

## The option of elaborating a legally binding instrument

*Submission of Mr James Cockayne<sup>1</sup> prepared for the second session of the UN Human Rights Council's open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies*

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### I. Introduction

1. It is an honor to be invited, at the initiative of the Chair, to address the intergovernmental working group on the important question of the option of a legally binding instrument to regulate, monitor and oversee the activities of private military and security companies. I approach this task drawing on my experience as a non-governmental participant in the Montreux process, and after serving in 2011 as the Co-Chair of the working group on governance established by the Transitional Steering Committee for the International Code of Conduct for Private Security Providers.

2. In 2009, my colleagues and I at the International Peace Institute published a 350-page feasibility study called *Beyond Market Forces*.<sup>2</sup> This study looked at how an international regulatory framework for private military and security companies might be developed. We 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, and we considered what lessons those experiences might hold for the global security industry.

3. Our conclusion was straightforward: there are adequate standards in place for an effective international regulatory framework to be developed for the global industry. The gap is not in standards, but enforcement. In my remarks to the intergovernmental working group scheduled for Tuesday, 14 August 2012, I have been asked to address a simple question: is a single, international, legally binding instrument the way to achieve that enforcement? This submission offers an answer to that question.

4. Legally binding instruments, at least at the national level, will be a part of an effective regulatory framework for this industry. Experience has shown that there cannot be effective enforcement of standards in this industry without the use of legal enforcement mechanisms. Market forces alone do not work. But legally binding arrangements now seem more likely to emerge through the development of a set of coordinated, international regulatory positions implemented through national law – rather than an international treaty, code or regulatory body. The intergovernmental working group should aim in the next two years to develop common regulatory positions around five issues that I identify below, with a view states developing coordinated national legislation and perhaps also one or more international, legally binding instruments addressing specific issues such as licensing and export controls.

5. The best roadmap for these discussions is not, however, the draft Convention presented by the Working Group on Mercenaries, nor the Montreux Document and International Code of Conduct, for reasons I also explain below. Instead, the Human Rights Council's discussions

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<sup>2</sup> [http://www.ipinst.org/media/pdf/publications/beyond\\_market\\_forces\\_final.pdf](http://www.ipinst.org/media/pdf/publications/beyond_market_forces_final.pdf).

should be guided by its own far-sighted regulatory framework endorsed last year, the UN Guiding Principles on Business and Human Rights.

6. Over the next two years the intergovernmental working group should conduct broad-based discussions, involving states, the industry, corporate clients and affected communities, to consider the ramifications of the ‘Duty to Protect’ and ‘Remedy’ aspects of the UN Guiding Principles on Business and Human Rights for the regulation of private military and security services. It should use the Protect, Respect, Remedy Framework – which both states and the industry have said they believe applies to this industry – as a roadmap to guide discussions, and those discussions should aim to articulate common regulatory positions on specific issue areas. Discussions within each issue area may even crystallize into coordinated regulatory arrangements which could include binding legal instruments at the international, or more likely the national, level. The aim however should not be to produce either model laws or a supranational regulatory body, but something in between: international framework instruments coordinating more effective regulation and collaboration at the state level, similar to the system used in the fields of anti-bribery and anti-corruption or, in Europe, arms export controls.

7. Within this discussion of the ramifications of the UN Guiding Principles on Business and Human rights for the regulation of private military and security service providers, the intergovernmental working group could focus on five specific issue areas:

- a. State contracting of private military and security services;
- b. State support for respect for human rights by private military and security service providers in conflict-affected areas;
- c. State licensing of private military and security services;
- d. Export controls; and
- e. Effective remedy, including identifying obstacles to effective corporate-level and national remedies (such as ineffective extension of national jurisdiction, weak mutual legal assistance, or lack of resources for victims), and possible international models (such as an International Ombudsperson).

8. The articulation of common regulatory positions will allow the Human Rights Council to identify where new legally-binding instruments might be within reach, whether through independent action by states or through coordination within a binding international framework (as occurs in the field of anti-bribery and anti-corruption, for example). These discussions will help states to strengthen their own – and each others’ – national regulatory arrangements.

9. At the same time, organizing discussions around the question of how to apply the UN Guiding Principles on Business and Human Rights to this industry, with a particular focus on states’ duty to protect and issues of remedy, will help enrich this discussion and move it beyond the false ‘voluntary’ versus ‘mandatory’ dichotomy.

