

Private Military and Security Companies: A Framework for Regulation

James Cockayne and Emily Speers Mears

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Cover Photo: Members of a private security company pose on the rooftop of a house in Baghdad, September 18, 2007. ©Patrick Baz/AFP/Getty Images

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ABOUT THE AUTHORS

JAMES COCKAYNE is Senior Associate at the International Peace Institute, where he co-manages the *Coping with Crisis* research program. He has spoken and published widely on the reorganization of global violence, focusing on multilateral responses to commercial armed groups, peace operations, and international humanitarian law.

EMILY SPEERS MEARS is a writer and researcher on humanitarianism and security. In 2008 she completed an MPhil in International Relations at the University of Oxford, and acted as assistant coordinator of the European Interagency Security Forum, a network of security focal points for humanitarian NGOs.

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Acronyms

BAPSC	British Association of Private Security Companies
BHRC	Business and Human Rights Resource Centre
FATF	Financial Action Task Force
GSI	Global Security Industry—the industry made up of PMSCs
ICAS	International Council of Arbitration for Sport
ICRC	International Committee of the Red Cross
ICTI	International Council of Toy Industries
IHL	International Humanitarian Law
IPOA	International Peace Operations Association
NGO	Nongovernmental organization
OECD	Organization for Economic Cooperation and Development
OPCW	Organization for the Prohibition of Chemical Weapons
PMSC	Private military and security company
PSCAI	Private Security Company Association of Iraq
SIEF	Standards implementation and enforcement framework—any framework addressed in this study.
UN	United Nations
VPSHR	Voluntary Principles on Security and Human Rights
WTO	World Trade Organization

Executive Summary

In late 2008, seventeen states, including the US, UK, China, Iraq, and Afghanistan, endorsed 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*. This provides important guidance to states in regulating Private Military and Security Companies (PMSCs). But there is a need to do more, to provide increased guidance to industry and ensure standards are enforced.

The arrival of a new administration in the United States offers a unique opportunity for rethinking the global regulation and accountability of private military and security companies. There are positive signs that the Obama administration will step up efforts to improve regulation, both domestically and internationally. And there are signs that other states, such as Switzerland, the UK, and Canada, are willing to do more. Yet domestic regulation is not enough, because the industry is increasingly global. Even many of the PMSCs employed by the US government are incorporated offshore, and recruit third-country nationals that they then deploy overseas without their ever having entered US jurisdiction.

What is needed is a roadmap toward effective international regulation. There are now adequate standards in place to develop a global framework to guide implementation and enforcement.¹ What is lacking is an understanding of the options available for implementing and enforcing these standards. This policy report examines these options, and identifies five blueprints for the development of a global framework.

During 2008, the International Peace Institute (IPI) reviewed thirty standards implementation and enforcement frameworks in a range of global industries, including the financial, extractive, textile and apparel, chemical, toy, toxic-waste disposal, sporting, and veterinary sectors, to identify how such a framework might be constructed for the global security industry (GSI). The result was a

nearly 200-page study, *Beyond Market Forces: Regulating the Global Security Industry*. A consultation draft of the study was commented on by a diverse set of industry stakeholders (results available at www.ipinst.org/gsi). This policy report summarizes the resulting key policy options.

Beyond Market Forces identifies five different types of frameworks that could be applied to the GSI. These frameworks all go beyond reliance on market forces and unilateral national regulation, providing mechanisms that should assist states in regulating the GSI. The aim is not to compete with effective national regulation—which is essential—but to facilitate and supplement it.

The study identifies four design principles that could shape effective standards implementation and enforcement in this industry. It argues that any effective global framework should

- 1) assist states to discharge their legal duty to protect human rights;
- 2) involve all relevant GSI stakeholders, including states;
- 3) use “smart incentives” to encourage stakeholder involvement and influence their conduct; and
- 4) improve PMSCs’ accountability to clients, the communities they operate in, and other stakeholders.

On the basis of these design principles, and *Beyond Market Forces’* review of thirty standards implementation and enforcement frameworks in other global industries, this policy report provides blueprints for five different frameworks that might be developed immediately for the GSI, on the basis of existing standards:

- 1) a global watchdog;
- 2) an accreditation regime;
- 3) an arbitral tribunal;
- 4) a harmonization scheme; and
- 5) a global security industry club.

The report describes how each of the blueprints would add value to existing state, industry, and civil

¹ The Montreux Document should also be read in conjunction with other relevant standards: the *Geneva Conventions* (1949) and *Additional Protocols* (1977), the *Universal Declaration on Human Rights* (1948), the *UN Code of Conduct for Law Enforcement Officials* (1979), the *UN Basic Principles on the Use of Force* (1990), and the *ILO Conventions and Recommendations*. Other existing standards, such as the *Voluntary Principles on Security and Human Rights* and the *Sarajevo Code of Conduct and Client Guidelines*, may also be applicable to the activities of PMSCs in specific contexts.

society regulatory efforts. It outlines the governance structure, financing, barriers to development, and added value of each. And it suggests that it may be necessary to combine different blueprints to construct one overall effective framework. A final section sets out the steps that stakeholders need to take in order to realize such a comprehensive global framework for the GSI on the basis of these blueprints.

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 Midwest 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 subcontractors and large multinational companies are connected through subcontracting 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 of, 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 US-led military campaigns in Iraq and Afghanistan. In the ensuing years, it has received particular attention regarding its perceived lack of respect for human rights and international humanitarian law (IHL), as well as labor rights and other standards relating to corporate responsibility. Evidence of industry violations of these standards remains partial, disputed, and problematic. However, the persistence and plausibility of such allegations has not been effectively matched by improved regulation and accountability, either on the part of states, which bear the primary duty of regulation, or from other stakeholders in the GSI. Indeed, existing regulation of the industry has received widespread

criticism for a lack of transparency and—in particular—a lack of appropriate accountability for violations of human rights and IHL by PMSC personnel.

