

BEYOND MARKET FORCES

A Feasibility Study for a Standards Implementation and Enforcement Framework for the Global Security Industry

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www.ipinst.org/GSI

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EXECUTIVE SUMMARY

In late 2007 and early 2008, governments and industry actors expressed interest in the International Peace Institute (IPI) carrying out a study on how to improve international regulation of private military and security companies (PMSCs) by combining governmental initiatives with industry self-regulation.

The **aims of this Feasibility Study** are:

- i) to better expose all stakeholders in the Global Security Industry (GSI) – states, industry and civil society – to the wide variety of approaches used to implement and enforce standards in other global industries; and
- ii) to identify options for combining components of these other Frameworks in ways that will add value to the regulation of the Global Security Industry, by supplementing – and not supplanting – existing regulation.

We aim to catalyze thinking on the practical and policy issues involved in regulating this industry. **We do not aim to develop a preferred model for a Framework for the industry, nor to prescribe standards for the industry.** Instead, we aim to foster reflection within all relevant stakeholder groups – governments, industry and civil society – on *their own* positions regarding possible approaches to the implementation and enforcement of standards in the Global Security Industry, better to prepare the ground for informed dialogue. In that sense, the Study is intended to serve as a **reference document** for stakeholders.

A Draft version of this Study is being made available for a **period of public notice and comment** until 30 September 2008, at www.ipinst.org/GSI . Comments may be sent to James Cockayne, cockayne@ipinst.org, and will be posted on IPI's website unless confidentiality is specifically sought.

Overview

Part I of this Study explains the background to the Study in more depth, and explains the methodology we used in preparing it, including definitions of key terms that appear throughout the Study.

Part II of the Study provides a more detailed explanation of the limitations of existing regulation. It discusses national, industry-level, intergovernmental and civil society approaches.

Part III sets out four contours of effective standards implementation and enforcement for the GSI. We offer these contours as an assessment of what effective regulation would need to offer to each set of stakeholders, and use these contours to guide our evaluation of standards implementation and enforcement in *other* industries, and existing GSI-relevant Frameworks.

Specifically, we highlight:

- i) the fundamental responsibility of states;
- ii) the need to supplement, not supplant, state regulation;
- iii) the need to add value for other stakeholders, including the industry and civil society; and
- iv) the need to use ‘smart incentives’ to influence stakeholder conduct that include – but also go beyond – market forces.

Part IV uses these four contours to present analysis of 30 Standards Implementation and Enforcement Frameworks. Each of the 30 sections in Part IV begins with a brief summary of ‘Our Analysis of Lessons for the GSI’.

Part V offers a series of conclusions and recommendations. We identify components of other Frameworks that may be useful in building a Framework for the Global Security Industry. And we recommend five steps that will foster construction of this Framework, beginning with a series of closed-door consultations with 1) the industry; 2) its clients; 3) civil society actors; and 4) states to develop a way forward.

Introduction

In the last decade, commercially-organized security personnel have become an increasingly common sight around the world, from protecting shopping malls in the American mid-West to providing convoy security in the Middle East. They are the increasingly visible side of an industry that provides a wide range of services related to the provision, training, coordination and direction of security personnel, and reform of their institutions.

In many cases, small local sub-contractors and large multinational companies are connected, through sub-contracting arrangements, joint ventures, personnel movements, and subsidiary structures. Together, they form a complex web of commercial providers of guarding and protection services; operational support in combat, intelligence, interrogation and prisoner detention services; and advice to, training and reform of local forces and security personnel. They form, in other words, a Global Security Industry.

The Global Security Industry (GSI) has undergone particularly dramatic growth following the U.S.-led military campaigns in Iraq and Afghanistan. In the ensuing years, existing regulation of the industry has received widespread criticism, including for a lack of transparency and – in particular – a lack of appropriate accountability.

These criticisms suggest the existence of regulatory failings that may, in time, lead to market failure. In the meantime, critics argue, the absence of effective regulation leaves responsible industry players and investors without the guidance they require, and allows less responsible players to indulge in contractual fraud and price gouging, and to hide the true social and economic costs of their activities – including violations of human rights and international humanitarian law.

Effective regulation to combat these issues is therefore in the interests of all concerned. Yet national regulation, company codes, intergovernmental efforts and civil society initiatives have all, so far, fallen short in remedying these failings, for reasons we outline in more detail in Part II of this Study. Among others, the UN Special Representative on Business and Human Rights, Professor John Ruggie, has pointed to the need for the general lessons of ‘business and human rights’ to be applied in considering the specific question of how to improve regulation of PMSCs, including through international and multistakeholder arrangements.

