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Private Military Contractors: Deploy or Avoid?

Lessons from the 'Blackwater Scandal' in Iraq

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It was a deadly concoction: cascades of money, high-powered weapons, legal indemnity, [and] a war against a ruthless and culturally alien enemy

John F. Burns, 'Q and A: Private Military Contractors' - At War Blog
New York Times 19 October 2009.

The so-called 'Blackwater scandal' – a reference to the seventeen Iraqi civilians killed on Nisour Square by security guards of the private military company (PMC) *Blackwater* in September 1997 – puts into question the proposition that private military contractors or 'mercenaries' could be relied upon to act effectively and responsibly in peacekeeping and other international operations. Arguably, Blackwater's frequently observed callousness, if typical of other Private Military Companies (PMCs), gravely undermines this proposition. After closely analysing the Nisour Square incident and the Blackwater company in a wider context of revealed patterns of violence by the personnel of multiple PMCs, the article concludes that the use of 'mercenaries' is in principle still possible, doable and defensible – after the necessary reforms an improvements have been made. Yet it remains doubtful whether a sufficient number of PMCs and their personnel are or soon will be (self-)disciplined, well-trained and thrustworthy enough for large, complex and dangerous operations. Be as it may, one should strengthen the (pre)conditions for deploying these 'contractors' in both international military missions which involve combat duties and operations, and international civilian missions with a military component focused on (body)guard and sentry duties only.

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Introduction

The so-called ‘Blackwater scandal’, if characteristic of other Private Military Companies (PMCs), puts into question the proposition that private military contractors or ‘mercenaries’¹ could be relied upon to act effectively and responsibly in peacekeeping and peace-enforcement operations, and in humanitarian interventions with or without UN Security Council approval to rescue defenceless people. Despite the International Peace Operations Association (IPOA) established in April 2001 to self-regulate and improve the image of the private military industry, ‘private military firms’ often “walk a fine line of legality, with potentially illegitimate clients, business practices, and employees with dark pasts”.² The hope of R. R. K. Hiemstra that the currently ‘shadowy’ PMCs will become part of a “mature branch” with “possibilities for control and thus prevention of excesses” through “registration, supervision, controlled training, [and] transparency of operations” has yet to materialise.³ On the other hand, moral imperatives may clash with legal ones: thus helping without any UN or state approval defenceless people or rebels against repressive and murderous regimes easily crosses the ‘fine line of legality’ in current international law.

Blackwater and the Nisour Square killings

On 16 September 2007 security guards of the private military company *Blackwater U.S.A.* (est. 1997, renamed *Blackwater Worldwide* in October 2007), hired by the US State Department to protect diplomats, killed seventeen and injured twenty-four to twenty-seven Iraqi civilians, including children, at a traffic intersection on Nisour Square in Baghdad. Believing it to be a suicide attack on their convoy carrying American diplomats (evacuated from a meeting after a bomb went off near them, thus the tension), they fired at a car which reportedly refused a stop sign, killing a man and his mother. In the ensuing chaos – the guards threw non-lethal sonic bombs to disperse a crowd – nearby Iraqi soldiers and Blackwater personnel in helicopters covered the intersection with gunfire, killing bystanders and passers-by; Blackwater guards even shot some of those fleeing in the back of their heads. After the convoy continued north, the same contractors reportedly fired at other cars, killing one and wounding two people. Blackwater and the State Department claimed that a roadside bomb went off, the convoy came under gunfire (damaging one car), and so on. These diverging, misleading and unconvincing accounts, even if containing a kernel of truth, can not justify the killing spree. Iraqi and American investigators found credible Kurdish and other Iraqi witnesses saying that the firing was unprovoked, and found damning evidence, like exclusively American-made bullet casings on the scene.

Blackwater was a small player with never more than one thousand personnel in Iraq. Yet the State Department was so dependent on it for protecting its diplomats, that the company resumed its operations in a low-key manner less than a week after the Nisour Square killings – and got its contract renewed in early April 2008.

¹ Though the term ‘mercenary’ is a pejorative term – especially nowadays, which accounts for the objection by PMCs to be labelled as such – I occasionally apply it so as to stress the controversy surrounding the phenomenon.

