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Leashing the Dogs of War: The Rise of Private Military and Security Companies

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Leashing the Dogs of War

THE RISE OF PRIVATE MILITARY AND SECURITY COMPANIES

On the morning of Sunday, September 16, 2007, U.S. Agency for International Development and State Department officials were meeting in a guarded compound in central Baghdad. At ten to twelve, a bomb exploded on the road a few hundred yards from the compound, prompting a decision to evacuate. Private security company contracted to ensure the security of State Department employees, Blackwater USA, huddled the diplomat into one convoy while a second went ahead to ensure a clear path back to the International Zone of Iraq, known more commonly as the Green Zone.

This second convoy, comprising four SUVs, was attempting to stop traffic at Nisour Square when gunfire broke out. Though Blackwater initially claimed that its personnel had been fired upon, this was not supported by subsequent investigations by the Iraqi government, the Pentagon or the FBI, all of whom concluded that Blackwater had used excessive force. Seventeen Iraqi civilians were killed in the incident; according to a report in The New York Times, one Blackwater guard continued shooting after “cease fire” was called out several times, stopping only when another guard turned a weapon on him.

More than a year later, despite a series of damning but somewhat imprecise reports, there appears to be no prospect of prosecutions arising from this or the many other incidents involving contractors and the deaths of innocent bystanders in Iraq. Two days after the Nisour Square incident, the Iraqi government issued a statement purporting to revoke the company’s license to operate in Iraq. This was quietly dropped. In April 2008, Blackwater’s State Department contract to protect U.S. officials was extended through 2009.

The Fall and Rise of Mercenaries

Private military and security companies such as Blackwater, Triple Canopy, ArmorGroup and many others are frequently compared to mercenaries. This is partly accurate: they are private actors offering military services ranging from training and advice to combat. It is misleading, however, to draw very different ways. The first is that no major firm today offers to fight wars for a fee. Though Executive Outcomes and Sandline International did provide such services to Sierra Leone, Angola and Papua New Guinea in the 1990s, that aspect of the industry has come to be discredited—epitomized in the move from private “military” to “security” companies. EO and Sandline have

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In this essay, Simon Chesterman, who has written widely on international institutions, international criminal law, human rights, the use of force, and post-conflict reconstruction, considers how the activities of Blackwater and other private contractors in Iraq have helped to focus public attention on the post-Cold War trend toward the outsourcing of military services. Are such scandals proof of the impossibility of holding modern mercenaries to account, or evidence that the market for force is beginning to mature?
These trends explain the rise of outsourcing in intelligence and contracting in the past two decades. The U.S. government has increasingly relied on private companies to perform intelligence-related tasks, partly because of budget constraints and a desire to maintain some level of national security, but also because of the perceived benefits of outsourcing. This has led to a significant increase in the role of private contractors in the intelligence community.

One of the earliest examples of outsourcing in intelligence is the creation of the Central Intelligence Agency (CIA) in 1947. The agency was established to coordinate and manage U.S. intelligence activities, and was initially staffed primarily by military personnel. Over time, however, the CIA began to rely more heavily on private contractors to perform a variety of tasks, including collection, analysis, and dissemination of intelligence.

A turning point in the development of outsourcing in intelligence occurred in the 1990s, when the U.S. government began to explore the use of private companies to perform intelligence-related tasks. This was driven by several factors, including changes in the nature of conflict, the rise of non-state actors, and the increasing use of technology. The U.S. government began to rely more heavily on private contractors to perform a variety of tasks, including collection, analysis, and dissemination of intelligence.

Over time, the role of private contractors in the intelligence community has grown significantly, and today they perform a wide range of tasks, from providing support services such as translation and interpretation, to collecting and analyzing intelligence data. This has led to a significant increase in the number of private contractors working in the intelligence community, and to a greater degree of dependency on private companies for intelligence-related tasks.