This Study argues for a Global Framework to identify, implement and enforce relevant standards across the industry. Any such Framework should, we argue, improve the capacity of existing regulatory mechanisms to function effectively and supplement them with regulatory capacity they cannot – or will not – provide.

By examining 30 Standards Implementation and Enforcement Frameworks used in other global industries, and evaluating what insights they offer for this industry, we identify a variety of components that stakeholders might appropriate and combine, ultimately – and perhaps not for some time – forming a Global Framework for the GSI.

Existing efforts to implement and enforce standards in the GSI – and their limits

State efforts

At present, the most developed efforts to implement and enforce standards within the GSI are occurring at the national level. However, states lack the regulatory reach to effectively implement and enforce human rights and other standards in PMSCs’ off-shore operations. In addition, states are open to charges of conflict of interest, since they are not only the watchdogs for but often the major clients of the industry. They may have justified interests in limiting industry transparency – such as national security concerns – but this can also limit transparency for other industry clients (such as extractive companies and humanitarian organizations). And it has, at times, led to a lack of effective enforcement of existing legal obligations.

Most existing state-based regulation displays a bias towards ‘single-state’ contracting arrangements, with little attention paid to the increasingly off-shore nature of PMSC recruiting, organization and contract performance. Even where national regulatory frameworks are comparatively developed – as in the U.S. and South Africa – states confront challenges in monitoring, oversight and accountability for the industry’s off-shore activities. The U.K., another significant exporting hub within the GSI, has a notably sparse regulatory framework.

States where PMSCs operate (territorial states), such as Colombia, Afghanistan and Iraq, have also begun to exercise their regulatory authority. However, given that many of these states are wracked by insecurity or have weak governance arrangements, they lack enforcement power.

Industry efforts

PMSCs have long recognized the importance of guidance on what standards they are expected to abide by and how. They have, consequently, developed an array of internal management, ethics programs and controls on the use of force – both individually, and in cooperation, for example through the BAPSC, IPOA and PSCAI.

Yet these efforts lack credibility and are heavily criticized by civil society groups for failing to provide effective and transparent enforcement arrangements. Indeed, the gravity of some allegations about PMSC conduct may make state involvement necessary, if not inevitable – through recourse to criminal courts guaranteeing a right to fair trial and due process.

From a non-scientific examination of more than 40 PMSCs, we observe that many PMSCs profess to support external ethical standards in their publicity materials and on their websites. They also have in place implementation frameworks for other *internal* standards, which are supervised and/or managed at the senior management level. These may include strict hiring and vetting policies, and guidelines on contracts requiring the provision of armed security services, as well as on how personnel may use – and must report the use of – force.

However, the actual level of commitment to any *external* ethical standard is almost always highly ambiguous. PMSCs' internal standards and enforcement arrangements also betray a number of weaknesses. For example, they rarely cover sub-contractors. Most importantly, no PMSC that we examined had an effective and transparent Grievance Mechanism that could be accessed by third parties which would meet the benchmarks identified by the UN Special Representative on Business and Human Rights.¹ And there are only very weak arrangements for sharing information about potentially criminal conduct with law enforcement authorities.

Similar concerns arise in relation to PMSC industry associations. Of the two largest, at present, the BAPSC provides only broad standards in the form of a Charter, though it is currently working with its membership to develop more detailed operational guidance, in the form of a private BAPSC Standard. BAPSC currently has no formal Systems Monitoring or Grievance Mechanism. IPOA does have an Enforcement Mechanism, but this lacks transparency and impartiality. The absence of direct Participation within the IPOA Framework by states and civil society representatives also means that on its own, IPOA will not provide a sufficient vehicle to bring transparency and accountability to the Global Security Industry.

Intergovernmental and civil society efforts

Early intergovernmental efforts to regulate mercenaries, for example through the United Nations, were riven by political tensions – and more recently, have proved poorly suited to dealing with the complex issues arising out of the GSI.

The efforts of the **UN Human Rights Council's Working Group** on mercenaries remain hamstrung by the baseline unwillingness of PMSCs and exporting states to see PMSCs likened to mercenaries, and treated as an inherent threat to human rights. The Working Group has made progress in some key areas – especially in relation to recruiting and the impact of personnel returning from working with PMSCs in conflict zones to their home communities. But it currently lacks the resources, access to PMSCs, territorial and exporting states and their enforcement power, that it would need to develop a framework for consensual regulation of the industry at the multilateral level.

