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New U.N. Draft International Convention On The Regulation, Oversight And Monitoring Of Private Military And Security Companies

The use of private security contractors (PSCs) in international relief and contingency operations has been the focus of considerable attention in recent years. In particular, the use of security contractors to support operations in Iraq and Afghanistan, and a series of unfortunate incidents involving such contractors, have generated debate about the roles PSCs should play, the standards under which they should operate and how to oversee their activities. A new U.N. *Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies* (Draft Convention) aims to establish a national and international legal regime to resolve those questions. It is only a working draft, not a final proposal. But the Draft Convention is a substantial attempt to address these long-standing issues at the international level, and it arrives just as these issues may be returning to international focus. As such, it provides a valuable window into present international concerns and developing expectations for international security contractors.

Background—In July 2005, the U.N. Commission on Human Rights established its Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of Rights of Peoples to Self-Determination. Commission on Human Rights Resolution 2005/2 (April 7, 2005), available at www.unwg.rapn.rulen/1/E-CN_4-RES-2005-2.doc. Among other things, the working group was tasked to “monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market ... and to prepare draft international basic principles that encour-

age respect for human rights on the part of those companies in their activities.” Id. at ¶ 12(e).

In recent years, the working group has increasingly focused on the activities of these “private military and security companies.” This has been driven substantially by reports of contractor misconduct in Iraq, as well as by allegations concerning contractor participation in renditions and the interrogation of detainees in U.S. custody. See, e.g., Press Statement, HCRC, “UN Human Rights Experts Encouraged by US Government Efforts to Increase Oversight and Accountability over Private Security Contractors but Concerned by Gaps in Access to Effective Remedy for Victims of Human Rights Violations” (Aug. 3, 2009), available at www.unhchr.ch/huricane/hurricane.nsf/0/C0D2DED6AC092F9BC12576080035A404?opendocument. Notably, such reports also have generated concern in the U.S. Congress, which responded in part by enacting § 862 of the National Defense Authorization Act for Fiscal Year 2008, P.L. 110-181—requiring new regulations for the selection, training, equipping and conduct of PSC personnel in combat areas.

Now, the U.S. appears poised to increase its reliance on PSCs to support growing operations in Afghanistan. With the ranks of the U.S. military already strained by competing demands and years of conflict in Iraq, it seems that the Government simply does not have the resources to perform its mission without contractor assistance. In fact, the U.S. Army recently signaled its intention to hire PSCs to protect as many as 50 forward operating bases and command outposts throughout Afghanistan. Department of the Army, Request for Information from PSC/ASG Companies (July 10, 2009), available at www.fbo.gov/index?&s=opportunity&mode=form&id=623e06f2f116f482f948e758aef72ad5&tab=core&tabmode=list.

Such reliance on contractors in combat areas and the potential for blurring the lines between military and civilian roles are critical challenges. See Press Statement, HCRC, “UN Human Rights Experts Encouraged by US Government Efforts to Increase Oversight and Accountability over Private Security Contractors but Concerned by Gaps in Access to Effective Remedy for Victims of Human Rights Violations” (Aug. 3, 2009), available at

www.unhchr.ch/huricane/hurricane.nsf/0/C0D2DED6AC092F9BC12576080035A404?opendocument.

Not surprisingly, therefore, the working group recently completed visits to both Afghanistan and the U.S., gathering information and vigorously promoting an agenda of increased oversight and accountability for PSCs. See *id.*; See also Press Statement, HCRC, “Expert Group on Mercenaries Concludes Visit to Afghanistan” (April 8, 2009), available at www.unhchr.ch/huricane/hurricane.nsf/view01/0149FD9784B6EE4EC1257592005B5B24?opendocument. It is in this context that the working group now distributes its Draft Convention.

The Draft Convention—The working group’s July 13 Draft Convention is generally a document of principles rather than precise rules. It seeks to (a) “promote cooperation between States regarding licensing and regulation of the activities of private military and security companies”; (b) “reaffirm and strengthen the principle of State responsibility for the use of force”; and (c) “identify those functions which are, under international law, inherently governmental and cannot be outsourced.” Draft Convention, Art. 1. In support of these general principles, the Draft Convention’s 51 articles also make more specific proposals. These include establishing domestic licensing regimes for the import and export of security services, restricting the use of force, establishing jurisdiction over contractors to prevent “impunity” for certain criminal misconduct, identifying limits on the responsibilities governments may delegate to PSCs, and establishing a framework for international monitoring.

