DIIS POLICY BRIEF

Weak International Response to the Use of Private Military Security Companies

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The private military security industry is booming. Meanwhile, a UN convention on the outsourcing of military tasks may turn into an excuse for doing nothing, while obscuring the real issues at hand: The changes in the security architecture and its implications which international and national laws are not equipped to address.

A few months ago, in November 2010, a UN working group presented a draft convention on the regulation of private military security companies and how they should be employed.

The draft convention leaves a lot to be desired. This policy brief points out some of its shortcomings, problems and contradictions. The question is not how to avoid the outsourcing of violence. Despite the sovereign principle of the state's monopoly on legitimate violence, outsourcing is already a fact. The question is how to prevent excessive use of force and ensure the accountability of companies that do not play by the rules. Regulating in this area is not simple – there are some unclear questions about jurisdiction that are clearly reflected in the proposed convention, which leaves the legal questions up to the individual states.

When the international community leaves the legal questions up to the individual states, it does not play any valuable part in untying the Gordian knot of regulating this area. In fact, regulation at the international level may not be possible or even desirable. Political interests are so diverse that they may stand in the way of advances and it is hard to imagine how a convention can encapsulate all the dimensions of the question. If political motives are too diverse, a convention may turn into an excuse for doing nothing and obscure the real issues at hand: the changes in the security architecture and its implications, which international and national laws are not equipped to address.

The UN working group behind the proposal encourages the "elaboration and adaptation of legally binding instruments at the national, regional and international level". This scatter-gun technique runs the risk of creating a responsibility vacuum – when responsibility is shared, no single actor is responsible. At the same time, the draft leaves it up to the individual states to prosecute private military security companies and their personnel, when this is required. A UN convention does not apply to the private military security companies as such – ratification obliges *states* to impose regulation on their domestic companies or companies with which they make contracts. It is up to the states to fill out the framework with the legislation they find appropriate. This means that much depends on their implementation, and this does not ensure a uniform regulatory and legislative framework across states. A conven-

RECOMMENDATIONS

1. States should engage in internal debates concerning the extent of the use of private military security companies. There is no one-size-fits-all solution and relying on the definitions in the draft UN convention will not be sufficient. National debates are a logical first step in regulation.
2. The legal status of private military security company personnel must be clarified. It must be clarified whether contractors in war-zones are protected by the same international conventions as soldiers if they are employed by a state and serve as an extension of state capacities.
3. The private sector's use of private military security companies, as a means to protect investments, assets and employees abroad should also be regulated.

tion is binding for the states that ratify it – but the UN has limited sanctions in case of non-compliance.

As a consequence of the weak international response to the use of private military security companies, states and regional bodies, such as the EU, *must* take over the responsibility for regulating the area where the UN seems to leave off, and they must *not* let the convention become an excuse for doing nothing. National debates are a logical first step. The issue is not only relevant for states already employing private military security companies; since the number of low-intensity conflicts around the world is increasing and Western defence budgets are decreasing, outsourcing of military tasks may also become relevant for other states in the future. Since the draft convention seems inapt for regulating the area, states need to create legal uniformity and coherent policies themselves, and regional cooperation may be better than the UN option.

This said, much of course also depends on the actual wording of the convention, and it may well start a development of norms – thus it may help to define what is acceptable and what is not for the contracting parties when security is outsourced. Consolidating these norms may in time stabilize the field and the use of private security, but this will be a slow process.

STATE JURISDICTION

When ratifying the convention a state is obliged to "establish jurisdiction through its domestic law over the offences set out in the convention". A state may do so when an offence is committed within the territory of that state; on board a vessel flying the flag of that state; by a national of that state; against a national of that state; or by a stateless person who has his or her habitual residence in the territory of that state.

FILLING IN THE REGULATORY VACUUM

The UN working group behind the convention proposal was established in 2005. It was mandated "to monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services in the international market on the enjoyment of human rights [...] and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities." This was an attempt to fill the international regulatory vacuum and set up appropriate oversight bodies to monitor the use of these companies. It is also the latest of very few international attempts to curb the negative effects of the increased use of private companies in military and security operations.