² Peter Warren Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* Ithaca, NY/London: Cornell University Press, 2003, pp.viii (IPOA),ix (quote). Singer prefers the term ‘Privatized Military Firms’ (PMFs), as PMCs just refer to combat and other ‘tactical’ services (p.8, note 19). I stick to the widely used PMC term, however.

³ R.R.K. Hiemstra, ‘Krijgsmacht in Krijgstreep: Implicaties van de private militaire industrie voor westerse krijgsmachten (Soldier in Stripesuit: Implications of the private military industry for western armies)’ *Militaire Spectator* Vol.174 No.7/8, 2005, p.308; quote translated from Dutch. One can regard my article as an ‘follow-up’ on Hiemstra’s article, though my focus lies on the impact of one scandal by one PMC, and at the same time has a broader context of PMCs in international missions that may encompass non-western forces as well.

The private military industry has become a big player overall, as post-Cold War “downsizing and increased deployments have left U.S. forces stretched thin”.⁴ The same is true for the Dutch armed forces, whose 1,200-strong force in the Afghan province of Uruzgan has relied on private contractors for logistics, supply and convoy-protection of fuel and food; during 2007 as many as 250 Afghan contractors guarded the outer rings of its bases there.⁵ Defense expert J.M.D. van Leeuwe – who also refers to the “250 individual Afghans (the *Afghan Security Guard*)” guarding the “outer ring of the Dutch bases in Uruzgan” – is worried about this “relatively large deployment of private companies” in the Dutch military’s logistical concept, with possibly “serious political, military as well as judicial and ethical risks” as a consequence.⁶ Outnumbering its own troops there, the Pentagon hired 137,000 of the 180,000 foreign and local civil and military contractors in Iraq, many of whom fell under the Military Extraterritorial Jurisdiction Act (MEJA), including those involved in intelligence gathering and hostage negotiations. The largest defense contractor with forty-thousand employees in Iraq was *Kellogg, Brown & Root*, a subsidiary of *Halliburton* once led by Vice President Dick Cheney. However, just 7,300 of the Pentagon’s contractors, and twenty- to thirty-thousand contractors overall, did security and combat duties. Between 2003 and 2008 the United States spent a whopping \$100 billion (a conservative estimate) on all its contractors in Iraq, a fifth of their overall costs in occupying the country. Reportedly the Bush Administration decided on ‘privatising’ the occupation in order to avoid the draft. This strategic decision seems to have been made without fully anticipating the military, political and moral drawbacks.

Last drop in the bucket

The Iraqi government under prime minister Nuri Kamal al-Maliki had had enough: it cancelled Blackwater’s license, and demanded a trial of its personnel involved in the Nisour Square shootings, preferably in Iraq; the company’s removal from the country; and \$ 8 million in damages to the victims’ families. An interior ministry report recommended replacing all fifty foreign security companies with Iraqi counterparts (forty already active and registered). Half of those, including Blackwater, already had failed to renew their licenses due to Iraqi officials deliberately slowing down the process. For the first time, the authorities arrested on 19 November forty-three contractors of the Dubai-based company *Almco* (ten Iraqis, two Americans and thirty-one other foreigners) involved in a shooting incident wounding one Iraqi woman. A year later Baghdad revoked the June 2004 immunity law for foreign contractors and military personnel, first decreed as ‘Order No.17’ by American administrator L. Paul Bremer III of the Coalition Provisional Authority. A new law holding them accountable under domestic criminal law came into force on 1 January 2009 as part of the new Iraqi-American security accord regulating the continuing presence of American troops.

It must be said that the United States responded swiftly to the Iraqi anger. On 4 October 2007, Congress voted 389 to 30 for a law making it possible to prosecute ‘civilian’ contractors hired by the State Department in both civil and military criminal courts, for violating humanitarian

⁴ P. W. Singer, *Corporate Warriors* Cornell University Press, 2003, pp.15(quote)-16.