State Licensing and Regulation: A fundamental premise of the Draft Convention is that protection against violations of human rights by international security contractors “cannot be effective unless appropriate national and international legislation is adopted and implementation mechanisms are developed so as to ensure enforcement.” The working group further concludes that “self-regulation [by PSCs] is not sufficient to ensure the observance of international humanitarian law and human rights law by the personnel of these companies.” *Id.* Accordingly, the Draft Convention proposes the creation of national regulatory regimes to license, regulate and monitor PSC conduct.

Under the Draft Convention, “Each State party bears responsibility for the military and security activities of private entities registered or operating in their jurisdiction, whether or not these entities are contracted by the State.” *Id.*, Art. 4, ¶ 2. Each state therefore is to establish a “comprehensive domestic regime of regulation and oversight over the activities in its territory

of private military and security companies and their personnel,” *id.*, Art. 13, ¶ 1(a), to include, *inter alia*, (1) procedures for registration with the government, (2) specific legal requirements for the training and experience of contractor personnel, (3) mechanisms for states to monitor the offshore activities of registered contractors, and (4) governmental bodies specifically responsible for the registration and oversight of the security companies. *Id.*, Art. 15.

The Draft Convention does not provide a precise blueprint for this regulatory regime. Instead—and by practical necessity—it provides only a rough outline of what is needed, leaving the details of design to each state. Likewise, the Draft Convention provides guiding principles that the new regulatory regimes would enforce, but it does not attempt to identify or resolve every application of those principles. There are, however, certain areas in which the Draft Convention is relatively precise in its prescriptions, and these are discussed in greater detail below.

Restrictions on the Use of Force: International concerns about PSCs have focused largely on their use of lethal force and their perceived lack of accountability. As a general matter, therefore, the Draft Convention seeks to ensure that “arbitrary or abusive use of force and firearms by personnel of private military and security companies is punished as a criminal offense under the law of the contracting State, territorial State or home State.” *Id.*, Art. 20, ¶ 2. To effect this, states are asked, *inter alia*, to take all legislative, judicial, administrative and other measures necessary to define and enforce the rules for use of force. *Id.*, Art. 19, ¶ 1. The Draft Convention then takes a step further—defining the use of force as “the use of lethal as well as non-lethal weapons or techniques which may have lethal consequences,” *id.*, Art. 2, ¶ m, and setting out detailed criteria for its use.

Option of Last Resort—First, the use of force is designated as the option of last resort. The Draft Convention states that contractors “shall, as far as possible, apply non-violent means before resorting to the use of force and firearms” and “may use force or firearms only if other means remain ineffective or without any promise of achieving the intended result.” *Id.*, Art. 19, ¶ 2.

Limited Circumstances for the Use of Force—Second, the Draft Convention limits the circumstances in which force may be lawfully employed. A contractor employee may

- (a) defend the contractor or other employees of the company against what he or she believes is an imminent threat of death or serious bodily injury,

in respect of the exercise of the essential right of self-defense;

(b) defend persons whom he or she is under a contract to protect against what is believed to be an imminent threat of death or serious bodily injury;

(c) resist what he or she reasonably believes is an attempt to abduct him- or herself, other employees of the company or a person whom he or she is under contract to protect; and

(d) prevent or put a stop to the commission of a serious crime that would involve or involves a grave threat to life or serious bodily injury.

The Draft Convention further provides that in circumstances involving the commission of a serious crime, “the personnel of private military and security companies shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed.” *Id.*, Art. 19, ¶ 5.

Principles of Restraint—Third, even if the use of force appears necessary and lawful, principles of restraint should be applied. The Draft Convention provides that if the use of force and firearms is “unavoidable,” PSCs should (1) exercise restraint in such use and act in proportion to the seriousness of the offense; (2) minimize damage and injury, and respect and preserve human life; (3) ensure assistance and medical aid are rendered to injured or affected persons as soon as possible; and (4) ensure that relatives of injured or affected persons are notified. *Id.*, Art. 19, ¶ 3.

Consistent with these principles of restraint, the Draft Convention specifically prohibits the “excessive use of firearms.” This is described as the use of “firearms, ammunition and equipment as well as methods of conducting fighting and special operations of such character as will cause excessive damage or unnecessary suffering or which are non-selective in their application, or otherwise violate international humanitarian law.” *Id.*, Art. 11. The Draft Convention further calls for state parties to take “due account” of the *United Nations Code of Conduct for Law Enforcement Officers* of Dec. 17, 1979, and the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* of Sept. 7, 1990. *Id.*

Rules for Military Support—Finally, if PSCs are “providing military and security services under an agreement as a part of armed forces or military units of the State Party,” the use of force is to be regulated by “the norms of its military and other respective legislation and relevant international humanitarian law and international human rights law.” *Id.*, Art. 19, ¶ 6. Simply put, this seems to call for application of mili-

tary rules for use of force whenever contractors work for the military.