Capitalizing on the 'good will' of the industry

Simultaneously with the UN draft convention, in November 2010, 58 companies signed a voluntary code of conduct developed by the industry of private military security companies. The signatories pledge to curb their use of force, respect human rights, vet and train personnel and report breaches of the code. One can suspect that the establishment of the code is nothing more than an attempt to avoid further regulation, and it may have exactly that effect in the states that depend most on outsourcing.

Even though states can hardly afford to rely exclusively on industry-driven codes of conduct they should certainly capitalize on the 'good will' displayed by the industry and exploit the fact that the industry is increasingly keen on positive PR and good working relationships with their potential clients – governments, private business and NGOs. The fact that private military security companies are now established as an industry also gives the state new opportunities for influence and regulation – opportunities that did not exist earlier when private military forces comprised individual mercenaries.

BEYOND HUMAN RIGHTS

A convention can be an impediment to improvement. An example of this is the draft proposal of mandatory courses in human rights for private military security personnel. Human rights are of course an important issue, but regulating this aspect, in itself, is not the same as regulating the whole private military security area. However, the draft seeks to focus the whole debate on human rights. And in the end, if the private military security companies do not comply with the demands in the convention, it leaves the actual regulation up to the individual states. This cannot lead to uniform legal practices across states. So if the convention does not succeed in setting up more detailed and comprehensive regulation on the whole issue of private military security companies, there is a risk that it will amount to nothing more than an empty symbol of the good intentions of international society.

Registration and licensing

The convention calls for a system of national registration and licensing of private military security companies, and for an international register. In order to increase transparency and accountability the states should report once a year which companies they have contracted. Furthermore, licenses should only be given to companies offering compulsory training of personnel in international human rights laws. It is interesting to note that the UN itself lacks an adequate internal oversight system for its use of private military security companies and that some 60 percent of UN's offices use such services worldwide. The work with the convention was undertaken partly in recognition of this.

PROBLEMS AND SHORTCOMINGS

In spite of the good intentions, the draft does not introduce any groundbreaking proposals and will probably not lead to many concrete results. The inherent problems already

mentioned are intertwined with important issues of legal status, which are not dealt with in the draft, even though it would have been natural to explore them. The following are some of the most evident problems and shortcomings:

- The draft is not based on a clear definition of the challenge of the privatisation of force.
- States that already use private military companies are not likely to sign.
- Private military security companies are outside the military chain of command and difficult to hold accountable.
- The legal status of private military security companies' personnel is still uncertain.
- There are loopholes for bilateral agreements.
- There are loopholes for failed states' use of private military security companies as a substitute for a national force.
- There are loopholes regarding *private* companies' use of private military security companies.

A clear definition of the challenge is missing

First of all, the challenge presented by privatisation of force and outsourcing must be defined before it can be regulated. The draft treats privatisation of military and security functions as merely something that can be switched on and off at will. Thus, it does not grasp the complexity of the new tendency of outsourcing. It fails to take into consideration that this tendency is the visible sign of a change in security in general, and correspondingly, the scope of the draft is too narrow to achieve the desired outcome – a decrease in the use of private military security companies.

The draft convention has succeeded only in defining the role of private military security companies negatively – i.e. what they are not and what they should not do.

They are not mercenaries. The term 'mercenary' refers to a time when individual operators, especially in Africa, violated human rights for profit. The private military security companies of today are not mercenaries in this sense, but a corporate variation that entails a whole new (private and business) structure for the use of force. Still, the definition is unclear and therefore hard to target in terms of legal status.

According to the convention, some functions should not be undertaken by private military security companies, since they inherently belong to the state and should not be outsourced. These functions include most of the services that private military security companies are capable of providing, except for logistics and other services. These state functions include "direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees".

Why states should not be expected to sign

The working group has stated that it is not the purpose of the convention to ban private military security companies.

Draft Convention on Private Military Security Companies, Article 2

Definitions (Article 2)

The convention proposes a number of definitions, including the following:
• Private military and/or security company (PMSC): a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities.
• Military services: specialized services related to military actions, including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities.
• Security services: armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, elaboration and implementation of informational security measures and other related activities.

– Elements of the proposed draft convention on private military and security companies.