These criticisms get to the heart of *the regulatory problem: the lack of industry-wide standards to protect human rights and ensure respect for IHL, and effective arrangements for their implementation and enforcement*. Collaborative regulatory action is clearly needed to secure the future of the industry—or at least to secure the human rights of those it affects—so long as the industry continues to thrive in a free market. And such collaborative regulatory action is clearly in the interests of not only those affected by the conduct of the industry, but those with financial, political, or personal stakes in it.

This report's call to improve the implementation and enforcement of human rights and IHL, as well as other standards in the global security industry, should therefore be understood not only as one part of a larger effort to mitigate the risk of further human rights violations by PMSCs, but also as an attempt to harness the potentially positive contribution to security, development, good governance, and even the enjoyment of human rights, that such an industry—if effectively regulated—has the capacity to offer.

As demonstrated below, national regulation, company codes, intergovernmental efforts, and civil society initiatives have all, so far, fallen short in remedying these failings. And reliance on the “invisible hand” of market forces to achieve effective regulation does not seem to have protected all stakeholders' interests. 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 the regulation of PMSCs, including through international and multistakeholder arrangements.² We need to go beyond unilateral state regulation and beyond market forces.

This report argues for a **global framework to identify, implement, and enforce relevant standards across the industry, assisting states to**

² United Nations Secretary-General, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc. A/HRC/4/035, February 9, 2007, p. 18.

achieve effective regulation. Such a standards implementation and enforcement framework (SIEF) would have both a preventive and a remedial aspect: it would ensure behavior in compliance with national and international legal norms, as well as ensuring accountability in cases of noncompliance. Such a framework would thus assist both industry in discharging its responsibility to respect human rights, and states in discharging their legal duty to protect human rights, as well as help both state and industry to remedy human rights violations. And it could harness—and supplement—existing efforts in order to do so.

The Limits of Existing Regulatory Efforts and How they Could be Supplemented

STATE EFFORTS

There are two main problems with existing state efforts to regulate the GSI. The first relates to the inadequate substantive and geographical reach of existing regulation. The second relates to the lack of effective enforcement of regulatory instruments which are in place, particularly in the area of human rights law and IHL. Given states' fundamental legal duty to protect, states should take steps to overcome these shortcomings; but given the global nature of the industry, that is something states may find they cannot do acting alone—or even together, absent support from industry and civil society.

At present, the most developed efforts to implement and enforce standards within the GSI are occurring at the level of *home and contracting state* regulation. However, home states often lack the regulatory reach to effectively implement and enforce human rights and other standards in their PMSCs' offshore operations. And many of the major home states for the GSI—such as the US and UK—are also themselves major contracting states. Contracting states are open to charges of conflict of interest in their dealings with the GSI, since they are not only the watchdogs for, but also the clients of, the industry. These states may have justified interests in limiting industry transparency (such as

national security concerns). But in protecting their own interests they may unhelpfully—if unwittingly—limit transparency for other industry clients (such as extractive companies and humanitarian organizations). This leads not only to a lack of effective enforcement of existing legal obligations, but also to a weakening of the effectiveness of market forces as a regulatory instrument in the GSI.

Most existing home and contracting state-based regulation displays a bias toward “single-state” contracting arrangements, with little attention paid to the increasingly offshore nature of PMSC recruiting, organization, and contract performance. Even where national regulatory frameworks are comparatively developed—as in the US and South Africa—states confront challenges in monitoring, oversight, and accountability for the industry's offshore activities. Perhaps due to concerns about how to ensure any such regulation is actually effective, the UK, another significant exporting hub within the GSI, has a notably light 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 territorial states are wracked by insecurity or have weak governance arrangements, they lack enforcement power.

What all this makes clear is that PMSCs operating transnationally can easily escape domestic regulation. Numerous obstacles to effective regulation through and by states remain around issues such as extraterritorial jurisdiction, evidence collection, and adaptation of public norms to private business relationships. And the emergence of uncoordinated regulatory frameworks at the national level may in fact play into the hands of those PMSCs that seek to avoid effective oversight. In some parts of the world, there is significant evidence of PMSCs being closely linked to organized crime³ and activities that fuel violent conflict, such as trafficking in resources and arms. Given the mobility of personnel within the industry, it is difficult—absent effective international standards and a global framework for their implementation and enforcement—to insulate some parts of the industry from the pernicious effects of such conduct in other parts of the industry.

3 This appears to be the case particularly in southeastern Europe and Latin America.

INDUSTRY EFFORTS

Some 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 systems, ethics programs, and controls on the use of force—both individually, and in cooperation, for example, through the British Association of Private Security Companies (BAPSC), International Peace Operations Association (IPOA), and Private Security Company Association of Iraq (PSCAI).⁴

Yet these efforts have gained only limited traction and done little to ensure effective remedying of human rights violations by industry actors. They 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.

In *Beyond Market Forces*, IPI presents the results of a nonscientific examination of more than forty PMSCs,⁵ which found that many PMSCs profess to support external ethical standards in their publicity materials and on their websites. Some also have in place implementation frameworks for other *internal* standards, which are supervised and/or managed at the senior management level. These may even 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* standard (such as human rights or IHL standards) is almost always highly ambiguous. PMSCs' internal standards and enforcement arrangements also betray a number of weaknesses. For example, they rarely cover subcontractors. And even more importantly, no PMSC examined has 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.⁶

And none has provided transparent arrangements for referring allegations of serious human rights or IHL violations by their personnel to relevant state 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. And BAPSC currently offers no formal grievance mechanism for dealing with complaints about its members' conduct. IPOA does have a formal enforcement mechanism, but it lacks transparency and appears highly partial, given that it leaves the enforcement of the IPOA Code of Conduct to the unfettered discretion of its membership. Nor does it give any formal role to states or civil society in enforcing standards.

The global security industry cannot effectively implement and enforce human rights and IHL standards on its own: industry-only efforts will lack credibility in the eyes of the broader public, especially if they do not lead to credible and impartial enforcement action against PMSC personnel alleged to be involved in serious violations of human rights and IHL. But the internal standards arrangements developed by some PMSCs and industry associations could provide a starting point for supplementing state regulation and preventing violations of human rights and IHL being committed in the first place. They may, therefore, need to be connected to or folded into a global framework if it is to add value for industry stakeholders.