Fundamental State Functions: Under the Draft Convention, “No State Party can delegate or outsource fundamental State functions to non-State actors.” *Id.*, Art. 4, ¶ 4. In general terms, the Draft Convention provides that states shall “define and limit the scope of activities of private military and/or security companies and specifically prohibit functions which are intrinsically governmental.” These include, but are not expressly limited to, “waging war and/or combat operations, taking prisoners, espionage, intelligence and police powers, especially the powers of arrest or detention, including the interrogation of detainees.” *Id.*, Art. 8; Art. 2, ¶ k.

Unfortunately, these statements provide little useful guidance for determining what is “intrinsically governmental” and therefore outside the bounds of appropriate delegation. Moreover, the Draft Convention fails to define “delegate” or “outsource.” The proper objective seems to be a prohibition on governments abdicating their intrinsic powers and responsibilities, without appropriate direction and oversight for their contractors. But as presently constructed, the Draft Convention arguably prohibits any contracting support. Such a broad prohibition seems neither necessary nor practical. Instead, the emphasis should be on whether appropriate government oversight and control are maintained for the services—in that way, governments do not abdicate their responsibilities, but neither are they deprived of valuable assistance from private contractors.

Participation in Armed Conflicts: Perhaps consistent with the concept of non-delegation of state functions is the Draft Convention’s call for states to prohibit PSCs and their personnel from “directly participating in armed conflicts, military actions or terrorist acts, whether international or non-international in character, in the territory of any State.” *Id.*, Art. 10. The Draft Convention calls for this prohibition particularly if such activity is aimed at

- (a) the overthrow of a government (including regime change by force) or undermining the constitutional order, or legal, economic and financial bases of the State;
- (b) The coercive change of internationally acknowledged borders of the State;
- (c) The violation of sovereignty, or support of foreign occupation of a part or the whole territory of State;
- (d) Assaults on the life, or security of civilian persons;
- (e) Acts of terrorism;
- (f) The establishment of control over the natural resources of the State, including water,

petroleum, uranium, and associated industries or facilities; (g) The coercive removal or displacement of people from areas of permanent or habitual residence.

Id., Art. 10. This too is a potentially overbroad restriction. It is not clear what is intended by the critical phrase “directly participating.” Does this extend to the provision of on-base security by PSCs in a combat zone—as the U.S. is currently considering for Afghanistan? To the protection of petroleum infrastructure in Iraq? Would it prohibit PSCs from protecting officials of civilian agencies if those civilians were endangered by active hostilities between U.S. forces and their battlefield adversaries? The answers to such questions are not clear.

Other Restricted Activities: On a related note, the Draft Convention provides that security companies should “never under any circumstances” take certain actions relating to nuclear, biological and chemical weapons. *Id.*, Art. 11, ¶ 2. The prohibition relates not only to the use or threat of use of such weapons, but also to ensuring that PSCs do not “develop, test, produce, otherwise acquire, deploy, stockpile, maintain, retain, or transfer” such weapons. *Id.* Neither would PSCs be allowed to participate in research on such weapons. *Id.*

The Draft Convention further calls for governments to prohibit PSCs from “trafficking in firearms, their parts, components or ammunition.” *Id.*, Art. 12. The Draft Convention does not elaborate on this restriction, again leaving individual states to set parameters.

Jurisdiction over Specific Criminal Acts: Another critical component of the Draft Convention is its effort to ensure that states establish jurisdiction over criminal conduct by PSCs. This is in addition to the general procedures for regulation and oversight discussed above, and the goal of the Draft Convention is to ensure that contractors cannot engage in criminal misconduct with impunity. The framework in the Draft Convention likely would accomplish that goal, although its belt-and-suspenders approach raises the possibility that multiple jurisdictions could claim the right to address a single incident. The Draft Convention states that

1. Each State party shall take such measures as may be necessary to establish its jurisdiction through its domestic law over the offenses set out in this Article when:

- (a) The offense is committed in the territory of that State; or
- (b) The offense is committed by a national of that State.

2. A State party may also establish its jurisdiction

over any of the offenses set out in this Article when:

- (a) The offense is committed against a national of that State; or
- (b) The offense is committed by a stateless person who has his or her habitual residence in the territory of that State; or
- (c) The offense is subject to universal jurisdiction.