UN Mercenary Convention, Article 1

1. A mercenary is any person who:
(a) Is specially recruited locally or abroad in order to fight in an armed conflict;
(b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
(c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
(d) Is not a member of the armed forces of a party to the conflict; and
(e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. A mercenary is also any person who, in any other situation:
(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
(ii) Undermining the territorial integrity of a State;
(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
(c) Is neither a national nor a resident of the State against which such an act is directed;
(d) Has not been sent by a State on official duty; and
(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

– UN Mercenary Convention

Rather, it is to establish minimum standards for states to regulate the companies' activities and personnel. But we should probably not expect too many of the states who actually use or house private military security companies to sign. This is because the convention bans just about all the services that such companies offer – except for logistics and a few other services. The stated negative purpose of the convention – not to ban the companies – is therefore contradicted by the specification of the functions that they should not be allowed to undertake.

It is doubtful whether the US, by far the industry's biggest client, will sign the convention. The use of these companies is an integrated part of the US military machine and a consolidated part of public policy making in the US political system. As such, US employment of private military security companies is more than a quick-fix solution driven by pure necessity; it is a part of an ideology of privatisation that now extends to security and military policy. A UN convention is not likely to change this.

Consequently, the convention may prevent *new* states from outsourcing military core functions and associating themselves with questionable companies, but it will probably *not* facilitate any rollback in the use of private military security companies in states already dependent on them – the US being one of them.

Private military security companies are outside the chain of command and outside jurisdiction

Most private military security companies have good reputations and deliver their services in accordance with human rights and the rules of war. But some – such as *Blackwater* (now *Xe Services*) and *DynCorp* which have not acted in accordance with these rules – have drawn attention to the problems of employing just any private company indiscriminately. Both companies have now signed the voluntary code of conduct. But at present it is difficult to prosecute such companies if they violate human rights, since they fall outside the military chain of command and are not subject to military prosecution. The draft convention seeks to remedy this by excluding private military security companies from services beyond logistics, instead of setting up frameworks to ensure that they can be prosecuted.

The question is how the convention will work in areas of conflict when private military security companies are employed as support for state military forces. If it had been in place at the time, would the convention have worked in the case of Blackwater in Iraq? Or would it have been overridden by 'Order 17' – an order signed by Paul Bremer, head of the Coalition Provisional Authority, that grants all Americans associated with this authority and with American government immunity from Iraqi law? The convention urges states to "renounce the inclusion of immunity provisions in bilateral agreements for their national contractors working abroad", but it can actually do very little to prevent this.

Uncertain legal status of private military security company personnel

The draft convention does not discuss the legal status of the employees of the private military security companies. It is not defined whether contractors are protected by the Geneva Convention when operating in the theatre of war or if they are illegal combatants or indeed mercenaries, as defined by the UN Mercenary Convention. The draft does take into account the difference between mercenaries and private military security company personnel, but it does not clearly define this in terms of legal status.

Bilateral agreements

The draft leaves a loophole open, because it does not seek to regulate instances where private companies are employed in capacity-building through bilateral agreements between states. It would for instance still be permissible for the US to outsource the training of Afghan security forces, as long as the US does not outsource the training of its own forces.

Failed states

Yet another issue is that of failed states. The draft does not take into account the instances where failed states – defined here as states that are unable to uphold the state monopoly on legitimate violence – employ private companies instead of, or as a supplement to, their own armed forces. If a country hiring a company has not signed and ratified the convention, then who has the jurisdiction, the right and obligation to prosecute the company, if it has committed a crime according to the convention, but it has not violated the laws of the country in which it is operating?

No UN regulation of *private* use of private military security companies

The convention applies to "States and intergovernmental organizations". Private military security companies employed by other private companies, (e.g. mining corporations operating in failed states) are not included, even though this private employment challenges the state monopoly on violence in the countries where they operate. The UN lacks jurisdiction over the private use of private military security companies and this question must therefore – again – be subject to national regulation.

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FURTHER READING

Edwards, Stine Heiselberg and Christa Moesgaard: "Private Military Companies in Counter-insurgency Strategy", *DIIS Policy Brief*, March 2011, www.diis.dk

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