The **Swiss Initiative** provides the most significant contemporary international efforts to improve standards implementation and enforcement within the GSI. In September 2008, its 'Montreux Document' is expected to be agreed by 18 states – notably including all five permanent members of the UN Security Council, as well as Iraq, Afghanistan, South Africa and Sierra Leone. It will be explicitly non-binding, and will contain no new legal obligations. And it is also limited to states' dealings with PMSCs in armed conflict. However, it will serve as the most coherent, precise and consensually-developed statement of "good practice" relating to this industry that is supported by multiple states.

Civil society actors have been involved in efforts to improve standards implementation within the industry in a number of ways, predominantly monitoring PMSC behavior. NGOs have participated in single-country efforts to strengthen the operational link between security and human rights, including through the Sarajevo Process and the Voluntary Principles on Security and Human Rights (both of which are discussed at more length in Part IV). Some have also assisted in industry efforts to raise standards, or in the case of the Business & Human Rights Resource Centre (BHRRRC), provided a public platform for engaging companies directly when specific concerns arise relating to PMSC conduct. The sanctioning levers to which civil society sometimes has access – public sentiment and purchasing power – will require significant mobilization before they have any real impact on this industry. But civil society activism has an important role to play in drawing attention to the costs of ineffective regulation.

Research and policy institutions in the U.S. and Europe have also conducted important research on the issue of PMSC regulation. But in order for their full import to be effectively realized, these efforts need to feed into a regulatory process. And at present, there is no broad process working with stakeholders to think

¹ See UN 2008c: 24.

through the practical issues around different regulatory options, and build a coherent Framework of improved standards implementation and enforcement.

The contours of an effective Global Framework

Ultimately, no single stakeholder group is in a position to provide credible, effective standards implementation and enforcement for the industry on its own.

But each stakeholder group – states, industry, the industry’s clients, and civil society groups – all bring something to the table. Together or separately, they may need to develop different components of a larger Framework that, over time, fosters convergence towards effective implementation and enforcement of shared standards.

In Part III of this Study, through our analysis of existing regulation, we identify four characteristics of a global standards implementation and enforcement Framework that would help stakeholders to overcome the limitations of existing regulation. We describe these as **the ‘contours’ of an effective Global Framework**. They are:

1. **the fundamental responsibility of states** to ensure effective implementation and enforcement of human rights and IHL standards;
2. **the need to supplement, not supplant, state regulation;**
3. **the need to add value for other stakeholders**, including the industry and civil society; and
4. **the need to use ‘smart incentives’** to influence stakeholder conduct **that include – but also go beyond – market forces.**

Learning from Other Frameworks

We undertook analyses of 30 Standards Implementation and Enforcement Frameworks, drawn from a range of industries, including the Global Security Industry.

In evaluating these Frameworks, **we do not seek to pass judgment on their effectiveness** – but only to identify what insights their structure, history and activities may provide for improved standards implementation and enforcement in the GSI. **Our analysis of the insights that each of these Frameworks holds for the GSI is contained at the beginning of the section discussing each separate Framework in Part IV.**

We cast a wide net in selecting Frameworks for review, in order to maximize our chances of identifying useful components for a Global Framework for the GSI. Our selections range from the Anti-Slavery Courts of the 19th century, to the World Organisation for Animal Health (OIE), established in the 1920s, as well as a range of business and human rights Frameworks such as the UN Global Compact, the Voluntary Principles on Security and Human Rights (VPSHR) and accreditation, certification and licensing regimes.

Across the 30 Frameworks examined, we identify **seven types** of Standards Implementation and Enforcement Frameworks:

1. the **Watchdog**;
2. the **Court**;
3. the **Auditing, Certification, Licensing or Ratings** Frameworks;
4. the **Club**;
5. **national regulatory harmonization arrangements**;
6. the **Clearinghouse**; and
7. the **Code of Conduct**.

These seven types combine different components of implementing authority and enforcement power within a Standards Implementation and Enforcement Framework. They provide a range of different regulatory options for stakeholders in the GSI to consider.

We do not advocate that the GSI adopts any particular one of these types. On their own, none of them will lead to effective standards implementation and enforcement across the Global Security Industry as a whole. Each type offers certain opportunities for either standards implementation or standards enforcement, but each also has certain limitations or drawbacks. We lay these types out so that stakeholders can consider how they each might adapt or apply these types' various components to their own, or collaborative, efforts to implement and enforce standards in the GSI – or combine them in one over-arching Framework.