10. Not only states, but also the industry (in the Preamble to the International Code of Conduct) have said that they believe the UN’s Protect, Respect, Remedy Framework applies to international businesses such as private military and security service providers. Now is the time to figure out exactly how.

## **II. Filling the accountability gap**

11. Legally binding instruments of some kind – especially based in national law – will be a necessary element, but not a sufficient solution, for effective regulation of this industry. In this

section I explain why.

12. This is an industry that claims to sell security. Often that is just what it provides, especially to clients operating in insecure environments, such as conflict-affected zones. Yet the industry continues to be dogged by claims that this security for its clients comes at a very real cost: insecurity for third parties. That is not surprising, given that the core expertise of the industry is the use of force. Some commentators, as the intergovernmental working group will hear in its second session, even suggest that adverse human rights impacts are a recurring by-product of the industry's operations.

13. If that is so, then the Human Rights Council is right to be concerned. No business enterprise should consider itself entitled to treat human rights abuses in the way that it might treat environmental impacts, as externalities that can be addressed through public relations and credit trading schemes. Victims' human rights should be non-negotiable, and private military and security companies should be placing human rights due diligence at the heart of their management and operations.

14. Yet at present victims of such alleged rights abuses find it almost impossible to test their claims. Private military and security companies often operate in places where legal accountability mechanisms are stretched. Even where the industry's clients are foreign governments with robust court systems, ensuring complainants' effective access to those courts is simply very hard. It is not easy to organize justice in a war zone, or where the rule of law has been compromised.

15. This has created a perception that there is a kind of regulatory 'gap' that needs to be 'filled', by creating a new, international, legally binding instrument. Stronger accountability arrangements are clearly needed. Right now victims lack access to effective remedies, states lack an understanding of the human rights impacts of the companies they contract, license and allow to operate in and from their territory, and the industry lacks certainty.

16. An international accountability system would, in theory, thus serve several stakeholder groups' interests:

- a. it could help victims achieve remedies where their human rights are violated;
- b. it could help states discharge their duty to protect human rights, not least by providing improved market information about whether certain companies are more likely to violate human rights; and
- c. in turn, it would help human rights sensitive companies and penalize those that have adverse human rights impacts, by creating a single, level international playing field. In time, this will strengthen the industry's claims that it sells security, not insecurity, and create greater certainty allowing increased investment.

### **III. Looking beyond the false 'voluntary' versus 'mandatory' debate**

17. Some argue that this gap can only be filled by an international treaty imposing uniform accountability arrangements. Others counter that this is unworkable, and only a 'voluntary' approach will work. The dichotomy is a false one. The Human Rights Council long ago recognized this to be so in the broader discussion on business and human rights, but discussions of regulation for this industry have not yet caught up with those in other sectors. No effective regulatory system is either purely voluntary or purely mandatory. An international treaty will only work if the most affected states 'volunteer' to participate. And an international industry code will

only work if affected states make it ‘mandatory’ for companies to comply if they want those states’ custom.

18. In fact, responsible private military and security service providers make clear that it is not necessarily *less* state involvement, but *more*, that they are looking for. Responsible companies would *welcome* clearer guidance from states on issues such as how companies can ensure respect for human rights, how states can help guide them on conduct in conflict-affected zones, what human rights due diligence measures should be in place, what vetting and training arrangements they should have, how to provide effective remedies to alleged victims of abuse, and how to handle apparent conflicts between international and national law. Stronger state guidance means greater certainty for the industry *and* more effective human rights policies and practices.

19. So the choice that confronts this intergovernmental working group is *not* between a voluntary code and a mandatory treaty. What both states and industry are looking for, what will be effective, is something much more collaborative. The good news is that states, the industry, and interested civil society actors have all made extensive efforts in recent years to identify the *standards* to which the industry ought be held. The less good news is that none of them have succeeded in developing *implementation* arrangements that will make those standards enforceable. Below I consider two such efforts: the draft Convention prepared by the working group on mercenaries, and the Montreux Document and International Code of Conduct developed through the so-called ‘Swiss Initiative’.

#### **A. Looking beyond the draft Convention**

20. The Working Group on Mercenaries’ draft Convention offers a rich set of insights into the issues that must be addressed if the industry is effectively to be regulated. Since it was based on extensive regional consultations, it must be recognized that the issue areas it addresses are important to states – and should receive further discussion. Yet the implementation arrangements it suggests simply will not work, for five reasons.

21. First, because the draft Convention seeks to regulate whole companies, rather than specific service offerings. Given the fluidity of the market, states would find such a scheme extremely difficult effectively to implement.