The use of private contractors in intelligence has also raised a number of concerns, including issues related to accountability, transparency, and the potential for conflicts of interest. There have been several high-profile cases in which private contractors have been accused of engaging in illegal or unethical behavior, which has raised questions about the adequacy of oversight and regulation of private contractors in the intelligence community.
The most important treaty, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, was opened for signature in December 1989 but took over a decade to get the twenty-two ratifications needed to enter into force. None of the major suppliers or consumers of private military services is a party. The intervening period also saw a sea change in how these companies are perceived. Executive Outcomes turned around the orphaned conflict in Sierra Leone in the mid-1990s; Military Professional Resources Incorporated (MPR) trained the Congolese military prior to Operation Storm, which helped clear the way for the Dayton negotiations.

This ambivalence as to the merits of abolishing mercenarism in all its forms explains the treaty's lukewarm reception. But in any case the Convention hardly provides a workable legal framework. Emphasising the presumed aversion of mercenarism, it defines a mercenary as someone who is "motivated to take part to any extent in the hostilities essentially with the purpose of profiting from their outcome." The difficulty of proving such motivation led the British military historian Geoffrey Best to suggest that anyone convicted of an offence under the convention should be "shot—as should his lawyer.

Ongoing efforts at the United Nations have continued to be abolitionist. In 1987 a special rapporteur was created to examine "the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination." Unsurprisingly, this has not been embraced by states sympathetic to the role private military companies can play, and has been ignored by the industry itself. The replacement of the special rapporteur in 2005 by a working group "on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination" seems unlikely to be much more successful.

Fear to abolish private military companies at the national level have also met with limited success. Weak states may be unable to exercise meaningful oversight over actions brought in to make up for a lack of government capacity; strong states may be unwilling to do so because such companies are retained precisely to avoid the responsibility of the state.

South Africa is a rare case of a country that is a significant supplier of private military companies adopting strong legal regulation attempting to prohibit private military companies from operating. Driven by predictable problems of having former apartheid-era soldiers operating in other African states, it adopted legislation intended to prohibit South African citizens working for such companies—but inadvertently threatened to end the careers of 600 South Africans in the British armed forces and made even undertaking humanitarian work in conflict zones legally precarious.

The failure to outlaw modern mercenarism reflects the changing attitudes toward private action providing military services, but also the inherent difficulty of regulations that is directed at prohibiting a type of company or outlawing a class of individuals. (One might apply a similar analysis to efforts to respond to terrorism.) The better attempts to address concerns raised by private action wielding powers normally reserved to the state have focused not on who they are but what they do.

Rules of Engagement

It is frequently asserted that private military company— one of the parties to the U.S. Coalition Provisional Authority's rack to transferring authority to Iraqi hands. CPA Order 17 provided that contractors' home countries could exercise jurisdiction, but few states are able or willing to investigate alleged crimes in a distant and dangerous environment like Iraq by using their normal law enforcement tools.

These are not new problems, however, and arise whenever the military is deployed to foreign lands. Members of the armed forces are subject to the Uniform Code of Military Justice (UCMJ), which is designed to cover such situations. In October 2006 an amendment was included in the 2007 Defense Authorization for Senator Lindsay Graham (R-S.C.) that effectively extended the UCMJ to cover civilian contractors. Previously it had covered such persons only in time of declared war. The most amendment—which was completely ignored by the media for three months—changed this to cover such persons during "war or a contingency operation." This means that contractors in Iraq or Afghanistan could be court-martialized in a process similar to that which applies to regular service men and women despite the U.S. Congress not having declared a state of war.

Another possibility is the Military Extraterritorial Jurisdiction Act (MEJA), which allows for civil prosecution of persons "employed by or accompanying the armed forces" overseas for crimes punishable by imprisonment of more than one year. It is not clear whether this covers contractors who are not retained by the Defense Department and are operating independently in U.S. military operations—for example, the Blackwater guards involved in the Nisour Square incident, who were employed by the Department of State. Other relevant legislation includes the U.S. War Crimes Act and the federal antitorture statute, both of which allow prosecution for acts outside the United States.

