Working Group on the International Code of Conduct Association Meeting of 11 October 2017

Chair's Summary

1. Introduction

A seventh exchange of the Working Group on the International Code of Conduct Association (ICoCA Working Group) was held under the Chairmanship of the United States of America (USA) in Geneva on 11 October 2017. The meeting was attended by Montreux Document (MD) participants, Mr. Rémy Friedmann, the Chairman of the Board of Directors of the ICoCA and representative of the government of Switzerland, Mr. Jamie Williamson, the Executive Director of the ICoCA, the Co-Chairs of the MDF (Switzerland and the International Committee of the Red Cross (ICRC)), and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) which acts as the Secretariat for the Montreux Document Forum (MDF). This summary provides a brief account of key issues discussed during the meeting. Its content is the sole responsibility of the Chair and does not purport to reflect the consensual view of participants.

2. Opening statement by the Chair (US) of the ICoCA Working Group

In their opening remarks, Mr. Christopher Mayer and Mr. Ian McKay, representing the United States the Chair of the Working Group recalled the agenda. The present 7th meeting served as an opportunity for Montreux Document participants to discuss and provide feedback to the ICoCA on the proposed amendments to the ICoCA Articles of Association (Transitional Membership and Certification and to the Certification Procedure (ICoCA Recognition Process for Certification Bodies).

In accordance with paragraph 12 of the Working Practices of the MDF and the ICoCA Working Group guidelines, the MDF Working Group on the ICoCA performs the functions of the Advisory Forum of Montreux Document Participants as provided for by the Articles of ICoCA. Following the previous meeting of the Working Group, the ICoCA shared the proposed amendments with the Montreux Document Forum for feedback and advice. In the weeks following, a number of Montreux Document participants provided written advice which was gathered into an Addendum to the Chair's Summary. The Addendum is not representative or reflective of Montreux Document participants' views as a whole, nor of the MDF as a whole.

3. Presentation from Representatives of the ICoCA

The presentations were delivered by Rémy Friedmann and Jamie Williamson. They provided a brief on ICoCA activities and noted that as part of its strategic sequencing, the ICoCA is presently moving into its operational

phase. The ICoCA has been working with its membership to further strengthen the added value of the Association and to identify opportunities for growth and capacity building across the three pillars.

In terms of statistics, the Association has 101 PSC members, and a number of new applications, headquartered across approximately 35 countries, with 21 new members and with 23 companies leaving the Association in 2017. Nearly 10% of industry members are certified to the ICoCA. There are 22 CSO members with five new CSO members joining in 2017. There are seven government members.

With respect to main functions of the ICoCA, the ICoCA Secretariat is advancing the development of the company self-assessment (CSA) reporting system to give Member companies an opportunity to report each year on their progress towards implementing the Code of Conduct. In return, and following receipt and review of the CSA reports, the ICoCA Secretariat will work with Member companies to address identified challenges or obstacles to compliance with the Code of Conduct and provide support and guidance in order to improve performance. The Association will launch the first annual CSA report later this year which will focus on selection and vetting of personnel.

The ICoCA Secretariat is also preparing for field-based reviews in Iraq and Pakistan during the next months. Building on a field-based review conducted in Nigeria in August 2017, these reviews will help ICoCA to deepen its understanding of and address the challenges that Member companies face in complex environments. Based on feedback from ICoCA to the companies, the FBRs help PSCs comply with and implement the Code of Conduct, and tackle related human rights and security risks.

With respect to the complaints mechanism, the ICoCA Complaints form is now live on the ICoCA website. ICoCA's Complaints mechanism receives and responds to complaints against member companies from aggrieved individuals, and offers external processes for complaints beyond the capacity of the company's internal grievance procedures. In addition, ICoCA's Complaints function is designed to assist Member companies in establishing their own mechanisms for handling grievances: guidance on effective operational grievance mechanisms is currently being prepared, to be released later this year.

4. Discussion on Proposed Amendments to the ICoC Articles of Association:

The Chair of the Working Group first offered a few explanatory details regarding the Proposed Amendments. ICoCA Certification is defined by the Code as a process through which the governance and oversight mechanism will certify that a company's systems and policies meet the Code's principles and the standards derived from the Code, and that a company is undergoing Monitoring, Auditing, and Verification, including in the field, by the governance and oversight mechanism. Certification is one element of a larger effort needed to ensure the credibility of any implementation oversight initiative. Certification is intended to ensure that member companies comply with the Code of Conduct, and it serves to distinguish member companies from those other parts of the industry that have not undertaken the diligent action towards compliance. Notably, it requires companies to work with an external actor (the accredited certification body) to gain certification.