22. Second, because the draft Convention’s approach to state responsibility for private extraterritorial conduct is not consonant with existing international law, as reflected in the Draft Articles on State Responsibility.

23. Third, the draft Convention seeks directly to impose legal obligations for non-state actors not party to the Convention. This is a novel approach, to say the least, and one to which states seem unlikely to agree any time soon. That will just lead to prolonged treaty negotiation and ratification processes, deferring the date on which victims can expect effective remedial mechanisms to be in place.

24. Fourth, the draft Convention is based on a distinction between ‘inherent state functions’, whose contracting it prohibits, and other functions, which it seeks to have states regulate. This is a concept that does not seem likely to have a bright future in the Human Rights Council, given the diversity of the constitutional traditions there represented.

25. And fifth, the Convention seeks to create a new human rights treaty body of considerable reach. That also seems like an ambitious aspiration in a period of fiscal austerity, and while the

Council is still working through the larger questions around the treaty body system. It may be wiser for the intergovernmental working group to focus its attention on identifying the practical, jurisdictional and other obstacles to states and industry themselves providing effective remedies, before constructing a new remedial mechanism on the international plane. That, as I explore further below, is certainly the approach that flows from the UN Guiding Principles on Business and Human Rights.

26. To summarize, the draft Convention does not provide a workable starting point for the development of a legally binding instrument to regulate this industry, whether that instrument operates through national or supranational enforcement mechanisms. The intergovernmental working group should not, however, start from scratch and try to develop a new draft treaty text to cover the field through the creation of a supranational regulatory system, for two reasons. First, because that kind of treaty negotiation will distract from shorter-term efforts to improve regulation and practice. States and other interested parties have only so many resources to devote to this topic. Better to direct them towards developing practical solutions with tools already at hand, including coordinated national-level legally binding arrangements. Second, because any global regulatory Convention risks being a lowest common denominator document. That would be counter-productive. Surely the aim of this exercise is to drive standards up, not down?

## **B. Looking beyond the Code**

27. Since the working group on mercenaries' draft Convention does not seem to offer a neat solution, some states suggest that a more 'voluntarist' approach may be needed. They point to the International Code of Conduct for Private Security Providers, which draws on the earlier Montreux Document, as a starting point for discussion. The Montreux Document and International Code of Conduct together provide a very rich vein of guidance on the standards to which key states and companies believe they should be held, to ensure they discharge their respective duty to protect and responsibility to respect human rights. But they lack one key element: consequences.

28. The states concerned, and the over 400 signatory companies, promised to have a Charter for an International Governance and Oversight Mechanism in place by July 2011. More than a year later, the Charter has not been agreed. Though the Transitional Steering Committee set up to draft the Charter has promised it will be in place by the end of this year, it is clear that the document will leave a number of key issues – including grievance mechanism arrangements – unresolved. The current working group on mercenaries has made a powerful argument that the grievance arrangements currently contemplated by the draft Charter text do not meet the effectiveness criteria for grievance mechanisms laid out in Guiding Principle 31 of the UN Guiding Principles on Business and Human Rights.<sup>3</sup>

29. What is more, none of the states involved in the International Code process has yet committed to contract *only* with private military and security companies that have been certified compliant with the Code. In other words, companies that violate the Code will face no legal consequences – not even a bar from contracting with states participating in the Code.

30. The Code process offers an important forum for developing collaborative regulation of this industry. It has done much to develop concrete standards for licensing, contracting and

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<sup>3</sup> I argued the same in a submission to the Transitional Steering Committee earlier this year, excerpts of which are available on the International Code of Conduct website. See [http://www.icoc-  
psp.org/uploads/Comments\\_Draft\\_Charter\\_ICoC.pdf](http://www.icoc-<br/>psp.org/uploads/Comments_Draft_Charter_ICoC.pdf).

oversight of companies operating in this sector. But because it continues to lack enforceability through legally binding instruments such as national contracting and licensing processes, it is not a sufficient solution to ensure effective regulation.

### C. Be Guided by your own Principles

31. So where does this leave the UN Human Rights Council, in its quest to find a regulatory framework that is both practical *and* effective? How can you navigate between the rock of the draft Convention, with its promise of enforceability but its normative over-reach, and the hard place offered by the Code, with its helpful guidance on good practice but lingering questions over whether it will ever have any real teeth?