⁵ Frank Kuitenbrouwer, ‘Onder wie valt het schaduwleger?’ (Under whom falls the Shadow army?) *NRC* 5 Aug 2008 (kuitenbrouwer@nrc.nl). *NRC*, ‘Missie in Uruzgan leunt op privéhulp ([Dutch military] Mission in Uruzgan [Afghan province] depends on private military contractors)’ *NRC* 14 Dec 2007.

⁶ J.M.D van Leeuwe, ‘De inhuur van private militaire bedrijven in operatiegebieden (The hiring of private military companies in operational areas)’ *Militaire Spectator* Vol.177 No.4, 2008, pp.240,241(Afghans guarding dutch bases),242; quotes translated from Dutch. Van Leeuwe was secretary of the Commission on Peace and Security within Holland’s Advisory Council on International Peace Issues (AIV; Dutch acronym), which issued the report *De inhuur van private militaire bedrijven: een kwestie van verantwoordelijkheid* (The Hiring of private military companies: a question of responsibility) No.59, December 2007 (www.aiv-advies.nl).

and human rights laws or any rules of engagement (ROE). Until then ‘civilian’ mercenaries hired by ‘civilian’ bodies had been virtually immune, falling outside American, Iraqi or any other military jurisdiction. Yet even the Pentagon had prosecuted few if any misbehaving ‘mercenaries’ on its payroll – not even after Congress in 2006 brought them firmly under the Uniform Code of Military Justice. Nevertheless, the scandal’s uproar forced Washington to deal head on with ‘mercenary accountability’. The United States was strenuously seeking a victory or a way out of Iraq. Yet the damage Blackwater and other contractors inflicted was “incalculable, in terms of engendering a fear and loathing of the American occupation”.⁷ The Bush Administration could hardly afford to antagonise Iraq’s government or its people with any more mistakes and excesses by people in its employ. The abuse by some American personnel in Abu Ghraib prison, a scandal which broke in April 2004, had already damaged its standing in Iraq and across the world. The insurgents milked these scandals through propaganda messages; their effect was dampened only by their own, more blatant terrorist outrages against civilians.

History of excessive force by Blackwater – and others

Whatever the consequences of the Blackwater scandal for the American-led mission in Iraq, it seems to represent endemic, wanton callousness by self-proclaimed ‘professionals’ of private military companies, at least among their rank-and-file. This undermines their bosses’ claim that they have progressed far beyond the amateurish, unreliable and brutal ‘soldiers of fortune’ of old.

Blackwater’s trigger-happiness certainly typified its Iraq and Afghanistan operations, for which it was paid nearly \$ 1 billion since 2001. The Nisour Square killings represent a rather common overreaction to imagined attacks when on duty. Since 2005, its private contractors fired first in 84% of 195 ‘escalation of force’ incidents in Iraq, leading to at least sixteen fatalities. The contractors usually fired from moving vehicles, without stopping to secure the scene and verify the results of their barrage, let alone help injured bystanders. To its credit, Blackwater provided these unsettling figures in its own incident reports. These figures help to explain why its personnel managed to kill dozens, perhaps hundreds, of civilians. The company was notorious for questionable or prohibited use of force, weaponry and riot-control agents like CS gas just to force traffic out of the way, and for ill-prepared, badly armed and organized operations. The most fateful operation led to the lynching of four Blackwater employees escorting a convoy in Falluja on 31 March 2004, triggering a spiral of escalating violence between ‘occupation’ and insurgent forces.⁸ A drunken Blackwater contractor, later identified as Andrew J. Moonen, even killed a bodyguard of the Iraqi vice president Adil Abd-al-Mahdi on 24 December 2006. He was fired yet not prosecuted; the victim’s family received just \$ 15,000 in compensation. From February till August 2007 he worked on logistics for *Combat Support Associates*, under the Defense Department, in Kuwait.

Also Blackwater’s involvement with the Central Intelligence Agency (CIA), at least since 2002, raises serious questions, particularly its role in the agency’s 2004 assassination programme against Al-Qaeda leaders (cancelled by the Obama Administration in June 2009) and Predator

⁷ John F. Burns, ‘John Burns Q and A: Private Military Contractors’ (part I) - At War Blog *New York Times* 19 Oct 2009 (www.nytimes.com).