Below, we summarize our thinking – presented at more length in Part V of the Study – relating to how stakeholders might develop regulatory arrangements for the GSI based on these types, which might, in time, converge into a coherent global Framework:

1. A GSI watchdog...

- might resemble Geneva Call, share some similarities to the International Committee of the Red Cross (or even deliberately interface with it), or even be modeled on the UN's framework for dealing with Children in Armed Conflict;
- could monitor the implementation and enforcement of standards by industry actors, or by states with regulatory power over them, through reporting, inspections or other forms of monitoring;
- could combine the information obtained from monitoring with authoritative analysis to measure performance against widely accepted standards, and develop a body of best practice in implementing these standards;
- would greatly benefit from the tacit support of other GSI stakeholders and states. State support would also help ensure that monitoring by the Watchdog was appropriately connected to state law enforcement, so that – where appropriate – specific allegations of misconduct could be dealt with by the relevant authorities;
- would be even more effective if states explicitly delegated monitoring power to it, in a similar way to the ICRC's monitoring of state and armed groups' compliance with international humanitarian law;
- could carry out its activities in conjunction with representatives of stakeholder groups (for example operating as a 'mixed commission');
- could conduct confidential dialogue with stakeholder groups and commit not to engage in public 'naming and shaming'. However, such an approach would not help build market transparency, improve market signaling or necessarily inspire the confidence of third parties and civil society actors.
- should avoid interfering with the oversight activities of national law enforcement authorities, or the role of the ICRC as guardian of international humanitarian law;
- could offer positive incentives for cooperation to companies and other stakeholders, such as providing a periodic digest of good practice in standards implementation and enforcement, or by serving as a 'switchboard' to match Participants with specific needs to other Participants that can meet those needs.

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2. ***A GSI Court or Tribunal...***

- could draw on precedents such as the 19th Century Anti-Slavery Courts, the Court of Arbitration for Sport, and the ILO Tripartite Dispute Resolution Mechanism;
- could consist of a common judicial or arbitral mechanism to deal with human rights violations or other industry-related disputes;
- could help create a level-playing field for global industry by enforcing agreed standards across a wide variety of jurisdictions and different client/contractor arrangements;
- through its decisions, might produce jurisprudence or an ‘acquis’ which could be folded back into client and industry-led standards implementation, state regulation, and civil society monitoring;
- could be based on voluntary submission to jurisdiction by industry players and their clients, through references in contracts;
- might pool the jurisdiction of different states, or be delegated arbitral power by them, as occurs with investment arbitration arrangements;
- might need to meet certain high thresholds in order to be effective and credible, including:
 - access to information about, or the ability to verify information provided by the disputants about, the underlying dispute or grievance, while protecting commercial confidentiality and national security;
 - due process guarantees;
 - the shadow of domestic and/or international law jurisdiction if arbitration (or other international) decision-making fails; and
- simply might not be an appropriate forum for the handling of some grievances relating to the GSI, given the gravity of some of the alleged violations of human rights and IHL by the industry. For some such violations, criminal courts may be the only appropriate dispute resolution venue.

3. ***A GSI Auditing, Certification, Licensing or Ratings scheme...***

- could help to institutionalize the connection between standards implementation and market access.
- An **auditing or certification Framework** could:
 - be structured along lines familiar from the Fair Labor Association, the Business and Social Compliance Initiative, the Kimberley Process, and even the Extractive Industries Transparency Initiative, among others;
 - involve the creation of a body that accredited evaluators, who would evaluate Participants’ implementation and enforcement of agreed GSI standards;
 - be difficult and costly to implement, if it involved in-theater inspection of PMSC operations.
- A **centralized licensing scheme** could:
 - involve states or other clients delegating power to a common agent to license PMSCs against certain agreed licensing standards;
 - be politically and constitutionally difficult for some states to participate in – but more feasible for other clients. Some humanitarian agencies may already be considering an informal licensing and accreditation scheme for individual security personnel.

- A **decentralized mutual recognition scheme** could:
 - resemble systems in use in a range of global industries that also involve the transboundary activities of companies, professionals and commodities with potentially harmful expertise, such as the medical profession;
 - entail states (or other industry clients) agreeing to:
 - deal only with PMSCs that had been licensed by another state (or other client) participating in the mutual recognition scheme, guided by baseline licensing standards; and
 - allow only licensed PMSCs to operate on their territory, or alongside government agencies operating overseas;
- A **ratings scheme** could:
 - be modeled on the example of the Credit Rating Agencies that serve the debt market;
 - serve an important role in connecting market access and revenues to respect for human rights and IHL, while leaving clients and regulators greater discretion in their purchasing and regulatory decisions than a licensing scheme would allow;
 - involve a ratings agency being delegated power to assess PMSC performance against a range of published performance indicators, including operationalized indicators of compliance with human rights and IHL;
 - offer states and other GSI clients the discretion to weigh different indicators according to their own preferences;
 - not need to be led by states, but could be initiated by any segment of the GSI's client base.