32. The answer, I believe, is hiding in plain sight. Just over a year ago, the UN Human Rights Council took the historic step of unanimously endorsing the UN Guiding Principles on Business and Human Rights. These Guiding Principles, and the Council's earlier Protect, Respect, Remedy Framework on which they are based, offer the roadmap towards legally binding instruments that I believe the intergovernmental working group is searching for. The challenge now is for states, working with the industry and other interested parties, to figure out how to apply these Guiding Principles to this industry, starting with the state duty to protect and questions of remedy.

33. The Guiding Principles are not in themselves a 'legally binding instrument'. But they do offer a roadmap for discussions that will likely lead to common regulatory positions which could underpin such instruments. Both Guiding Principle 1, relating to the state Duty to Protect, and Guiding Principle 25, relating to remedy, are phrased in terms of what states 'must do'. Not 'should', but 'must'. In the Council's own terms, *then these are legally binding obligations*. That would seem to be highly significant evidence of *opinio juris* and customary international law.

34. The Guiding Principles set out what states are already obliged to do to discharge their duty to protect human rights and provide remedies for their violation, in the context of business conduct. They, and the accompanying commentary, also discuss the policy ramifications for state protection and business respect for human rights, providing detailed guidance on the types of practical issues that states in particular – and also the industry – will need to address to develop effective, human rights-sensitive regulation. They offer a powerful roadmap for this Council's future discussion of how to improve this industry's respect for human rights.

35. Approaching the question of regulation of this industry from the perspective of the Guiding Principles will bring a number of analytical and practical advantages. First, it will help move the discussion beyond the stale and false 'mandatory' versus 'voluntary' dichotomy, towards a more collaborative regulatory approach. Seen through the lens of the Guiding Principles, the complementarity of a number of existing initiatives becomes clear. The Montreux Document is, at its own Preamble recognizes, an effort by concerned states to discharge their duty to protect. The International Code of Conduct discussion should be seen as a similar effort by states, and also an effort by industry to develop a system for discharging its Responsibility to Respect human rights, as it is framed in the Guiding Principles. Likewise, the 'international basic principles' that the Working Group on mercenaries has been mandated to develop should be seen as a source of guidance on the Responsibility to Respect.

36. A second advantage of this approach is that it means that the Council, states, the industry and affected parties, can all draw on the rich discussions that have *already* occurred over the last seven years within the Council's mandate on business and human rights, and are continuing to occur through the working group mandated on that topic. Why should the discussion of regulation

of private military and security companies occur in a separate silo, sealed off from all the learning and insights that the Council has developed within that mandate? What is so ‘special’ about this industry that entitles it to place victims’ human rights at risk in ways that the Council now expects other industries not to?

#### IV. A roadmap towards binding legal instruments

37. The intergovernmental working group should use the Guiding Principles as a roadmap to guide discussion towards common regulatory positions, which may crystallize into a variety of regulatory arrangements, including binding legal instruments at the national or even international level. All of the current regulatory initiatives – the draft Convention, the Montreux Document, the International Code of Conduct, the working group on mercenaries’ work on international basic principles – can and should be seen as feeding into an ongoing intergovernmental discussion, which this working group would convene, on how to apply the UN Guiding Principles to this industry.

38. Within this discussion, states could offer each other advice, support and technical assistance to drive up regulatory and enforcement arrangements. Some kind of regionalized peer review, modelled for example on the Financial Action Task Force system, might even be possible. Space should also be made for input from the industry, private clients and affected communities, though the focus should remain on what states must do to discharge their duty to protect human rights (rather than what the industry must do to discharge its responsibility to respect, which should be addressed through the working group on mercenaries’ ‘international basic principles’ process).

39. Over time, these discussions will generate common regulatory positions which may underpin agreement around specific enforcement arrangements based on legally binding instruments – whether using coordinated national legislation, framework conventions, or international accountability mechanisms. Five concrete issue areas stand out for immediate attention in this regard.

40. First, the intergovernmental working group should develop a common regulatory position on **state contracting of private military and security services**. As private military and security companies use force, there may be a risk of adverse human rights impacts occurring as a result of state contracting. States will need to implement human rights due diligence policies, and take steps to ensure policy coherence across multiple agencies. The intergovernmental working group should look to UN Guiding Principles 4, 5 and 6 (on the state-business nexus), and 8 (on ensuring policy coherence). Useful guidance might also be found in the Montreux Document’s section on contracting states, and in parts of the draft Convention offered by the working group on mercenaries.