INTERGOVERNMENTAL EFFORTS

Intergovernmental efforts to regulate mercenaries, for example through the United Nations, have been rife with political tensions resulting from the role of mercenarism in colonial history. This legacy of tension has prevented formal intergovernmental mechanisms from dealing effectively with the complex issue of regulation of the GSI.

The efforts of the UN Human Rights Council's

4 A "Pan African Security Association" was also formed in 2008. However it remains in its early stages and has not been specifically addressed in this report or the larger study.

5 See the book-length study, James Cockayne, Emily Speers Mears, Iveta Cherneva, Alison Gurin, Shiela Oviedo, and Dylan Yaeger, *Beyond Market Forces: Regulating the Global Security Industry* (New York: IPI, forthcoming 2009) for further details.

6 See John Ruggie, *Protect, Respect, and Remedy: a Framework for Business and Human Rights*, UN Doc. A/HRC/8/5, April 7, 2008, p. 24.

Working Group on mercenaries remain hamstrung by the baseline unwillingness of PMSCs and home 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—and it could serve an important role in developing the kind of global frameworks discussed here. But, acting alone, the Working Group currently lacks the resources, as well as the access to PMSCs, territorial states, and exporting states—and their enforcement power—that it would need to develop such a framework for consensual regulation of the industry at the multilateral level.

The Swiss Initiative provides the most significant contemporary international effort to improve standards implementation and enforcement within the GSI. In September 2008, its “Montreux Document” was agreed upon by seventeen states—notably including Afghanistan, China, France, Germany, Iraq, Sierra Leone, South Africa, the UK, and the US. It contains a reaffirmation of existing international law obligations and over seventy good practices for states in contracting and regulating PMSCs. The Montreux Document is explicitly nonbinding and contains no new legal obligations. And it is also limited to states’ dealings with PMSCs in armed conflict. However, it is the most coherent, precise, and widely supported statement of “good practice” relating to the global security industry. As such, it could form the basis for standards implementation and enforcement in any of the five global framework blueprints put forward in this report.

CIVIL SOCIETY EFFORTS

Civil society actors have been involved in efforts to improve standards implementation within the industry in a number of ways, predominantly through 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.⁷ Some have also assisted in industry efforts to raise standards or, in the case of the Business &

Human Rights Resource Centre (BHRRC), provided a public platform for engaging companies directly when specific concerns arise relating to PMSC conduct.

But 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. Most major industry clients (such as governments and extractive industries) are not easily moved by public pressure, and information about standards violations (which often occur offshore) is generally ambiguous and difficult to access. Civil society activism therefore has an important role to play in raising public awareness of violations of human rights and IHL, and the failure to adequately remedy them.

Research and policy institutions in the US 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 through the practical issues around different regulatory options and build a coherent global framework of improved standards implementation and enforcement. This report’s blueprints advance a number of different ideas for how civil society might be involved in the development and operation of such a global framework.

Five Global Framework Blueprints

Any effective Standards Implementation and Enforcement Framework will need to be based on the state’s fundamental legal duty to protect human rights, the corporate responsibility to respect these rights, and the shared obligation to provide access to a remedy in the case of violations.⁸ While no single stakeholder group is in a position to provide credible, effective standards implementation and enforcement for the industry on its own, each stakeholder group—states, industry, the industry’s clients, and civil society groups—brings something to the table. Together or separately, they may need to develop different components of a larger global

⁷ For further details see Cockayne, Mears, et al., the book-length *Beyond Market Forces*.

⁸ See Ruggie, *Protect, Respect, and Remedy*.

framework that, over time, fosters convergence toward effective implementation and enforcement of shared standards. This report fleshes out five blueprints for what such a global framework—our components of such a framework—might look like.

The five blueprints are based on four design principles, which the study *Beyond Market Forces* identifies as the basis for effective standards implementation and enforcement in the industry:

1. Any global framework should **assist states to discharge their legal duty to protect human rights**.
2. **It should also involve all relevant GSI stakeholders, including states.**
3. It will need to use **“smart incentives” to encourage stakeholder involvement and to influence their conduct.**
4. And it will need to **improve PMSCs’ accountability to clients, the communities they operate in, and other stakeholders.** It could do so through reporting, consultation, improving clients’, regulators’, and other stakeholders’ access to information about PMSC performance in the field, and possibly also through dispute-resolution arrangements.

Some of the following blueprints correspond more fully to these principles than others. Accordingly, it may be necessary to combine different blueprints to construct one overall effective framework that discharges all of the requirements of these principles.

However, the nature of some PMSC misconduct—specifically relating to serious human rights violations—also makes clear that any such framework should be able to “plug into” state enforcement mechanisms. **Many PMSC human-rights violations may need to be adjudicated in state courts through fair trial subject to due process.** Any global framework ought to assist effective judicial determination of human rights violations, even if that leaves room for more informal dispute resolution and remedial arrangements in relation to labor and contract disputes.

Existing arrangements such as the OECD’s National Contact Points for implementation of the Guidelines for Multinational Enterprises, may serve such a purpose, but may not prove adequate to deal with allegations of serious violations of human rights (such as violations of the right to life) that recur in relation to the GSI.

Finally, this report notes that while adequate standards now exist for effective transnational standards implementation and enforcement, further elaboration and operationalization of these standards may still be useful. In particular, a **global code of conduct** would amplify the standards in the Montreux Document (which addresses only states and situations of armed conflict). It could help create greater market transparency and performance accountability, and is therefore likely to be welcomed by many parts of the industry, their clients, civil society, and states.⁹

1. A GLOBAL WATCHDOG

A global GSI watchdog would monitor PMSC compliance with globally applicable industry standards.¹⁰ Where it found reasonable evidence that these standards had been violated, it would refer matters to the relevant state authority and/or publicize the matter. It could take the form of either a states-backed global GSI ombudsman or—short of that—be established by the collective action of nongovernmental organizations (NGOs) and industry, without state participation. Precedents for such a mechanism include the UN framework on Children and Armed Conflict, the landmine NGO Geneva Call, and the International Committee of the Red Cross (ICRC).¹¹

How Would it Work?