4. **A GSI Club...**

- could be modeled on a range of existing Frameworks, such as the IPOA, the Financial Action Task Force (FATF), the Global Compact, and the VPSHR;
- would help develop and implement a shared professional culture or ethic among Participants, through collectively wielded peer pressure;
- would likely be regarded by outsiders as highly opaque, exclusive and partial, and therefore not a credible mechanism for handling Grievances relating to the performance of Club members;
- could partially address such criticisms by making members' own regulatory and even accountability arrangements a specific part of the Club's own standards, as occurs to some extent in the FATF;
- could take different forms, depending on its scope and stakeholders, including
 - a **states-only club**, which could:
 - like the FATF, focus not only on monitoring states' domestic regulatory frameworks and international cooperation arrangements, but also provide capacity-building assistance to states that were found to have weaknesses;
 - marry membership to a decentralized mutual recognition scheme, through club membership being linked to a state's agreement to deal with and license only those PMSCs operating in or subjecting themselves to regulation by another club member (as in the Kimberley Process and the OIE);

- a **PMSC-only club**, which could:
 - find it difficult to avoid replicating the concerns already leveled at IPOA, relating to the disconnect between the association’s collective self-enforcement arrangements and state sanctioning power, and the perceived lack of impartiality of these enforcement arrangements;
- a **mixed membership club**, which could:
 - involve states and PMSCs, and possibly also civil society actors or international organizations, following the model of the VPSHR and the Global Compact;
 - be vulnerable to a weakening of the common ‘ethic’ that lies at the heart of a club’s power to enforce particular standards, as is evident in the case of the VPSHR.

5. National GSI regulatory harmonization...

- would help to provide a more level global playing-field, improve market transparency and reduce the possibility for companies to engage in regulatory arbitrage, as well as improving military, security and judicial interoperability;
- could focus on harmonization of implementation, by agreeing common training requirements, and/or harmonization of enforcement arrangements, for example by agreeing jurisdictional arrangements. It could draw on precedents ranging from the Toxic Waste Convention to the EU Code of Conduct on Arms Exports;
- might avoid adoption of the lowest common regulatory denominator if:
 - states were to agree to require PMSCs to implement the most stringent human rights and IHL requirements they are subject to in any jurisdiction they operate in;
 - states were to agree to a centralized interpretative body or dispute resolution mechanism to resolve disagreements over the application of these regulatory baselines, and to apply the ‘acquis’ emerging out of this mechanism – as in some EU arrangements and in the WTO.

6. A GSI Clearinghouse...

- would primarily serve as a mechanism for improving transparency in the market, allowing participants to share information about their standards implementation and enforcement activities;
- find its precedent in the BAPSC and the PSCAI, or civil society mechanisms such as the BHRRRC and the Geneva Centre for the Democratic Control of Armed Forces’ nascent website www.privatesecurityregulation.net;
- represent a useful component in a larger Standards Implementation and Enforcement Framework, but would offer few incentives for standards implementation and enforcement, beyond brand recognition.

7. A GSI Code of Conduct...

- would represent potentially significant commitments by industry actors to external standards;
- would require being connected up within a larger framework to strong incentives for implementation of those standards, and the shadow of real enforcement power, if it were to have credibility with non-industry stakeholders.

What Next? 3 Steps towards Constructing a GSI Framework

IPI recommends that stakeholders in the GSI take three steps to develop a comprehensive Standards Implementation and Enforcement Framework. These steps are based on our reading of what is politically feasible, as well as guidance drawn from the International Organization for Standardization, the WTO Technical Barriers to Trade Agreement, and other sources.

1. Step One: Consult within stakeholder groups on Framework options.
2. Step Two: Agree the negotiation process.
3. Step Three: Negotiate.

To ensure that the current momentum in these discussions is not lost, **IPI proposes to help stakeholders take Step One, by convening a series of open-invitation but closed-door consultations for each stakeholder group, and specific client segments, to consider what kind of Frameworks might be feasible.**

These consultations will each produce a simple statement of what that Stakeholder Group considers feasible, and what 'scope' any Framework should have – what it should actually seek to regulate. These statements will help to clarify whether subsequent efforts should be channeled towards one shared Framework, or towards separate components, fashioned by different combinations of stakeholders, which might at a later date converge or become interlocking.