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A Workshop with the UN Working Group on Mercenaries

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IPI's work on private security is undertaken within the context of its wide-ranging research and policy-facilitation program *Coping with Crisis, Conflict, and Change*, which works to inform and assist decision makers in the UN, multilateral organizations, member state capitals, and civil society to address emerging security challenges and to strengthen multilateral response capacities.

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The discussions were conducted under the Chatham House Rule. This meeting note was drafted by James Cockayne, Senior Associate at the International Peace Institute. It reflects the *rapporteur's* interpretation of the discussions and does not necessarily represent the views of all other participants.

On July 29, 2009, the International Peace Institute convened a meeting of civil society, academic, and industry representatives to meet with the United Nations Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination (the "Working Group"). The United Nations Human Rights Council has requested that the Working Group consult with a wide range of actors on the content and scope of possible legal instruments for regulation of private military and security companies.

This closed-door workshop provided an initial opportunity for the Working Group to discuss these matters with relevant experts and civil society representatives, primarily based in the United States. A draft international Convention, prepared by the Working Group, was circulated to participants prior to the meeting. The Working Group is consulting with nongovernmental actors on the draft Convention until the end of September 2009. In early 2010, it will share a draft with states for their consideration, and report back to the Human Rights Council in September 2010. The Human Rights Council will then determine whether and how to proceed with further elaboration and/or adoption of the text.

This brief meeting note summarizes the key themes that emerged at the meeting, which was held under the Chatham House Rule. It does not seek to provide a comprehensive account of all matters discussed, or the many useful suggestions for strengthening the draft convention that the gathered experts made.

Are there "inherently governmental functions" that ought not be outsourced to private military and security companies?

The draft Convention prepared by the Working Group—which remains a work in progress—is based on existing international and national approaches to this issue, and in particular principles found in international human rights and humanitarian law. It proposes to define certain "inherently governmental functions" that ought not be outsourced by states to private military and security companies (PMSCs). The first part of the workshop was spent considering this approach.

Participants recalled that even if states choose to contract out certain activities, they cannot contract out their legal responsibilities. These include the state duty to protect (as recognized and elaborated in the Policy Framework developed by Professor John Ruggie in his UN Human Rights Council mandate on business and human rights), the obligation to provide effective remedy for certain violations of international law, the obligations of Occupying Powers under the Fourth Geneva Convention and the Hague Regulations, and

a variety of other fair trial, due process, and broader human rights obligations.

Some participants recalled that international humanitarian law (IHL) specifically precludes states from outsourcing the performance of certain tasks such as the exercise of "the power of the responsible officer over prisoner of war camps or places of internment of civilians" (see Art. 39 of the Third Geneva Convention; Art. 99 of the Fourth Geneva Convention). One participant suggested that the probability of contractors' direct participation in hostilities ought be an important consideration in determining which functions should, as a matter of policy, not be outsourced. Other participants recalled that while there is no specific prohibition on civilians' direct participation in hostilities, such participation would at a minimum lead to the loss of certain privileges, such as immunity from attack. A number of participants noted that the concept of "direct participation in hostilities" could not provide a workable definition of what is an "inherently governmental function." Recourse to broader human rights concepts would probably be required.

Participants spent some time considering what might be learned from the recent discussion of this issue in the United States. Differing opinions emerged as to whether it is appropriate for contractors to participate in prisoner interrogations, force-protection activities (including protection of forward operating bases), the gathering of actionable intelligence, de-mining, data mining, and cyber-security functions. Participants noted that the US Congress has specifically mandated the Office of Management and Budget to develop a "single consistent definition" of "inherently governmental functions" by October 14, 2009. Other participants noted that the US experience indicated how hard it was to reach agreement on the meaning of the term among agencies of just one government; it would be all the harder to reach agreement among different governments, which have very different political circumstances, constitutional traditions, and material capabilities.

Nevertheless, it was considered useful to recall that section 832 of the Duncan Hunter National Defense Authorization Act for FY2009 (US) specifically requires that private security contractors are not authorized to perform "inherently governmental functions" in areas of combat operations. The US Congress has also indicated (see 122 Stat. 4611 §1057) that it is its sense that interrogation of enemy prisoners of war, civilian internees, retained persons, other detainees, terrorists, or criminals captured, confined, or detained during or in the aftermath of hostilities is an inherently governmental function which cannot appropriately be transferred to private-sector contractors. And Congress has asked the Commission on Wartime Contracting to indicate whether providing security in an area of combat operations is inherently governmental (see 122 Stat. 230-34 §841). The United States Congress has also, notably, already expressed its sense that "security operations for the protection of resources . . . in uncontrolled or unpredictable high-threat operations should ordinarily be performed by members of the Armed Forces." And the US Department of Defense's (DoD) Instruction 1100.22 lists a number of activities that the DoD considers inherently governmental, including exercising command authority; ordering the arrest or confinement of US armed forces members and civilians accompanying the armed forces; conducting combat authorized by the US government; certain types of security operations and shows of military force; military medical and military chaplaincy services; handling and determination of treatment of prisoners of war, civilian internees, terrorists, and criminals; direction and control of intelligence interrogations; certain law enforcement functions; and direction and control of certain detention facilities.