Whether a states-backed global ombudsman or a creation of NGOs and industry, a global GSI watchdog would do the following:

- a) Act as a “guardian” of global GSI standards,¹² by
 - monitoring compliance by PMSCs (and/or their clients, and/or state regulators) with these standards;
 - providing desk and field monitoring of areas

⁹ For a draft code of conduct limited to human rights and IHL, and a consideration of how such a code of conduct might be developed, see Nils Rosemann, “Code of Conduct: Tool for Self-Regulation for Private Military and Security Companies,” Occasional Paper No. 15 (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2008).

¹⁰ See documents referred to in note 1, above.

¹¹ For analysis of these and other frameworks referred to throughout the report, please refer to Part IV of Cockayne, Mears, et al., *Beyond Market Forces*.

¹² In the style of the UN Framework on Children and Armed Conflict, Geneva Call, and the ICRC.

of particular concern in which PMSCs operate, with specific investigations into violations conducted by panels of experts assembled from standing lists drawn from government officials, industry, clients, and civil society;

- providing a complaints hotline¹³ for whistleblowers, whose allegations could then trigger an investigation by the watchdog; and by
- publishing an annual review of industry-wide trends in compliance with the standards, and a digest of good practices in implementing and enforcing them.¹⁴

b) Encourage implementation of the global GSI standards, through

- publicizing findings about compliance with GSI standards in specific cases, for example through a website; and
- passing on any serious concerns or grievances regarding illegal activity, and relevant information, to the appropriate state enforcement mechanisms.

Any watchdog would have minimal standards enforcement capacity. Were states to explicitly delegate monitoring power to it, in a similar way to the ICRC's monitoring of state and armed groups' compliance with IHL, it might be useful also to endow it with the capacity to engage in confidential dispute resolution.

Governance Structure

The watchdog would consist of a secretariat and a board. The secretariat would be responsible for the day-to-day monitoring and review functions of the watchdog. In specific cases it would assemble a panel of experts to undertake field inspections. These experts could be drawn from standing lists nominated by different stakeholder groups (states, industry, affected communities, clients, and investors) according to a pre-agreed formula. The secretariat would require a small permanent staff of six to eight, managed by a secretary-general.

The secretary-general would be responsible for overseeing the direction and daily operation of the

secretariat and guiding its relations with industry stakeholders, including the board. He or she would be a senior, respected figure with an extensive background in corporate social responsibility, international security, or human rights advocacy, and would promote the watchdog internationally and raise both diplomatic and financial support for its activities. He or she would be assisted by three staff. The director for monitoring would have primary responsibility for coordinating and running the watchdog's monitoring activities, including the complaints hotline and organization of panels of experts. The director for good practice would be responsible for developing and editing the annual review of industry compliance and good practice, and for developing related outreach activities. These officers would be backstopped by an administrative officer, one or two research assistants, and two or three clerical and administrative staff.

The board would oversee the watchdog's strategic direction, and comprise a maximum of fifteen members, all serving elected two-year terms. In a states-backed watchdog, states would hold seven seats on the board, and chair the meetings on a rotating basis. These seven seats would be distributed among contracting, territorial, and home states. A further three seats would be held by local and international human rights NGOs and labor unions, three by representatives of the industry itself (drawn from specific PMSCs or from trade associations), and two by representatives of client and investor groups (such as extractive-industry clients, humanitarian organizations, and the insurance industry). These seats would be filled by elections within each group (with voting rights perhaps being tied to payment of scaled subscription fees). If states did not participate in the watchdog, the board would operate without them. In either case, the secretary-general would also serve as *ex officio* deputy chair of the board.

Finance

The GSI watchdog would be funded by states, private foundations, retail donations, subscriptions

¹³ Like those established by the International Council of Toy Industries (ICTI) CARE Process, and Clear Voice.

¹⁴ In promoting good practices it would resemble another "watchdog," the NGO Transparency International. TI works with governments, businesses, civil society groups, and other stakeholders to promote transparency in elections, public administration, procurement, and business. However, unlike the GSI watchdog proposed here, Transparency International does not investigate allegations of corruption or expose individual cases. For further information, see the organization's website, available at www.transparency.org.

from electors of members of the board, and possibly sales of its annual review. This report estimates an annual operating budget of approximately \$1.2 million (c. \$600,000 personnel costs; \$300,000 operating costs; and \$300,000 overhead costs). Specific investigations would need separate financing, which might call for the creation of a separate strategic fund.

What are the Barriers?

The effectiveness of a watchdog will depend on (1) its access to information; and (2) remedial action based on the information it brings to light.

Access to information will be facilitated by connections to civil society networks, industry participation, and especially by state support. State support might be facilitated by linking the watchdog closely to standards they already support. A GSI watchdog could, for example, be established by states that endorse the Montreux Document, as an aid to assist them in implementing that document. Access to information will also depend on stakeholders working with the secretariat to establish careful protocols to protect national security, contractual confidentiality, individual privacy, and whistleblowers.

Effective remedial action will depend on clients, investors, and regulators having access to the watchdog's findings about compliance with standards, and taking appropriate action. The watchdog could also be mandated to monitor such follow-up.

What are the Benefits?

The GSI suffers from a chronic lack of market transparency, and states find standards enforcement difficult because of limited access to reliable information about industry performance. A GSI watchdog would help fill these gaps, without jeopardizing state enforcement authority and existing market arrangements. By clarifying the reality of PMSC performance, it would make industry underperformers accountable to clients, investors, and regulators, while rewarding good performers.

Given that standards already exist, there are no real barriers—beyond will and finance—to the

relevant GSI stakeholders setting up a watchdog on the earliest possible date.

2. AN ACCREDITATION REGIME

An accreditation regime that deliberately harnesses market-based incentives could be set up immediately on the basis of the Montreux Document and the other existing standards listed above.¹⁵ It could be set up by the GSI and its clients either on their own, or with states' backing. A credible accreditation regime would create demand for standards-compliant PMSCs, and drive up standards across the GSI. And accreditation would operate as a market signaling device, to turn demand into an incentive for compliance and accreditation.

