review shall be aimed at improving performance or addressing specific compliance concerns.

12.2.4 The Secretariat shall review information gathered pursuant to Articles 12.2.1-12.2.3 to identify compliance concerns, assess the human rights impacts of company operations, and identify and analyze broader patterns in particular complex environments.

12.2.5 The Secretariat shall offer observations and engage in dialogue with Member companies aimed

at improving performance or addressing specific compliance concerns. The Executive Director shall refer alleged violations of the Code to the Board. The Executive Director shall report regularly to the Board on the Secretariat's activities pursuant to this Article.

12.2.6 The Board shall review performance and compliance issues referred by the Executive Director or at its own initiative. The Board shall offer observations and advice to Member companies aimed at improving performance or addressing specific compliance concerns.

12.2.7 If the Board determines that corrective action is required to remedy non-compliance with the Code, the Board shall request a Member company take corrective action within a specific time period. Should a Member company fail to take reasonable corrective action within the period specified by the Board, or fail to act in good faith in accordance with these Articles, then the Board shall initiate suspension proceedings in accordance with these Articles.

12.2.8 Member companies shall be expected to co-operate in good faith, consistent with applicable contractual and legal requirements.

12.2.9 The Board shall implement necessary confidentiality and nondisclosure arrangements related to its activities under this Article. Subject to these arrangements and following consultations with relevant parties, the Board may issue a public statement on the status or outcome of the Association's review of a Member company.

12.2.10 The Board shall ensure that the Association appropriately respects legal investigations or proceedings and any rights or privileges attached to those investigations or proceedings in carrying out the functions of this Article, but the presence of a legal investigation or proceeding will not necessarily of itself cause suspension of the functions of this Article.

12.3 The Association will report publicly, no less than annually, on its activities under this article.

12.4 The Association shall serve as a central agency for, and will promote industry best practices on, particular elements of the Code that will be available to companies.

Article 13

Complaints Process

13.1 The Association shall maintain a process to support Member companies in discharging their commitments under paragraphs 66, 67, and 68 of the Code, which require Companies to address

claims alleging violations of the Code by establishing fair and accessible grievance procedures that offer effective remedies.

13.2 The Board shall develop procedures for this Article based on the following elements and submit them to the General Assembly for approval:

13.2.1 The Secretariat shall receive complaints from individuals or their representatives, which must both (i) contain specific allegations of conduct that, if true, would constitute a violation of the Code, and (ii) allege harm to one or more of those individuals. Complaints, including purely contractual or personnel disputes, that do not meet these criteria, or that are manifestly unfounded, frivolous or vexatious, will not be considered.

13.2.2 After a complaint has been received and considered under Article 13.2.1, the Secretariat shall inform the complainant, in a timely manner, of fair and accessible grievance procedures that may offer an effective remedy, including any such grievance procedure provided by a relevant Member company. The Secretariat may facilitate access to such grievance procedures, but shall remain neutral and shall not act in a representative capacity.

13.2.3 If a complainant alleges that a grievance procedure provided by a relevant Member company is not fair, not accessible, does not or cannot offer an effective remedy, or otherwise does not comply with paragraph 67 of the Code, the Secretariat shall review that allegation.

13.2.4 After conducting such a review, the Secretariat may offer observations to the Member company, the complainant and the Board and engage in dialogue with the Member company and the complainant to address how, if at all, the grievance procedure provided by the Member company does not comply with paragraph 67 of the Code and on the possible need for corrective action, including the suitability of the complaint being referred to another, identified fair and accessible grievance procedure that may offer an effective remedy.

13.2.5 After receiving the observations of the Secretariat, the Board may suggest that the complaint be referred to another, identified fair and accessible grievance procedure that may offer an effective remedy, and/or recommend that the Member company take corrective action within a specified period. This may include cooperation with the Association's good offices, the provision of a neutral and confidential mediation process, or other arrangements that may assist the Member company to offer an effective remedy as required by paragraphs 66 and 67 of the Code. The Association shall not impose a specific award on the parties.

13.2.6 If, after further consultation with the complainant and Member company, the Board considers that the Member company has taken reasonable corrective action or the parties have referred the claim to a fair and accessible grievance procedure that may offer an effective remedy, it may determine that the complaint has been addressed.

13.2.7 Member companies shall be expected to cooperate in good faith, consistent with applicable law and contractual requirements. If, after further consultation with the complainant and the Member company, the Board considers that the Member company has failed to take reasonable corrective action within a specified period or cooperate in good faith in accordance with this Article, it shall take action, which may include suspension or termination of membership.

13.2.8 Member companies shall provide, in good faith, to the Association information relevant to the complaint, consistent with applicable law and contractual requirements.

13.2.9 The Association shall discharge its function under this Article in a timely manner and respect the confidentiality of the complainant, Member companies, and other stakeholders, and, where relevant, consider the complainant's fear of reprisal.

13.2.10 The existence of legal investigations or proceedings addressing the alleged conduct shall be considered, but will not of itself cause a suspension of the complaints process. The Board may suspend or otherwise limit the complaints process as necessary and appropriate in order to avoid serious prejudice to any such investigations or proceedings or party thereto.

13.3 From time to time the Board shall publish guidance to Members on best practice and compliance with paragraphs 66, 67 and 68 of the Code, based on a review of complaints brought to the Association and claims brought to Member companies, and other relevant developments.

