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

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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?

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. The private security company contracted to ensure the security of State Department employees, Blackwater USA, bundled 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 Nassir 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 Nassir 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.

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Since being wound up, though many key individuals quickly resurfaced in new corporate gaues. And, as we shall see, though wars may be off limits the privatization of peacekeeping is a real possibility.

It is also misleading in that it implies that the comparison is negative. This glosses over much of the history of mercenaries. Though the adjective “mercenary” today means motivated chiefly by the desire for gain, until around two centuries ago mercenaries were very much the norm in European armies. Indeed, the Pope is today guarded by a contingent of Swiss mercenaries first retained in 1506. Less pejorative meanings live on in words such as “freelance,” which now describes a writer operating on short-term contracts but previously denoted contractors who preferrd to operate on a fee.

The discrediting of skilled warriors offering their services at a price in favor of national armies was partly a function of technology. Around the Napoleonic Wars, the introduction of the musket greatly reduced the time required to train an effective soldier. Quantity soon became more important than quality, and national conscription became more efficient as a way of generating an army that could easily be supported. Indirectly, economic shifts were reinforced by politicians and culture. As Deborah Avant has written, in the nineteenth century mercenaries “went out of style.” Notably, the social contract and the Enlightenment transformed the individual’s relationship to the state, which came to be based not on a feudal allegiance but the idea of citizenship. Reliance upon mercenaries was no longer necessary, but also came to be seen as suspect: a country whose men would not fight for it lacked patriots; those individuals who would fight for reasons other than love of country lacked morals.

Mercenaries never really went out of business, however, and continued to be important in low-technology war where the quality of troops and their weapons still mattered. This explains both the ongoing significance in Africa through the twentieth century—frequently in attempting to overthrow weak governments—and efforts by those governments through the Organization of African Unity and the United Nations to prohibit mercenarism completely. But it was the end of the Cold War that saw an explosion in mercenary activity. As Peter W. Singer documented in Corporate Warriors, the 1990s saw a proliferation of small-scale conflicts and a demand for skilled military services matched by a sudden supply of trained soldiers. State militaries by the end of that decade employed roughly seven million fewer soldiers than they did in 1989; some units that were retired, such as the South African 52nd Reccon Battalion and the Soviet Alpha unit, kept the outline of their structure and simply reconstituted themselves as corporations.

Outsourcing Intelligence and “Inherently Governmental Functions”

Though it lags behind the privatization of military services, the privatization of intelligence has expanded dramatically with the growth in intelligence activities following the September 11, 2001 attacks on the United States. In a report published three days after those attacks, the Senate Select Committee on Intelligence encouraged a “synergistic relationship between the Intelligence Community and the private sector.” In addition to dollars spent—dominated by large items such as spy satellites—this has seen an important increase in the proportion of personnel working on contract. More than 70 percent of the Pentagon’s Counterintelligence Field Activity (CIFA) unit is staffed by contractors, known as “green baddies,” who also represent the majority of personnel in the Defense Intelligence Agency (DIA), the CIA’s National Counterterrorism Service and the National Counterterrorism Center. At the CIA’s station in Islamabad contractors reportedly outnumber government employees three-to-one.

Controversy over government reliance on outsourcing in this area frequently coloreader around issues of cost (a contractor saves costs on average $250,000 per year, about twice as much as a government employed), “brain-drain” and political allegiances of self-dealing and other forms of corruption. More recently, however, the confirmation by the director of the CIA that contractors have probably participated in waterboarding of detainees at CIA interrogation facilities has sparked a renewed debate over what activities it is appropriate to delegate to contractors, and what activities should remain “inherently governmental.” This is, of course, separate from whether such activities should be carried out in the first place.

Privatization of intelligence services raises many concerns familiar to the debates over private military and security companies. One of the key problems posed by such companies is their use of potentially lethal force in an environment where accountability may be legally uncertain and practically unlikely; in some circumstances, they may also affect the strategic balance of a conflict. The engagement of private actors in the collection of intelligence exacerbates the first set of problems: it frequently encompasses a far wider range of conduct that would normally be unlawful, with express or implied immunity from legal process, in an environment designed to avoid scrutiny. Engagement of such actors in analysis raises the second set of issues: top-level analysis is precisely intended to shape strategic policy and the more such tasks are delegated to private actors the further they are removed from traditional accountability structures such as judicial and parliamentary oversight, and the more influence they may have on the executive.