Accordingly, under the terms set forth by the Draft Convention, jurisdiction over an offense would tend to lie not only in the state where the offense occurred, but also in the home state of the offender. There also is another possibility established by the Draft Convention at Art. 22, ¶ 4, which provides, “Each State party shall likewise take such measures as may be necessary to establish its jurisdiction over the offenses set out in this Article in cases where the alleged offender is present in its territory and it does not extradite such person to any of the States parties which have established their jurisdiction.” Moreover, the Draft Convention calls on states to punish offenses with “the same penalties which would apply when they are committed in [the state’s] own territory.” Draft Convention, Art. 22, ¶ 5. This means that offenders might be subject to very different penalties, depending on which state exercises its jurisdiction. This could generate uncertainty and confusion, particularly if more than one state attempts to exercise jurisdiction. And this is not helped by the Draft Convention’s provisions on extradition, which aim generally to ensure that such offenses will be deemed extraditable by all states. *Id.*, Art. 24.

Importantly, this proposed jurisdictional framework applies only to an enumerated list of offenses. These offenses include (1) war crimes, as defined in Art. 8 of the Statute of the International Criminal Court; (2) crimes against humanity, as defined in Art. 7 of the Statute of the International Criminal Court; (3) genocide, as defined in Art. 6 of the Statute of the International Criminal Court; (4) violations of the provisions of the International Covenant on Civil and Political Rights, in particular violations of articles 6 (right to life), 7 (prohibition of torture), 9 (security of person, prohibition of disappearances, arbitrary detention, etc.) and 12 (prohibition of forced expulsion and displacement); (5) violations of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; (6) violations of the International Convention for the Protection of All Persons from Enforced

Disappearance; (7) grave breaches of the Geneva Conventions of 1949 and Additional Protocols of 1977; (8) reckless endangerment of civilian life, right to privacy and property by private military companies and PSCs; (9) damage to or destruction of cultural heritage; (10) serious harm to the environment; and (11) other serious offenses under international human rights law.

Although some of the listed offenses are reasonably specific, others are quite vague. For example, it is not clear what might be “reckless endangerment” of a “right to privacy,” or what might be identified as damage to cultural heritage or “serious harm to the environment.” It is important, however, that these provisions do not establish what is a crime. Instead, they simply identify the types of misconduct over which states should assert jurisdiction. The nature and extent of any punishment is left to the states themselves, to be treated pursuant to domestic law.

International Oversight Committee: In addition to the proposed domestic regimes for regulation and oversight of PSCs, the Draft Convention proposes the International Committee on the Regulation, Oversight and Monitoring of Private Military and Security Companies. *Id.*, Art. 32. The Draft Convention envisions a 14-member committee that would serve several functions. *Id.* First, states would submit to the committee periodic reports on the legislative, judicial, administrative and other measures taken to implement the Convention. *Id.*, Art. 32–33. The committee then would offer its observations and recommendations on the report, or request additional information. *Id.*, Art. 33. Second, the committee would be empowered to issue interpretive comments on the provisions of the Convention. *Id.*, Art. 34. Third, the committee would collect information about PSCs alleged to be operating in violation of “international law and international human rights norms” and transmit any findings to the concerned states. *Id.*, Art. 36. But regardless of any findings, the committee would not have authority to direct action by any state.

The committee also would serve as a venue for member states to protest that other member states are not complying with the Convention. *Id.*, Art. 37–38. Procedures are provided for the appointment of ad hoc

conciliation commissions to promote an amicable resolution to such disputes and, if necessary, issue a report of findings. *Id.*, Art. 38–39. If an individual state so desires, it also would have the option of designating the committee to consider petitions from persons claiming to be victims of any violation of the Convention; however, the Draft Convention anticipates that this would require member states to enact legislation facilitating implementation of the committee’s conclusions or recommendations. *Id.*, Art. 40. Such abdication of authority by the states would seem unlikely.

Conclusion—The Draft Convention is an interesting contribution to the debate over use of PSCs in international relief and contingency operations. Whether it will ever become more than that is not clear. The Draft Convention sets out a collection of international principles, but the critical components for implementation are the rules and regulations to be established in each participating state. And in some ways, the states may already be ahead of this Draft Convention. For example, the U.S. and Iraq in 2008 executed a new Status of Forces Agreement that now allows the prosecution of contractors under Iraqi law. See, e.g., Robert Nichols, “New U.S.-Iraq SOFA Lifts Contractor Immunity,” 5 IGC ¶ 103. As noted above, the U.S. Congress also enacted § 862 of the FY 2008 National Defense Authorization Act, which required new regulations—issued by the Department of Defense in July—for the selection, training, equipping and conduct of PSC personnel in combat areas. In short, given the unilateral and bilateral arrangements already developing for contractor oversight, it is not clear that a convention of this sort will be needed. Nevertheless, the draft is a reflection of international sentiment, growing expectations for accountability, and the increasing desire of governments to limit and oversee the conduct of contractors. Contractors and governments alike must recognize and adapt to this evolving environment.



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