Article 14

Finances

14.1 The Association shall derive its resources from membership dues; contributions provided by its membership; public and private donations, grants, fees and other payments; in-kind contributions and support; and its own assets. The Association shall strive to achieve an appropriate balance of public and private funding.

14.2 The membership dues for companies shall be set as an annual fixed amount for small, medium and large Members. The three categories shall be

based on each Member company's revenue related to the provision of security services as defined in the Code.

14.3 The Association's assets shall be used entirely and exclusively in furtherance of the Association's public utility purposes as defined in Article 2 of the present Articles of Association. Surplus revenues realized by the Association may in no case be distributed to Members of the Association.

14.4 The Board may suspend or terminate the membership of a company, or suspend processing of the certification application of a company, where such company is in arrears in its financial obligations to the Association and does not cure such arrears within sixty (60) days after notice from the Association. A company that fails to cure financial arrears within the 60-day period shall not be entitled to vote in a meeting of the General Assembly.

14.5 The Association shall not normally be responsible for the costs of Board Directors fulfilling their duties nor make payment for fulfilling duties as a Board Director.

Article 15

Formation and Dissolution

15.1 Private Security Service Providers who have signed the ICoC, together with civil society organizations and governments, have adopted these Articles of Association and have thereby created the ICoC Association, and have selected the first Board of Directors of the Association, on the occasion of its inaugural meeting, held in Geneva, Switzerland on [date].

15.2 The Association may be dissolved by the General Assembly upon a recommendation by the Board or by resolution from among the membership of the General Assembly. Dissolution shall require a vote of not less than two-thirds of the Members in each of the three stakeholder pillars who are present at the General Assembly and eligible to vote and may be decided only if such decision is included in the General Assembly's agenda. Dissolution is also *de jure* in the event of insolvency or if its bodies can no longer be constituted.

15.3 In the event of liquidation of the Association, its remaining assets shall be entirely assignable to another public utility and tax exempt entity pursuing similar objectives to those of the Association. In no cases shall the Association's assets be returned to the Founders, Members or Board Members or be used for their profit in whole or in part and in whatever manner.

Annex II. Developments relating to Private Security Providers in the United Nations Human Rights System

In 2005 the UN Commission on Human Rights passed a resolution creating an expert Working Group on mercenaries. It replaced a special procedures mandate established in 1987. The content of the resolution highlighted how much the international community had begun to give attention to the private security industry.¹³¹ It included a request to:

... monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights, particularly the right of peoples to self-determination, and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities.¹³²

The request to prepare 'draft international basic principles' for the industry set down a new marker. It had been foreshadowed by an expert meeting organized in late 2004 by the UN Office of the High Commissioner for Human Rights (OHCHR), which recommended further discussion of a code of conduct for the private military and security industry. The experts present at the meeting concluded that a code would be 'a worthwhile additional measure, although not sufficient alone to ensure the accountability of individuals working for those companies'.¹³³

The UN Working Group chose not to develop a code of conduct, but embarked on drafting a legally binding instrument. In 2008 it presented elements of a convention on private military and security

companies.¹³⁴ In 2009, the Human Rights Council requested the Working Group to further elaborate a draft legal instrument,¹³⁵ and in July 2010 the Working Group submitted to the Council a draft Convention that did not [seek] 'the outright banning of PMSCs but the establishment of minimum international standards for States parties to regulate the activities of PMSCs and their personnel'.¹³⁶

For the purposes of the present discussion, it should be noted that the draft Convention referred to codes of conduct, but considered that 'self-regulation of private military and security companies is not sufficient to ensure the observance of international humanitarian law and human rights law by the personnel of these companies'.¹³⁷

In response to the Working Group's initiative, the Council resolved in October 2010 to establish a new 'open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies'.¹³⁸ The resolution took note of the draft Convention presented by the expert Working Group and decided:

... to consider the possibility of elaborating an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by the Working Group.¹³⁹

Twelve governments, including France, Japan, the United Kingdom and the United States, opposed the above resolution. Switzerland was among the countries that abstained.¹⁴⁰ The Intergovernmental Working Group's mandate was renewed in March 2013.¹⁴¹

¹³¹ See OHCHR, 'The Impact of Mercenary Activities on the Right of Peoples to Self-Determination', *Fact Sheet* 28. At: <http://www.ohchr.org/Documents/Publications/FactSheet28en.pdf>.

¹³² UN Commission on Human Rights, resolution 2005/2, §12(e) on 'The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination'. At: http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-2.doc.

¹³³ UN doc. E/CN.4/2005/23, §10.

¹³⁴ Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, UN doc. A/63/325, 25 August 2008. At: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/489/81/PDF/N0848981.pdf?OpenElement>.

¹³⁵ UN Human Rights Council, Resolution 10/11, 26 March 2009.

¹³⁶ Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, UN doc. A/HRC/15/25, 2 July 2010. At: <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf>.

¹³⁷ *Ibid.*, Annex, §20.

¹³⁸ Human Rights Council, Resolution 15/26, 7 October 2010. At: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/167/42/PDF/G1016742.pdf?OpenElement>.

¹³⁹ *Ibid.*, §4.

¹⁴⁰ *Ibid.*

¹⁴¹ Human Rights Council, Resolution 22/33, 19 April 2013. At: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G13/132/82/PDF/G1313282.pdf?OpenElement>.

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