⁸ Congress of the United States, House of Representatives, *Memorandum - Additional Information about Blackwater USA* Committee on Oversight and Government Reform, Democratic Majority Staff report 1 October 2007 (www.oversight.house.gov), pp.1-2,6-7,9-12 (Dec 2006 incident). The same committee investigated the Falluja incident, with a hearing in February 2007.

drone attacks on them and their Taliban counterparts. Former Blackwater and CIA operatives also revealed in December 2009 that the private company had participated in CIA's secret raids against insurgents in both Iraq and Afghanistan, particularly between 2004 and 2006. Even though CIA's assassination programme reportedly failed to capture or kill a single terrorist leader (officials claimed it was never implemented), other secret operations and the drones have killed 'targets' and innocent bystanders, probably violating the laws of war against them both in these incidents. Thus drone attacks may constitute 'extrajudicial executions' if military necessity is lacking, or if the targeted individuals could have been apprehended instead.

The American military, and contractors like those of the British *ArmorGroup International*, distanced themselves from their Blackwater colleagues, claiming that the latter were amateurish and brutish, not reflecting the overall quality of the private military sector. Some American officers already said so well before 2007. However, *DynCorp International* and *Triple Canopy*, two other PMCs hired by the State Department, fired first in 62% and 83% of their 'escalation of force' incidents respectively. They thus were nearly as triggerhappy as Blackwater. Though "Blackwater reports more shooting incidents than the other two contractors combined"⁹ this may be due to it operating in more dangerous areas than its competitors – and these incidents were a relatively small part of its 1,800 'escort missions' in 2007 alone. Other contractors behaved equally badly, as the following examples show:

- In August 2007 a *Triple Canopy* supervisor was accused in a Virginia civil court of shooting randomly into two civilian cars in Baghdad the previous year, after telling his mates he wanted to 'kill somebody' before going on vacation.
- On 9 October 2007 contractors from the Australian *Unity Resources Group* (URG) killed two 'suspicious' Iraqi women in a car nearing their convoy; they turned out to be Christians.
- The *Special Operations Consulting-Security Management Group* (SOC-MG), recruiting Namibians and other 'Third Worlders' for as little as € 500 per month, less than five percent of the salaries for British, American and other Western mercenaries, had 1,500 Ugandese contractors in Iraq accused of cruelty and trading in drugs.¹⁰
- In September 2009 whistleblowers revealed that *ArmorGroup North America* had for years understaffed and otherwise shirked its duties while 'guarding' the U.S. embassy in Afghanistan, hiring prostitutes and forcing recruits into lewd hazing rituals. Sixteen guards and supervisors were fired or resigned, which the State Department deemed sufficient to renew its contract (though currently it hangs in the balance).

Blackwater's bad track record merely exemplifies the widespread lack of professional restraint among 'mercenaries'. Some senior American officers have acknowledged this, yet with little effect. One could go on and on recounting dubious actions by private military companies other than Blackwater – also beyond Iraq. Thus many of the fifty-nine registered and twenty-five unregistered PMCs in Afghanistan during 2007 alone were suspected of armed robbery, murder and excessive force; Kabul expelled at least a dozen of those companies. All these scandals expose a private military industry gone astray, with few internal and external oversights and sanctions.

⁹ US Congress, House of Representatives, *Blackwater Memorandum*, 1 Oct 2007, pp.2(quote),7.

¹⁰ NRC, 'Namibië zet ronselaars VS land uit (Namibia deports US recruiters)' NRC 15 Oct 2007.