Precedents for such a regime exist in the global apparel and manufacturing regimes, in the diamond and chemical industries, and in rudimentary form in the British Association of Private Security Companies and the International Peace Operations Association. No such regime exists at the global level for the GSI, or with the involvement of clients, investors, and regulators.

How Would it Work?

An accreditation regime would have three linked functions:

a) Certification

- To participate, PMSCs and their clients would submit a completed checklist of compliance with the framework's standards, particularly relating to vetting of PMSCs and personnel, field management, and reporting of human rights and labor rights violations. This checklist and a preliminary desk and worksite check would serve as the basis for determining compliance with the framework standards.
- Companies and clients that fulfill these certification requirements would be provided with a certificate, which they would be permitted to use in publicity and marketing.¹⁶
- PMSCs would be required to integrate two-thirds of their subcontractors into the framework within three years, to ensure continued certification. These subcontractors would themselves have to undergo certification.¹⁷

¹⁵ See note 1, above.

¹⁶ As is the case with the Global Compact logo and ICTI.

¹⁷ As is required by the Business Social Compliance Initiative and ICTI.

b) Auditing

- An auditing team (either supplied by the secretariat, or assembled by participating NGOs) would conduct workplace and headquarters audits to evaluate participants' implementation and enforcement of agreed framework standards. These audits would be unannounced,¹⁸ and the auditing team would seek the input of third-party stakeholders and affected communities.
- Audits would rate participants' performance against agreed standards.
- PMSCs found to be falling below agreed ratings thresholds (on specific key standards, or on average across a range of standards) would be prescribed steps for remediation. If they had not carried out these steps after six months (as assessed by a follow-up audit), their accreditation and certification would be subject to revocation by the board.

c) Ratings

- The ratings produced by the auditing process would be published on the regime's website and/or provided to other regime participants. This would greatly increase market transparency, and allow clients, regulators, and investors to link future contracting, regulatory, and investment decisions to these ratings.

Governance Structure

The accreditation regime would consist of a board, secretariat, and auditing teams. The secretariat would be responsible for the framework's day-to-day operations, and answerable to the board. It would promote the framework and its standards, to ensure that they became internationally recognized. It would conduct the primary certification process, and also manage the activities of auditing teams. Doing so would require a full-time staff of ten, including a secretary-general, senior and associate certification officers, senior and associate auditing officers, finance, administrative, clerical, IT, and outreach staff.

The certification officers would be responsible for processing PMSC applications for certification, including the desk and worksite check, and, at the

outset, some outreach activities promoting the framework and its standards. The auditing officers would assemble, coordinate, and manage the activities of the auditing teams, including arranging the workplace and headquarters audits and coordinating the follow-up audits. All of their work would be backstopped by finance, administrative, clerical, IT, and outreach staff, under the direction of a secretary-general. The secretary-general would also be responsible for the overall direction of the regime, relations with participants and the board, and fundraising.

Auditing teams would be assembled from lists of experts approved by the board, or assembled by local NGOs according to prescribed criteria and then approved by the secretariat.

The board would oversee the regime's strategic direction, and comprise a maximum of fifteen members, all serving elected two-year terms. In a states-backed regime, states would hold seven seats on the board, and chair the meetings on a rotating basis. These seven seats would be distributed among contracting, territorial, and home states. A further three seats would be held by local and international human rights NGOs and labor unions, three by representatives of the industry itself (drawn from specific PMSCs or from trade associations), and two by representatives of client and investor groups (such as extractive-industry clients, humanitarian organizations, and the insurance industry). These seats would be filled by elections within each group. If states did not participate in the watchdog, the board would operate without them. In either case, the secretary-general would also serve as deputy chair of the board. The board would meet every six months to review the certification, auditing, and ratings process, and to decide how to deal with noncompliant participants that had not undertaken prescribed remedial measures.

Finance

The accreditation regime would levy a fee for all parts of the accreditation process. It would need to make sure that this fee was not a deterrent to smaller PMSCs—so it might use a graduated fee schedule, levying fees calibrated to the current and forecasted revenues of the applicant. Subsidy by

¹⁸ Like those of the Fair Labor Association.

clients and states would balance out industry membership fees, enabling the framework to maintain its independence. This report estimates that the secretariat would cost c. \$1.5 million per annum (c. \$900,000 personnel costs, \$300,000 operating costs, and \$300,000 overhead), not including the costs of auditing teams. These would be separately budgeted and should be covered by service fees.

What are the Barriers?

The Montreux Document provides important guidance on how states should expect PMSCs to vet their personnel, manage them, and deal with allegations of misconduct.¹⁹ These might provide the basis for an accreditation regime. However, some industry actors may seek greater specificity in these standards before they are willing to participate in an accreditation regime that creates market transparency and market signaling mechanisms. Accordingly, it may be useful—though it may not be necessary—to supplement existing standards with a code of conduct, as the basis of an accreditation regime.

Effective auditing will depend on substantial buy-in from both industry and from clients, since it may raise significant issues of national security, client confidentiality, and privacy. Yet precedents like those in the diamond and chemical industries demonstrate that with sufficient industry buy-in, certification, auditing, and inspection protocols can be developed that satisfy such concerns.

An accreditation regime would need to function quickly as well as effectively. It could use a tiered certification scheme, with PMSCs' compliance with the most important standards of human rights and IHL assessed first, providing a preliminary certification allowing PMSCs to bid for contracts while still applying for complete certification.

What are the Benefits?

Even a voluntary GSI accreditation regime, if robust and credible, would begin to institutionalize the connection between standards implementation, market access, and performance incentives. Its ratings could be picked up and used as the basis of

contracting and regulating decisions by GSI clients, regulators, financiers, and civil society. And it could be set up now on the basis of existing standards.