These laws have gone almost entirely unimplemented. In U.S. operations in Iraq and Afghanistan there has been only one court-martial under the expanded UCMJ and only one conviction under MEJA. The court-martial concerned an Iraqi-Canadian interpreter who stabbed another interpreter in February 2008; the MEJA conviction was of a Defense Department contractor in Baghdad who pleaded guilty to possessing child pornography. One further contractor, David A. Passaro, was convicted of assault in February 2007 for his role in the torture and beating to death of detainee Abdul Wali in Afghanistan. His background is testimony to the danger of contracting out such interrogations: both his previous wives have alleged that he was abusive at home, and he had been fired from the police force after being arrested for a parking lot brawl. As Passaro's case Continued on page 43
Private military and security companies (PMSCs) are companies that provide military and/or security services. The industry is at an early stage of development and there are different views on the appropriate breadth and depth of regulation.

Common Ground

The clients of PMSCs include states, intergovernmental organizations such as the United Nations and private entities such as corporations and NGOs. PMSCs do not operate in a legal vacuum. There are, however, gaps in the applicable laws and problems of implementation due to the unwillingness or inability of states and other actors to operationalize and uphold applicable laws...

Public international law potentially applicable to activities of PMSCs includes:

- Human rights law: States have direct responsibility for compliance with human rights law. States also have responsibility for protecting citizens and limit their jurisdiction from certain types of harm at the hands of third parties.
- International humanitarian law (law of armed conflicts). States must respect and ensure respect for international humanitarian law: the act of all persons—regardless of status—carried out in the context of, and associated with, armed conflict must comply with international humanitarian law.
- International criminal law: Individuals may be liable for crimes under international criminal law such as genocide, war crimes and crimes against humanity.
- International labor law: States biding PMSCs must respect relevant international labor standards.
- Obligations under regional organizations: States may have further obligations through regional organizations, such as the European Union (for example, procurement regulations), the African Union, etc.
- Domestic law—including criminal law, civil law and public or administrative law—of the following states may have an impact on the activities of a PMSC: (a) the state entering into a contract; (b) the state of incorporation or nationality of the PMSC; (c) the state of which its personnel are nationals; (d) the state in which it operates.
- Other norms relevant to PMSCs include (a) international standards on law enforcement and use of firearms; (b) other international guidelines such as the Voluntary Principles on Security and Human Rights; and (c) industry codes of conduct. These may be sources of binding law if incorporated into domestic law, or included in licensing regimes or contracts.
- Further regulation of the private military and security sector should distinguish between the various activities of PMSCs. Development of a regulatory framework must recognize the rights, interests and/or responsibilities of states and other clients, the industry (including personnel), international and national oversight bodies and affected communities. Effective state oversight capacity is necessary but insufficient to address all concerns about PMSCs. Self-regulation is necessary but insufficient to address all concerns about PMSCs.

Action Required

Victims of wrongdoing by PMSCs should have access to a remedy. If a victim does not have access to a remedy in the territory in which the wrong occurred, he or she should have access to a remedy in the state of incorporation of the PMSC or in the contracting state.

Immunity should not normally be granted to PMSCs. Where it is granted, immunity in one jurisdiction must not result in impunity.

States must exercise oversight of contracts for private military and/or security services. States should report on their contracts for private military and/or security services to an appropriate national oversight body, such as a parliament.

Nonstate clients of PMSCs (such as intergovernmental organizations, NGOs, corporations) should be transparent in their dealings with PMSCs and develop best practices for such contracts.

A global code of conduct should be adopted.

A short handbook of obligations of PMSC personnel should be drafted and widely disseminated.

Chairman’s Notes from the GreenTree Conference on Regulation of Private Military and Security Companies, March 24–27, 2007 (excerpts)3

3 This note was the product of a meeting convened by New York University (School of Law’s Institute for International Law and Justice) at a grant supported by Carnegie Corporation of New York. The fall and winter 2007 notes are available at http://www.cfr.org/pmu/GreenTreeNotes.asp.