The certification function was launched soon after the 2016 AGA, and the Secretariat has been processing applications over the course of the last year with 9 companies awarded ICoCA certification so far. There are currently 101 member companies, leaving a large number of companies that still need to become certified before the transitional period ends.

The Chair of the Working Group raised that there remains some uncertainty as to why more companies have not submitted applications for certification:

- With the deadline one year away, some procrastination can be expected.

- Not all of the member companies may be prepared to obtain certification from an accredited certification body.

- There are relatively few accredited certification bodies offering their services to audit to one of the Board-recognized standards. There are about 4 certification bodies, all of which are headquartered in the United Kingdom or the United States. Some ICoCA members have suggested this means certification is less accessible for companies not based in the United States or United Kingdom, though others have noted that 15 companies (not including maritime) that have been certified by an accredited certification body are based outside the UK and US (not including companies with headquarters in a country of convenience).

- There has been some concern expressed, particularly from civil society, about the role that external certification bodies play in the process to obtaining ICoCA membership, and a desire for the Association to exercise more control over that process.

- There is also concern that the ICoCA Certification could be duplicating the expertise already applied by accredited certification bodies to auditing companies for compliance with the standards (ISO 18788, ISO 28007, PSC.1) recognized by the Board.

At last year's Annual General Assembly, the Board noted the challenge of ensuring that ICoCA certification is "open to a global and diverse private security industry." The Board also pledged to work to "ensure greater alignment, consistency, oversight, and transparency" of the certification process. On both counts, the Board committed to review the situation and report back by this year's AGA.

The Board therefore drafted the two proposals on transitional membership and certification to address different aspects of this issue.

i. Proposed Amendment to the Articles of Association on Transitional Membership

Under the proposal, the requirements for becoming an ICoCA Certified Member would remain the same as current membership requirements for companies. Transitional Membership, on the other hand, would allow companies that have not obtained ICoCA Certification to become members of the Association if they meet the other requirements of membership and demonstrate commitment to working towards obtaining ICoCA Certification. Transitional Member companies would be given a maximum of 2 years to obtain ICoCA Certification and become ICoCA Certified Members.

ii. Proposed Amendment to the Certification Procedure on an ICoCA Process for Certification Bodies

This proposed amendment would enable member companies to apply for ICoCA Certification if they are certified to a Board recognised standard by either (1) an accredited certification body or (2) a non-accredited certification body recognised by the Association as satisfying the competency requirements.

This was proposed as an interim measure to be reviewed after two years. This review would be informed by experience in implementing the recognition system and in exercising oversight over accredited certification bodies.

The Association would also work to ensure greater alignment, consistency, oversight, and transparency of the certification process, including the role of accredited CBs. Although, at this time, accredited certification bodies are not required to apply for ICoCA recognition, the Association would improve oversight of accredited certification bodies through guidance on assessor credentials and capabilities, interpretation of

the Code, training, and additional oversight as required. Additionally, accredited certification bodies would be eligible to apply for ICoCA recognition as well.

Specifically, the Association would develop specific ICoCA briefing and training programs for certification bodies, to include: (1) training on the principles of the Code and its related human rights and international humanitarian law principles; (2) training on how to take into consideration specific ICoC related aspects during an audit of a PSC; and (3) guidance on how to audit to the recognised standards taking into consideration the ICoC and the identified additional information for each recognised standard.

The recognition of certification bodies was however met with some concern from different members of the Association who raised concerns that the proposal could undermine the role of accreditation bodies; that the Association may not have the required capacity or expertise to credibly assess certification bodies; and that there are other ways of increasing the number of certification bodies.

The Board has therefore decided not to submit the proposal on an ICoCA Recognition Process for Certification Bodies to the AGA at this time. The Board is considering the feedback received on that proposal and intends to continue consultation.

5. Summary of Discussion

The Working Group first discussed the advice that was expressed through the Addendum. One MD participant proposed that Transitional Members should only describe themselves as 'ICoCA Transitional Members.' Another MD participant raised that Transitional Members should not have the same voting rights as ICoCA full members. The MD participant suggested a differentiation could be made whereby Transitional Members have a right of participation but not a vote in the decision making of the ICoCA. In response to this, the Chair of the Working Group explained that under the Swiss Civil Code, only one form of membership is permitted in Swiss associations.