3. AN ARBITRAL TRIBUNAL

A GSI arbitral tribunal would provide an industry-tailored forum for dealing with the labor, contractual, and other disputes—not including serious human rights violations—that occur in this industry across multiple jurisdictions every day. It would help create a level global playing-field for the industry, reducing administrative costs and regulatory arbitrage, encouraging cross-border professionalization, and facilitating enforcement cooperation by different states. It could also generate an *acquis* of practice encouraging rising managerial standards within PMSCs around the world. The major precedent for such a forum is the Court of Arbitration for Sport, but it could also draw on the Interpretation Procedure of the International Labour Organization's Tripartite Declaration.²⁰

Such an arbitral tribunal could be set up immediately, on the basis of existing law and standards. Once the infrastructure and personnel were in place, the arbitral tribunal would be “activated” by stakeholders granting it jurisdiction over cases through references in their contracts, regulations, and investment agreements.

How Would it Work?

A GSI arbitral tribunal would serve as a forum in which contractual parties could enforce the terms of their contract, or from which state regulators could seek advisory opinions or decisions in specific cases.

- PMSCs and their clients, and PMSCs and their personnel, would specifically consent to submit to the arbitral tribunal's jurisdiction in their contracts.
- States could mandate the jurisdiction of the arbitral tribunal over certain types of labor or contractual disputes relating to the industry, regardless of such inclusion by private parties.
- These contractual and regulatory references would also give binding force to the standards—

¹⁹ *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*, Part II: Procedure for the Selection and Contracting of PMSCs, available at www.eda.admin.ch/psc.

²⁰ The Declaration is a set of voluntary principles to guide multinational enterprises, governments, and employers' and workers' organizations in adopting social policies and developing good practices. The Interpretation Procedure can be activated by any of these stakeholders in the instance of a dispute regarding the application of the Declaration. For more detail, see Part IV of Cockayne, Mears, et al., *Beyond Market Forces*.

such as the relevant provisions of the Montreux Document, the ILO Conventions and relevant Recommendations, and relevant international law—compliance with which the arbitral tribunal would assess.

- Rather than conducting its own investigations, signatories and complainants would be required to provide information to the arbitral tribunal upon request. This information would remain confidential, unless both parties agreed to its release. The outcome of the tribunal process would be made public, though written decisions might be made available only to the parties.
- The tribunal would provide needs-based assistance for those bringing claims, which would be particularly important for PMSC employees and smaller PMSCs.
- The decisions of a GSI arbitral tribunal would be enforced through states' domestic jurisdiction, as with other international arbitration arrangements.
- An annual digest of the decisions of the tribunal could be prepared by the secretariat, as the source of an *acquis* to provide guidance to industry stakeholders.

Governance Structure

Arbitrators would be chosen for either their arbitral experience, or their GSI-related legal experience, and appointed for a renewable term of four years. They would be entered into a database by a small secretariat, which would receive and process complaints. Both parties to the dispute would select one arbitrator from the database, and agree collectively on a third independent arbitrator, or have the third panel member appointed by the framework's secretary-general.

The secretariat would be staffed by a secretary-general overseeing the secretariat's daily operations, engaging in strategic outreach with stakeholders, and representing the regime to the broader international community; one full-time administrator to provide administrative support to the arbitral process, maintain its database of arbitrators, and receive and process complaints and requests for needs-based assistance; one outreach officer charged with developing the tribunal's website and outreach materials and dealing with the media, as well as working with the administrator to oversee

assistance to parties; one counselor, with dual responsibility for providing legal advice to the secretary-general and administrator, particularly to ensure respect for the arbitral regime, and for preparing an annual digest of arbitral decisions and notes on the developing *acquis*. These four substantive positions would be supported by a director of finance and administration and two clerical staff, for a total of seven staff.

Finance

Most of the expenses related to a GSI arbitral tribunal would be borne by the parties. However, states and industry actors might be required to provide voluntary contributions to a fund to cover the costs of PMSC personnel complainants, and/or small PMSCs. These contributions would also need to cover the operating costs of a small secretariat, to publicize the arbitral tribunal and encourage private parties to incorporate references to it and the standards it enforces in their private legal arrangements; maintain the lists of potential arbitrators; serve as administrative support to the arbitral process; manage the provision of assistance to claimants; and prepare an annual digest of arbitral decisions and *acquis*. This report estimates the annual costs of such an enterprise to be approximately \$900,000 per annum (\$600,000 personnel costs, \$150,000 operating costs, and \$150,000 overhead).

What are the Barriers?

A GSI arbitral tribunal would not deal directly with the key regulatory problem for the GSI: preventing and remedying PMSC violations of human rights and IHL. It may not, therefore, receive much support from civil society. But its encouragement of cross-border harmonization in labor management practices and facilitation of sanctioning of contractual underperformance might indirectly assist with improving respect for other standards in the GSI.

What are the Benefits?

The tribunal would offer industry-sensitive, time efficient, and cross-border harmonized resolution of complaints regarding adherence to labor and contractual standards. It would significantly reduce transaction and dispute-resolution costs for all industry stakeholders, assist states by supplementing their domestic enforcement options, and encourage improved respect for other standards in

the industry. It seems likely that any such arbitral tribunal might deal with disputes about occupational health and safety, and workplace personnel management, which could have a significant effect on the upstream and downstream impacts of PMSCs.

4. A HARMONIZATION SCHEME

A GSI harmonization scheme would encourage harmonization of national regulatory arrangements and/or PMSC management arrangements around the standards codified in the Montreux Document, and other agreed international standards. Such a scheme could operate on a decentralized but coordinated basis, with different states (or PMSCs) taking responsibility for championing harmonization of different aspects of state regulatory practice and PMSC performance. Partial precedents for such an approach include the UN Global Compact, the Financial Action Task Force (FATF), the Organization for the Prohibition of Chemical Weapons (OPCW), and the Toxic Waste Convention.

How Would it Work?