A number of participants argued that it may not be possible—or desirable—to identify ex ante which specific functions were inherently governmental, especially given the differences in governments' constitutional traditions, material capabilities, and political circumstances. One participant suggested that an activity which in itself might not appear inherently governmental might become so, if it enabled the performance of another inherently governmental function. Another participant argued that, accordingly, the concept should be kept very narrow; if it were too broad, he suggested, the Convention would simply antagonize the industry which would not then be inclined to cooperate with its implementation.

The key question, many interventions suggested, is not whether a particular task is performed by the state or by nonstate actors, but whether the state exercises effective oversight and provides effective accountability. That approach, some participants proposed, might provide a better vehicle for ensuring the protection of human rights—which was understood to be the overall purpose of the draft Convention. Otherwise, they suggested, the draft Convention might risk simply identifying a "lowest common denominator" which would not necessarily effectively protect human rights, and might lead some states to choose not to ratify the Convention. A number of participants also claimed that it is unclear from the current draft whether the Convention seeks to regulate state conduct, including state regulation of PMSCs, or to regulate the conduct of PMSCs themselves. Equally, further clarification of whether the Convention seeks to codify existing practice or to provide progressive development of the law may be useful.

Still, despite the challenges that states might face in identifying a single definition of those functions which are "inherently governmental," participants did agree that, in any Convention, a clear statement that it is not open to states to outsource all governmental functions would be useful.

How could an international convention and industry self-regulation complement each other?

The second session focused on the system of implementation and enforcement currently envisaged by the draft Convention; its scope of application to states, intergovernmental organizations, and PMSCs themselves; and the system of implementation through national legislation and an international committee that it currently envisages. A recurring consideration was the balance among international regulation, national regulation, and industry regulation.

A number of interventions focused on the need to clarify whether the draft Convention seeks to provide a "Code of Conduct" for states, or whether it seeks to create obligations also for other actors, including PMSCs themselves and intergovernmental organizations. Some participants noted that if the aim is to influence the conduct of PMSCs and intergovernmental organizations, then it would be important to consult closely with both groups in the elaboration of the Convention, and to give them a role in the resulting regulatory framework. Other participants noted that the draft article that currently purports to create obligations for PMSCs could perhaps be revisited, in particular to clarify its approach to the corporate responsibility to respect—a notion elaborated within the Ruggie Framework on business and human rights unanimously endorsed by the UN Human Rights Council.

One participant suggested that it might be useful to reconsider whether the international Convention should "cover the field," providing normative standards from the top that would then be implemented down through national and industry-level regulation; or whether instead the Convention should provide an "umbrella framework" that allowed autonomous state, industry, and hybrid forms of regulation to speak to each other, harmonizing their standards. A number of participants pointed to experiences in other industries, including the textile and apparel, chemical, toxic-waste disposal, and humanitarian sectors as sources of examples of how the latter kind of approach might be developed. A number of participants noted the utility of leaving states a significant margin of appreciation in formulating their own legislative and regulatory mechanisms for implementing the standards that the international Convention would promote. One participant noted that the Convention might be accompanied by a model law which would provide a template for states to work from. Numerous participants pointed to the Montreux Document as a possible source of standards that could be shared between different systems of regulation, within one overarching umbrella framework.

One participant noted that the Convention currently combines two quite different approaches to international regulation. The first is the approach traditionally used by the international community to regulate cross-border "dangerous forces," such as the movement of weapons or transboundary waste. This might point to the utility of an international "register" of PMSCs and their personnel. Some participants questioned the feasibility of and funding arrangements for such a plan. The second approach contained in the current draft is the

approach traditionally used by the international community to deal with human rights issues, such as the creation of an international committee that could receive complaints from states, individuals, and other actors. A number of participants made detailed suggestions for the possible improvement of the drafting of the provisions relevant to this approach.

Together, one participant argued, these two approaches appear to attempt to provide at least eight or nine functionalities: (1) a clearinghouse for information and standards; (2) a clearinghouse for inquiries among states relating to the activities of PMSCs; (3) receipt and consideration of complaints from individuals; (4) receipt and consideration of reports from states and PMSCs; (5) provision of transparency in regulation of the industry through establishment of a questionnaire system and (6) an international registry of PMSCs; (7) monitoring of situations worldwide where PMSCs are active; (8) conciliation between different states; and (9) sanctioning states that inadequately regulated PMSCs.