See, e.g., the UN Standard Minimum Rules for the Treatment of Prisoners (1955); the UN Code of Conduct for Law Enforcement Officials (1979); the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

The key barriers to meaningful accountability, then, are not legal but institutional and political. There is typically no structure in place to investigate and prosecute wrongdoing, and little political incentive to create one. Only in the wake of a scandal like the Nisour Square incident is there an effort to investigate, and that requires flying in FBI investigators. Doing so weekly for the fact makes fact-finding extremely difficult, while also making it clear that there is a very high threshold for any form of accountability when so many other incidents are ignored.

Whether or not the United States pursues such contractors, however, the country itself may be held responsible in a legal or political sense. Legally, the doctrine of state responsibility provides that some “private” conduct may in fact be attributed to the state. Politically, it is evident that some acts by contractors have undermined U.S. objectives in both Iraq and Afghanistan. This is on top of other practical difficulties posed by the presence of contractors alongside the military but operating outside a command chain and according to their own rules of engagement—as well as the resentment caused by former members of the armed services shedding their uniforms and working alongside their peers for vastly higher salaries.

The New Market for Force

Ironically, much of the energy to push for greater regulation comes from the industry itself. This is, of course, self-serving: the creation of a “legitimate” business through professionalization and the creation of industry associations may distinguish reputable companies from cowboys, raising the cost of entry for competitors and enabling the charging of higher fees for similar services. But it may also point to the most promising way of dealing with an area in which governments have failed.

Mercenary soldier Simon Nun wields a gun in a former British military base in Rhodesia. He was later extradited to Equatorial Guinea.

Continued from page 41 took place on a U.S. military base, however, he could be tried under civilian law. Soon after the Passaro story broke, a “Detainee Abuse Task Force” was established but does not appear to have brought any charges against contractors. The Department of Justice, which would ordinarily be responsible for investigating and prosecuting such cases, appears to have spent little time or effort doing so.

Civil suits offer another avenue to challenge companies and compensate victims. The companies Titan and CACI provided interpreters and interrogators to the U.S. military at the notorious Abu Ghraib prison in Iraq. A class action brought under the Alien Tort Claims Act was lodged in 2004 and is ongoing in the U.S. District Court for the Southern District of California. (Four more cases were launched by the Center for Constitutional Rights on June 30, 2008.) The original case against Titan was dismissed in November 2007 as its linguisits had found to have been “fully integrated into the military units to which they were assigned.” The case against CACI is ongoing, but few Alien Tort actions lead to victims receiving compensation.

Contractors are also subject to international law, including international criminal law and international humanitarian law. The latter is particularly interesting as some contractors see the benefit of being subject to a regime that might constrain their behavior slightly but also offer protections—for example, if they are detained and hope to be treated as prisoners of war. Clarifying the position of contractors under the laws of war has become a priority for the Swiss government and the International Committee of the Red Cross, which launched the “Swiss Initiative” in January 2006. It will hold its fourth meeting in September 2008, possibly adopting a new treaty elaborating the obligations of states and contractors, as well as recommending good practice in the use of private contractors.

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Markets can be an effective form of regulation, but operate best where there is competition, an expectation of repeat encounters and a free flow of information. It is far from clear that any of these conditions exist in the modern market for force. Demand often outstrips supply, as seen in the scramble to fulfill multimillion dollar contracts in Iraq; this creates monopoly-type problems and reduces the potential leverage of the hiring agency to impose strong oversight provisions. Second, even where such leverage exists it may not be exercised because the hire regards the contract as an exceptional event in the life of the nation that will not establish a precedent for future conduct. Finally, even where there might be leverage and established relationships—for example in the many contracts issued by the U.S. Departments of State and Defense—there has been minimal public scrutiny or active efforts to avoid it. It is possible to shape that market, however. Scandal can be a useful discipline and is encouraging the adoption of codes of conduct by new bodies such as the International Peace Operations Association (IPOA) and the British Association of Private and Security Companies (BAPSC). Nevertheless, the limitations of voluntary codes of conduct were displayed when, three weeks after the Nisour Square incident, IPOA for the first time authorized an investigation of whether Blackwater was in compliance with the IPOA code of conduct. This code is essentially a set of ethical and professional guidelines, the worst consequence for violation of which is expulsion from the association. Two days after the investigation was announced, Blackwater withdrew from the association itself and announced that it was setting up its own association, the Global Peace and Security Operations Institute.