- A small secretariat would track and assist with the implementation of the Montreux Document by states, the industry, and its clients.
- States and industry participating in the harmonization scheme would assist in this by reporting to the secretariat and through it to other scheme participants. Reports could, for example, be posted on a secretariat-hosted website.
- The secretariat would also have a minimal capacity to identify and provide technical assistance for newcomers to the scheme, for example drawing on expertise in other participating states and/or PMSCs.
- Different states would volunteer to “champion” harmonization in specific areas of practice, leading working groups on topics such as vetting personnel; training of PMSC personnel; dealing with third-party complaints; managing use of force and firearms; and remedying violations of human rights and IHL.

Two further elements could be added to a harmonization scheme once it has been established.

The first would involve a more formalized peer review process,²¹ which would greatly accelerate the process of national harmonization. This mutual evaluation process would be coordinated by the secretariat, and could, for example, draw on the expertise and independent assessments of the UN Working Group on Mercenaries.

The second add-on would be a mutual recognition scheme, in which participating states agreed to (1) allow only PMSCs incorporated in, or subject to the laws of, another participating state to operate on their territory, or to operate alongside government agencies operating overseas; and (2) allow PMSCs operating from their territory only to contract with or operate on the territory of other participating states.

Governance Structure

The secretariat would consist of four full-time staff. The executive director would oversee the secretariat and engage in strategic outreach with stakeholders, including where a need for assistance to improve implementation is identified. The executive director would also be responsible for the harmonization scheme’s fundraising and financial management, as well as managing the voluntary trust fund detailed below. A senior adviser would engage in more routine monitoring of implementation of the Montreux Document by those states that had endorsed it and other stakeholders that had expressed support for it, and identify emerging issues for the attention of the executive director. He or she would advise the executive director on strategic engagement to assist in its implementation. The executive director and senior adviser would, in turn, be assisted by an adviser, who would provide legal analysis to the secretariat and implementation assistance to stakeholders. These three officers would be supported by one administrator, responsible for overseeing the secretariat’s budget, general administration, and website. Were the harmonization scheme expanded to incorporate a peer-review process and a mutual recognition scheme, the secretariat would need to be expanded accordingly to provide the required administrative support.

In addition to this central secretariat, the harmonization scheme could also be advanced in a

21 Such as that developed by the FATF.

decentralized manner, and informally, with states volunteering to chair “Working Groups” focusing on specific issue areas for harmonization. This flexible approach could also allow the participation of nonstate actors in the scheme.

Alternatively, a more formal membership assembly could be established, comprising only states that have recognized each other as having adequately harmonized their domestic implementation arrangements around the agreed standards. Associate membership would be proffered to those states that aspire to drive up their standards, but need help to do so. Each state would nominate a national authority dedicated to upholding the standards, which would send a delegate to the assembly to report on the progress of implementation.²²

Finance

Member states would fund the secretariat with contributions graded according to their GDP.²³ The secretariat would also receive funding from civil society. This report estimates the cost of the secretariat at roughly \$800,000 per annum. This would cover four full-time staff, travel, and office and administration costs (c. \$500,000 personnel costs, \$150,000 operating costs, \$150,000 overhead).

A voluntary trust fund would provide assistance to countries with weak regulatory capacity wishing to participate in the framework. A mechanism might also be devised for making small contributions to assist PMSCs with their implementation of the standards. The secretariat would engage in fundraising, and help states identify donors for specific capacity-building projects relating to standards implementation through its matching function.

What are the Barriers?

States would have to follow due domestic procedure in changing any legislation in order to bring it in line with the agreed standards. And appropriate assistance would have to be made available to states with weak regulatory capacity, to ensure that this scheme did not create problematic barriers to trade. The participation of such states should be a central concern of such a scheme, since more effective

territorial state regulation of PMSCs will greatly reduce costs for home and contracting states, and improve GSI accountability.

What are the Benefits?

The Montreux Document has already been agreed upon by seventeen states. As a result, national regulatory harmonization among these states could begin immediately. A harmonization scheme would also provide a nonpunitive means for encouraging improved practice in regulation of the industry. This global framework blueprint offers a confidential forum for states to encourage each others’ improved regulation of the global security industry, as well as a platform for negotiating solutions to specific regulatory and coordination problems. The flexibility and informality of this approach will also allow international regulation to develop at different speeds on different tracks, depending on the specific needs and interests of different states and GSI stakeholders.

5. A GLOBAL SECURITY INDUSTRY CLUB

A GSI club would provide a framework for states, PMSCs (and their trade association representatives), and clients to develop and implement a shared professional culture or ethic, through collectively wielded peer pressure. It would start by encouraging its members’ compliance with existing standards, such as those implied by the Montreux Document, and eventually expand to include broader industry standards (as its members agreed). It could feasibly be set up by the relevant stakeholder groups immediately.

How Would it Work?

The club would

- have a mixed membership, divided into members (clients, industry, and states) and participant observers (civil society, affected communities, GSI financiers);
- require members to report on their own regulatory and accountability arrangements;
- require PMSC members to incorporate agreed standards into their internal management systems and contracts, and to establish internal monitoring and reporting mechanisms;

²² Like the OPCW.

²³ This funding structure is modeled on that of the Toxic Waste Convention.

- deal with specific instances of noncompliance through a “mixed commission,” drawing decision makers from each of the three membership groups (clients, industry, and states);
- provide guidance for members on how to implement standards and also monitor developments in the global security industry generally; and
- work with existing regulatory bodies—from industry associations to regulatory mechanisms, such as the Voluntary Principles on Security and Human Rights (VPSHR)—to improve standards and standards implementation.²⁴

Governance Structure

The club would consist of a members’ assembly, a board, a mixed commission, and a secretariat. The members’ assembly would meet semiannually to set the strategic direction of the framework and consider reporting from members and the mixed commission (discussed below). To become a member or a participant observer would require unanimous agreement among existing participants. Both members and participant observers would be expected to promote the club, implement or assist in the implementation of its standards, attend the members assembly, report annually on their efforts to implement the standards at the members’ assembly, and participate in dialogue with other club participants, including on specific implementation issues.²⁵ Participant observers could offer to assist members in their reporting. The secretariat should manage a small voluntary trust fund to be disbursed to smaller PMSCs and/or smaller states to facilitate their participation in assembly meetings.