41. Second, the intergovernmental working group should develop a common regulatory position addressing UN Guiding Principle 7 on **supporting respect for human rights in conflict-affected areas by private military and security service providers**. The Guiding Principles identify a variety of steps states may take, including:

- a. engaging with business enterprises and assisting them to identify, prevent and mitigate human rights-related risks of their activities and business relationships;
- b. denying access to public support and services – such as operating or export licenses – for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation; and

- c. ensuring that the state's current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

42. To my knowledge no state has yet conducted any kind of review to ensure that these steps are being taken with respect to private military and security companies operating in and from their territory or jurisdiction. That is remarkable, given that several of the states that are the largest exporters of private military and security services were also amongst the most vocal champions of the UN Guiding Principles. Clearly this is an area in which intergovernmental discussion could quickly make a very significant impact.

43. Third, Guiding Principle 7 suggests that states are committed to withdrawing support for business enterprises that commit gross human rights abuses. A license to operate is a form of public support. The intergovernmental working group should therefore aim to produce a common regulatory position on **state licensing of private military and security services**, articulating how such licensing can be made human rights sensitive. Intergovernmental discussion of licensing arrangements, drawing for example on the good practices identified in the Montreux Document, could help drive up standards in this area.

44. Fourth, one area in particular may be ripe for rapid transition from the development of a common regulatory position to the articulation of a stand-alone legally binding instrument: **export control arrangements**. It might be feasible for the intergovernmental working group to explore whether models such as the European Union Arms Export Code of Conduct, or the South African export licensing system, could provide the basis for a **framework convention on private military and security service export controls**, as a basis for coordinated national licensing arrangements. Such a discussion should focus on ensuring that exporting states conduct appropriate human rights due diligence and otherwise discharge their Duty to Protect, before granting an export license.

45. Fifth, and crucially, there is **the question of remedy**. Guiding Principle 25 makes clear that as a legally binding principle,

*As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.*

46. Yet such remedies for those adversely affected by private military and security contractors' human rights impacts are frequently absent. The intergovernmental working group's fifth area of focus should be the development of a common regulatory position on **effective remedies for adverse human rights impacts resulting from the provision of private military and security services**. Discussions should focus on identifying the obstacles that states (and the industry) encounter in providing effective corporate-level and national-level grievance mechanisms. As Guiding Principles 26 to 30 make clear, these mechanisms can take a variety of judicial and non-judicial, state and non-state based forms. There may be a variety of obstacles to effective remedy – such as ineffective extension of national jurisdiction, weaknesses in mutual legal assistance in criminal matters, ineffective grievance handling by the industry, or lack of resources for victims – which states could help each other to address.

47. Multilateral and multistakeholder remedial solutions should also be considered. The International Governance and Oversight Mechanism promised by the International Code of

Conduct might provide one avenue for the states involved to discharge their legally binding obligation under Guiding Principle 25 – but only if the mechanism that is eventually created meets the effectiveness criteria laid out in **Guiding Principle 31**.

48. In the meantime, the intergovernmental working group could even consider more creative solutions to complement corporate-level and national grievance mechanisms. For example it could consider creating an **International Ombudsperson** mandated to offer recommendations to the Human Rights Council on specific complaints brought by alleged victims of adverse human rights impacts resulting from the conduct of private military and security companies or their clients. This could be modelled on the Ombudsperson created by the Security Council to help it in its work on listing and delisting suspected members of Al Qaida. Given the challenges that office has faced, a detailed feasibility study would be needed to develop a workable proposal.

## **V. Conclusion: the road ahead**

49. There is no need for this esteemed Council to go searching for a new legally binding instrument to fill the accountability gaps around this industry. It already has an adequate regulatory framework at hand, as a result of its far-sighted adoption last year of the UN Guiding Principles on Business and Human Rights.

50. This is a framework that enjoys wide support amongst states. What is more, the more than 400 private military and security service providers that have signed onto the International Code of Conduct have themselves explicitly endorsed the Protect, Respect, Remedy Framework in the Preamble to that document. They cannot now, in good faith, resile from an intergovernmental discussion of how to implement those commitments.

51. The challenge now is for states to help each other to identify and overcome the obstacles to the effective application of that framework to this industry. An intergovernmental discussion of those issues seems the most likely means of generating the common regulatory positions that will underpin the legally binding instruments, operating at both the national and international levels, that are needed to ensure effective regulation of this industry. Not only states, but also the industry, stand to benefit from such a discussion. And ultimately, victims deserve, and the effective protection of human rights requires, states to take such measures to figure out how to discharge their duty to protect human rights in dealing with this industry, and how to remedy adverse human rights impacts that result from its conduct.