The boilerplate web site includes a few platitudes but makes it clear that Blackwater is the only member of this institute and that it does not have a code of conduct. IPOA codes remain essentially untested.

More effective tools of shaping behavior include licensing and contract terms. Licensing of companies providing potentially lethal services can be used to ensure that they meet minimum standards in terms of hiring, training and disciplinary practices; contracts can be crafted to require company oversight and the possibility of spot inspections. Coordination is also required to ensure that standards are implemented. A recurrent problem in places like Iraq is that even when an individual is fired for abusive behavior he can soon find employment with another company. Effective use of blacklists requires cooperation by the industry as well as those overseeing contracts.

A recurrent problem in places where an employee of a company can find employment with another company, prevent this but is unlikely.

Dogs of War or "Pussycats of Peace"?

In the next decade private contractors are likely to play an increasingly important role in conflict management. The most optimistic observers of the industry have suggested that the "dogs of war," as old-style mercenaries were known, will in future be seen as the "pussycats of peace.

Despite the formal opposition to mercenaries evinced by its treaties and special rapporteurs, the United Nations has increasingly had recourse to private companies to provide site security and transport in conflict zones. Ideas for a more expansive role for contractors are not new. In the early 1990s, for example, Sir Brian Urquhart proposed establishing an all-volunteer force along the lines of the French Foreign Legion to serve in UN peace operations. The organization routinely struggles to persuade member states to deploy troops of adequate quantity and quality. In July 2007, for example, the Security Council authorized a 26,000 strong peace operation in Darfur. A year later it had deployed fewer than 600 troops to join the 7,000 African Union troops already on the ground. The AU troops, who were intended to integrate into the new UN force, were reported to have literally slapped blue paint over their green helmets.

Drawing peacekeepers from private sources is not inconceivable—indeed, before the Nisour Square incident Blackwater had offered to supply a brigade-sized force in Darfur, approximately 4,000 to 5,000 troops. It was never clear how serious the offer was or how much it would cost, but it does not appear to have received much serious consideration. (In June 2008 Mia Farrow was reported to have revisited the idea of Blackwater making up for the slow UN deployment.)

Returning to the question of whether private military and security companies should be compared to mercenaries, the nature of the market in which they operate suggests that a better analogy may be drawn with ExxonMobil, Total and other multinational corporations that assume some functions of the state in which they operate. The reasons for concern over the actions of contractors are not their status, nor their motivation, but the consequences of their actions and the accountability structures within which they operate. Efforts to address the behavior of multinationals may offer some lessons about what works, what does not work and what has yet to be tried.

A pragmatic response must focus on developing a governance regime that strikes a balance between commercial and public interests, between voluntary and imposed regulation. It must draw upon international law to establish baseline norms and domestic institutions to oversee the activities of companies and punish individuals for abuse. In the absence of such a regime, as Chia Lehhardt and I concluded in From Mercenaries to<br />

**Back in Baghdad**

Three weeks after the Nisour Square incident, U.S. and civilian FBI investigators prepared to fly to Baghdad to examine the crime scene and interview witnesses. Under a State Department contract, initial plans provided for the investigation's security and transportation outside the Green Zone to be provided by Blackwater. Following protests, the FBI announced that in order to avoid "even the appearance" of a conflict of interest their agents would be protected by U.S. government personnel.

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