Participants raised queries about a number of specific functions, how these would operate in practice, and the wide scope of different functions currently under consideration in the draft. Numerous participants suggested that the Convention should provide a framework to allow harmonization among complementary regulatory efforts at the industry, national, regional, and global levels. But many also noted that any "system" provided by the Convention needs to be carefully designed with a view to its real-world impact on industry practice and incentives, and the costs of operating such a system. The aim should be, stressed one participant, to prevent violations of human rights in the first place, and not merely to remedy them once they occur.

A number of participants suggested that the form any implementation machinery should take would depend centrally on exactly what kind of corporate and/or state activities the international Convention was attempting to control. Some participants suggested that this was not clear from the Convention, given the broad definitions of "military services" and "security services" it currently contains.

Some participants suggested that the Convention's emphasis should be on generating incentives for companies to change their conduct in order to prevent human rights violations occurring in the first place. One example that was offered was connecting market access to compliance with certain performance standards or performance reviews, as occurs in the toxic waste industry, diamond industry, and some parts of the global apparel industry. Participants cautioned, though, that any effort to design such incentives would need to be undertaken in careful consultation with the industry itself, to ensure the standards set reflect best practice—and do not represent standards so high that smaller companies cannot meet them, creating problematic barriers to market access. Similarly, a number of participants noted that it would be difficult to generate systematically effective incentives given the diversity of industry actors and their operation in zones of weak government and market-control.

A number of interventions explored how the machinery provided by the current draft would work to overcome these structural limitations, and certain other inherent barriers to transparency and accountability within the industry: the national security concerns that surround some of its operations; the weak regulatory capacity of states in some of the areas in which it works; the need to respect commercial confidentiality; and the global nature of the industry that enables regulatory arbitrage and allows some PMSCs to escape the effective oversight of any one state.

There was also significant discussion of accountability issues. Some participants made a number of suggestions for how the draft accountability provisions could be strengthened and streamlined, including in areas such as interstate complaints, conciliation, exhaustion of local remedies, and victims' access to justice. A number of interventions called for any adjudicatory or grievance mechanism established by the Convention to operate with full transparency; other interventions cautioned that the need for transparency must not overshadow privacy rights or lead to a freezing of cooperation from the industry itself. One participant noted that some industry actors might find it difficult to cooperate with an international investigative body since this might expose them to increased liability

under domestic law. Some participants emphasized that for the accountability system to be legitimate and sustainable, it would need to provide for the participation of affected communities and the industry itself. Another participant suggested that the Convention could only establish a "whistle-blower" capability, and that ultimately sanctioning power would lie with the UN General Assembly or Security Council.

Finally, participants recognized and welcomed that the current draft Convention incorporates elements of best practice from the most recent international human rights treaties. The challenge lies in finding a way to organize these elements in a systematically effective manner.

Participants

1. Chair: Mr. James Cockayne (Senior Associate, International Peace Institute)
2. Ms. Shaista Shameem (Chairperson-Rapporteur of the UN Working Group on mercenaries)
3. Mr. Alexander Nikitin (Member, UN Working Group on mercenaries)
4. Ms. Amada Benavides de Pérez (Member, UN Working Group on mercenaries)
5. Mr. José Luis Gómez del Prado (Member, UN Working Group on mercenaries)
6. Mr. Karim Gherzaoui (Office of the High Commissioner for Human Rights)
7. Ms. Karin Lucke (Office of the High Commissioner for Human Rights)
8. Ms. Julie Tetard (Office of the High Commissioner for Human Rights)

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9. Mr. Paschal Badong, King's College London
10. Mr. Doug Brooks, International Peace Operations Association
11. Ms. Devon Chaffee, Human Rights First
12. Mr. Michael Cohen, New America Foundation
13. Ms. Victoria DiDomenico, Center on International Cooperation, New York University
14. Prof. Renée de Nevers, Syracuse University Law School
15. Mr. Eugene R. Fidell, Yale Law School
16. Ms. Katherine Gallagher, Center for Constitutional Rights
17. Mr. Sabelo Gumedze, Institute for Security Studies
18. Ms. Alison Gurin, International Peace Institute
19. Ms. Elizabeth Holland, Program on Humanitarian Policy and Conflict Research
20. Mr. Dan Kenney, NoPrivateArmies.org
21. Ms. Tara Lee, DLA Piper LLP
22. Mr. Mike Love, American Bar Association Battle Space and Contingency Procurements Committee
23. Ms. Margaret Maffai, University of Wisconsin
24. Mr. Francesco Mancini, International Peace Institute
25. Mr. Chris Rassi, Thompson Hine LLC
26. Ms. Caroline Rees, Harvard University
27. Ms. Hina Shamsi, New York University Center for Human Rights and Global Justice
28. Ms. Lillian Tan, Amnesty International USA
29. Mr. Jamie Williamson, International Committee of the Red Cross
30. Mr. Robert Young, International Committee of the Red Cross

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