The members’ assembly would also deal with both specific cases and general recommendations, through the establishment of a subsidiary “mixed commission.” This would consist of representatives elected from each membership and observer group (states, industry, clients, affected communities, civil society actors, investors), to investigate specific allegations of serious violations of the club’s standards, and make recommendations to the members’ assembly, as well as to the relevant state authorities in the case of any violation of legal

standards. Participation in the club would require cooperation with this mixed commission. The mixed commission could issue “general comments” on an annual basis, drawing on the practice of club members, its investigations in specific cases and reporting prepared by the secretariat. This would help the club to develop an *acquis* of good practice driving up standards across the industry.

The board would consist of six members (two state representatives, two industry representatives, two client representatives) and three participant observers (one civil society, one affected community and one GSI financier representative), with participation rotated every year, through election from the members’ assembly.

The secretariat would have at least four full-time staff: a secretary-general, a reporting officer, a compliance officer, and an administrator. As well as developing guidance for implementing standards and crafting reporting guidelines, the secretariat would monitor and report on developments in the GSI, and be responsible for producing an annual review of the club’s activities. All of its recommendations would be subject to the review and approval of the members’ assembly.

The secretary-general would work with club members to oversee its activities, improve standards and implementation, and represent the framework internationally. He or she would be responsible for fundraising for the framework’s activities and the voluntary trust fund. This would be a senior position and require extensive international experience in the management of security and/or a relevant nonprofit organization.

The reporting officer would receive the members’ reports and work with them to craft reporting guidelines, as well as providing periodic monitoring and reporting on developments in the GSI. The reporting officer would also assist in the production of the mixed commission’s annual “general comments,” and prepare the secretariat’s own annual review.

The compliance officer would work in coordination with the secretary-general to provide guidance on standards implementation and monitoring and reporting mechanisms, in specific cases. He or she

²⁴ As does the BAPSC.

²⁵ The club’s membership application structure and participation requirements draw on those of the VPSHR.

would also coordinate the mixed commission and handle any specific complaints relating to member conduct.

The administrator would coordinate the semi-annual members' assembly and manage the club's finances and general administration.

Finance

The club would be financed by membership fees, according to a graduated scale to ensure that participation costs were not prohibitive for any GSI stakeholders. It would cost around \$1 million per annum (\$500,000 personnel costs; \$300,000 operating costs; \$200,000 overhead). This would enable it to carry out significant research, handle reporting, manage the mixed commission and semiannual members' assembly meetings, and cover the cost of staffing and running the secretariat. A separate voluntary trust fund would cover participation for smaller members in the members' assembly.

What are the Barriers?

There are no legal barriers to the establishment of a GSI club. It is a soft tool for standards implementation only, one that would have no enforcement power other than peer pressure. As a result, it could easily become a means for stakeholders to argue that they were involved in a process of improving standards implementation and enforcement, while effectively doing neither. Existing clubs, such as the Voluntary Principles on Security and Human Rights, already suffer similar criticisms.²⁶ Given the very diverse nature of the likely membership of a GSI, a club would also be vulnerable to a weakening of the common "ethic" and system of peer pressure that provides a club's only real power to enforce particular standards.²⁷

What are the Benefits?

Its participatory nature would be the key added value of a multistakeholder GSI club. And the club could also provide a forum for coordinating and developing the various functions discussed in previous blueprints, including information collection, dispute resolution, and accreditation, as part of an interlocking umbrella framework.

What Next? Three Steps Toward Realizing a Global Framework

A global framework to assist states in regulating the global security industry could be put in place quickly, based on the standards that already exist. The blueprints above are intended as discussion-starters for how this might come about. All three main stakeholder groups—states, industry, and civil society—have an interest in considering whether it may be possible to develop a comprehensive GSI framework. As one PMSC noted in its comments on a draft of *Beyond Market Forces*:

responsible industry players welcome ... improved regulation of the industry, more closely defined legal status for companies and staff working in the field, and effective mechanisms for company and individual accountability... Aside from the clear ethical imperative ... we are also mindful of the business benefits of differentiation and improved perception of the sector.²⁸

IPI recommends that stakeholders in the GSI take three steps to develop a comprehensive global framework based on the blueprints detailed above: (1) consult within stakeholder groups on framework options; (2) agree upon the negotiation process; (3) negotiate. These steps are based on a reading of what is politically feasible, as well as normative guidance drawn from the International Organization for Standardization, the WTO Technical Barriers to Trade Agreement, and other sources on how such standards frameworks impacting global business ought to be developed.²⁹

States should work with their civil society and industry partners to convene a series of consultations for each stakeholder group, and specific client segments, to consider what kind of frameworks might be feasible. These consultations should each produce a simple statement of what the respective stakeholder group considers feasible, and what "scope" any framework should have—ie., what it should actually seek to regulate. These statements will help to clarify whether subsequent efforts should be channeled toward one shared framework,

²⁶ See Part IV of Cockayne, Mears, et al., *Beyond Market Forces*.

²⁷ As is evident in the case of the VPSHR.

²⁸ Comments of Control Risks Group, September 30, 2008, available at www.ipinst.org/gsi.

²⁹ For a detailed breakdown of what each step would entail, see Part V, *Beyond Market Forces*.

or toward separate components, fashioned by different groups of stakeholders, which might at a later date converge or become interlocking. The discussions will also establish which stakeholders should be at the table in the development of such a framework or its components.

Given the fundamental responsibility of states for ensuring the effective implementation and enforcement of standards—particularly human rights and IHL—across the GSI, states should take a leading role in driving this process forward. But the

industry also has a responsibility to respect human rights, and should do whatever it can to discharge that responsibility. Civil society actors, clients, and GSI financiers also have important roles to play in identifying those standards to which the industry ought to be held, and constructing a framework within which implementation and enforcement of these standards can more effectively occur. Ultimately, only creative collaboration among all stakeholders will lead to improved practice across the industry.

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777 United Nations Plaza New York, NY 10017-3521 USA

TEL +1-212 687-4300 FAX +1-212 983-8246

www.ipinst.org