The simplest way of containing some of these problems would be to forbid certain activities from being delegated or outsourced to private actors at all. In the United States, this question is framed in the language of “inherently governmental” functions, which are defined as being “so intimately related to the public interest as to mandate performance by the government.” Significant loopholes exist, however. In times of military mobilization the Defense Department is allowed to determine whether such rules apply at all.

Uncertainty in this area appears to be intentional and thus exacerbates the accountability challenges posed by secrecy and problematic incentives for private actors. At the very least the responsibility to determine what is and is not “inherently governmental” should itself be an inherently governmental task.

These trends explain the rise of Blackwater and in peer but not their attractiveness to Washington. The United States retains such companies for reasons very different than Sierra Leone, Angola and Papua New Guinea. In the 1991 Gulf War, it employed one contractor for every 50 active-duty personnel, by the 1999 Kosovo conflict, contractors made up ten percent of U.S. personnel and served as the U.S. force’s supply and engineering corps. After the United States went into Iraq in 2003, contractors made up the second largest grouping of personnel after the U.S. military—far more than the number of British troops at their highpoint. A recent National Defense University report estimated that there are 100,000 contractors in Iraq today, including around 35,000 private security professionals. Other accounts put contractor numbers in excess of U.S. personnel.

The growing reliance on contractors by the U.S. military was driven in part by the need to increase capacity swiftly (and flexibly) after the slow downsizing of the post-Cold War decade. It must also be seen in the context of the larger trend toward outsourcing in the U.S. government. A 2003 Government Accountability Office report examined these trends and concluded that outsourcing by the military provided access to specialized technical skills, enabled it to bypass limits on military personnel able to be deployed to certain regions and ensured scarce resources would be available for other assignments. What it did not support is the normal justification for outsourcing: that it saves money.

In fact, as the periodic scandals emerging from the contracts awarded to security and reconstruction firms in Iraq have demonstrated, relying on private companies can be very expensive. For a country lacking an effective military, such as Sierra Leone in the 1990s facing Foday Sankoh’s Revolutionary United Front, investing in a private army might make at least short-term sense. For the United States, however, it is apparent that the turn to contractors is precisely intended to shape strategic policy and the more such tasks are delegated to private actors the further they are removed from traditional accountability structures such as judicial and parliamentary oversight, and the more influence they may have on the executive.

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Weak states may not be able to exercise control over mercenaries; strong states may not want to in order to avoid responsibility for their actions.

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 (MPRI) 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. Emphasizing the presumed avarice of mercenaries, it defines a mercenary as someone who is “motivated to take part in the hostilities essentially by the desire for private gain.” 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—so 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.

Efforts to abolish private military companies at the national level have also met with limited success. Weak states may be unable to exercise meaningful control over actors 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 mercenaries reflects the changing attitudes toward private actors providing military services, but also the inherent difficulty of regulation 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 actors 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 companies—such as Blackwater operate in a legal vacuum. This is simply not true. In theory, at least, they are subject to the laws of the land in which they are operating, in particular the criminal law. In practice, however, these companies operate in places with weak or dysfunctional legal systems. These are occasions where contractors have been tried and convicted of crimes. In July 2008, for example, Simon Mann was sentenced to 34 years in prison for his role in an attempted coup in Equatorial Guinea. But such trials are exceptional.

Iraq is a rare case in which the local law explicitly provides for the immunity of foreign contractors from local justice (UCMJ), which is designed to cover such situations. In October 2006 an amendment was included in the 2007 Defense Authorization by 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 modest 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-martialed in a process similar to that which applies to regular servicemen 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 criminal 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 of 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 was convicted of murder in February 2008; the MEJA conviction was of a Defense Department contractor in Baghdad who pleaded guilty to possessing child pornography. One further conviction, David A. Pasaro, 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 by the police force after being arrested for a parking lot brawl. As Pasaro’s crime 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 civilians in their jurisdiction from certain types of harm at the hands of third parties.
- International humanitarian law (law of armed conflict): 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 hiring 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. There 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 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, be it the state or the state whose personnel are nationals or the state in which it operates, 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.

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 Niger Square incident is there an effort to investigate, and that requires flying in FBI investigators. Doing so weeks after 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 observation of a command chain and according to their own rules of engagement—as well as the resentment caused by former members of the armed services shielding 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.
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 hiree 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’s code remains 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.

The regulation can play not just punishing companies for behaving badly but encouraging them to behave well.

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 rapporteur, 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 Lehnardt and I concluded in From Mercenaries to Markets, the marketplace of war will continue to be regulated only by bankruptcy and death.

Back in Baghdad

Three weeks after the Nisour Square incident, 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 investigators’ 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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