With respect to certification, the Addendum also raised one MD participant's concern as to why current certification is inadequate. The Chair responded with referring to the explanation given at the opening of the meeting.

During the ensuing discussion, one MD participant raised the proposed amendment to Article 3.3.1.2.3 whereby "Transitional Member companies are required to demonstrate that they are meeting substantive and procedural benchmarks based on the Code and Board recognized standards. Should a Transitional Member company fail to act in good faith in accordance with this Article; the Board may terminate its Transitional Membership." The Montreux Document participant asked what 'good faith' means in this context as it is a subjective term.

The Chairman of the Board of Directors responded that "good faith" should be understood by general principles of interpretation; however, companies will be required to show they are making an effort to engage in the process towards certification. The Chair of the Working Group also raised that the companies in question are often third-party certified but are not yet fully ICoCA certified.

One MD participant inquired for a breakdown of the time to achieve certification to which the Association stated it could make a spreadsheet available.

Another MD participant raised whether there has been any research undertaken around the 7 member states to see how this has influenced government contracting of private security. Are companies being actually hired

on the basis of their membership in the ICoC? The participant underlined that it would be useful to paint a picture of the concrete market value of becoming certified to the Code.

This participant further raised that it requires its diplomatic representations and embassies across the globe to contract only ICoCA members. For smaller contracts, embassies also inform the local companies of the ICoC. However, it if is too costly to become a member of the ICoCA, then these companies cannot bid on contracts. The MD participant expressed that it is critical that local firms should be enabled to join the ICoCA and to gain access to certification.

6. Update from the Co-Chairs of the MDF on 2018 Plenary Meeting

The Co-Chairs of the MDF shared that the fourth Plenary Meeting of the MDF will take place in the first semester of 2018, likely in April or May. Following a consultation with the Group of Friends of the Chair that took place in September 2017, a number of structural and thematic elements are proposed. Importantly, participation of focal points from capital is welcomed and encouraged as this enables concrete discussions around implementation of the good practices of the Montreux Document. In terms of structure, the plenary will adopt a similar 1.5 day format with the first session open to all States, international organisations, civil society and industry; the second session open to States and international organisations only; and the third session open to MD participants only.

Regarding thematic focus, the next plenary will look at themes of mutual legal assistance and cross border cooperation in monitoring and oversight of PMSCs; the relationship with other processes held in Geneva such as within the Human Rights Council; the relevance of the MD beyond armed conflict; and the issue of training. The Co-Chairs also noted that the 2018 plenary will commemorate the ten year anniversary of the signing Montreux Document.

The Co-Chairs also updated the Working Group on the newly created Maritime Working Group which will hold its first meeting before the end of the year, as well as the composition of the Group of Friends (European Union, Costa Rica, China, US). The Co-Chairs warmly welcomed States to submit their candidature for representation of the Eastern European Regional Group.

The Co-Chairs also briefed the Working Group on the Montreux Document Forum Regional Meeting which will take place in Costa Rica in February 2018. This Regional Meeting will have the objective of networking practitioners and regulatory authorities from Latin America and the Caribbean. The event will seek to support the effective implementation of the Montreux Document's good practices and expand the Montreux Document in the region.

The MDF Secretariat also gave an update related to practical implementation tools. The Contract Guidance Tool is now finalized. The Legislative Guidance Tool has been translated to French, Spanish, Ukrainian and Romanian and will be available in Arabic before the end of 2017.

The Chair of the Working Group announced that the American National Standard for Quality Assurances of PSC Services (ANSI/ASIS PSC.1) completed its five-year review and was re-issued for publication by the American National Standards Institute. The only noteworthy changes were to incorporate the definition for "applicable national law" that was presented at the 2016 Plenary Meeting of the Montreux Document Forum and to revise the language for use of force procedures to reflect the concepts in the UNODC sponsored "Handbook on the Use of Force for Private Security Companies." The re-issued version of the standard is available on request from the Working Group Chair.

7. Any Other Business and Next Steps

The Chair of the Working Group confirmed with Montreux Document participants a number of issues related to the Working Group processes. MD participants confirmed that there was enough time given for States and International Organisations to be able to dialogue with capital and respond on the ICoCA proposals. Additionally, the Working Group confirmed that the non-attributed style of reporting on advice provided by MD participants was acceptable. Finally, the Chair shared that the next meeting of the Working Group will be held in early 2018.

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