Blackwater and their employers in the dock – sort of

Early reactions from Blackwater – apart from some former and active employees admitting anonymously to the press that something went ‘horribly wrong’ at Nisour square – hardly indicate a willingness to acknowledge errors and discipline its members, despite its assurance that it “supports accountability and transparency” through the International Peace Operations Association (IPOA).¹¹ Blackwater’s founder and CEO Erik D. Prince, a former Navy Seal, claimed on 2 October 2007 before the House of Representatives’ Oversight and Government Reform committee chaired by Democrat Henry A. Waxman, that on 16 September his men acted appropriately in a ‘complex war zone’. Soon after the hearing his company started an unsuccessful propaganda *blitzkrieg* with lawyers, lobbyists and public-relation firms to clear its name before the public, body politic, and the court against lawsuits by families of killed employees lacking protective armor (and since 2009 against lawsuits by families of the Iraqi victims). Yet the committee’s Blackwater Memorandum contains reliable witness accounts that ‘Prince’s men’ fired without provocation, without any attack on the convoy. This debunks Prince’s claim. Worse, this makes a mockery of the company’s ‘core value’ to protect “*under all circumstances .. the defenseless and provide a safe environment for all*”.¹²

Waxman’s committee (barring its Republican members) accused the State Department of frustrating its investigation and belittling, even covering up, the incidents, helping contractors to avoid prosecution and minimise compensation payments. Thus State Department investigators promised, prematurely and on dubious legal grounds, immunity to Blackwater personnel involved in the September 2007 killings. Nevertheless, the Federal Bureau of Investigation (FBI) took charge of the investigation, without offering immunity, though it is unclear whether they interviewed the American diplomats in the convoy. In late October Secretary of State Condoleezza Rice promised to implement the committee’s recommendations to create a common oversight with stricter rules for PMCs, including obliging them to give their personnel ‘local culture and sensitivity’ training, and allow Department monitors and Arabic translators on their patrols. In mid-November the FBI concluded that at least fourteen of the Nisour Square fatalities were victims of disproportionate force which violated already extensive contractor ROEs; indictments were still a long way off given the legal complexities of prosecuting contractors under American criminal law. The FBI’s investigation was yet incomplete, barred access to the State Department’s original Blackwater interviews. Still, a few days later federal prosecutors issued grand jury subpoenas to some Blackwater employees on the Nisour case. Eventually, in early December 2008, the Justice Department charged (under MEJA) five other Blackwater guards – all decorated military veterans – of manslaughter and misuse of firearms against unarmed civilians on Nisour square. A sixth (former) guard pleaded guilty; his testimony underpins the case against the others. Blackwater itself escaped prosecution, partially because it eventually cooperated with the FBI. The actual trial was set to begin in February 2010, whereby prosecutors intended to prove a ‘pattern of reckless behavior’ including widespread intention to harm and kill Iraqis ‘for sport’. However, on 31 December 2009 a federal judge in Washington dismissed the case, as prosecutors had violated the defendants’ constitutional rights by relying on statements that the guards had been compelled to make before the very State Department investigators who had offered them immunity (carrot). Crucially, the latter threatened to fire them if they did not talk, as contractors were obliged to fully report to their employers (stick). In January 2010, during a visit to Iraq, Vice President Joseph R. Biden Jr. announced that the Obama Administration would appeal the

¹¹ <http://www.blackwaterusa.com> (accessed 16 March 2007). Blackwater: “we conduct ourselves .. with honor and integrity. As members of and partners with the International Peace Operators Association, we accept and daily abide by our collective Code of Conduct”(ibid). Yet its operations rarely honor this impressive clause.

¹² Ibid; italics added. Variant in ‘Mission’: “protect those who are defenseless and provide a free voice for all”.

judge's decision through the Justice Department. At the same time Iraq's government started preparing with American lawyers a lawsuit against the Blackwater company. Even so, the trial's early (if not definite) dismissal shows how difficult it is to prosecute mercenaries under current law and rules on admissible evidence.¹³

Why Blackwater and other 'Mercs' went on the rampage

Blackwater's achilles heel has been its overzealous expansion into activities beyond its expertise and experience. Originally it was specialized in training American law enforcement and military personnel in 'bodyguard' duties at home. After Al-Qaeda's '9-11' attack and the consequent War on Terror, the State Department urgently sought its services to protect its and 'allied' diplomats abroad, culminating in the first 'indefinite quantity' contract in June 2004 (renewed two years later). Blackwater's bodyguards – each paid on average over \$445,000 per year – found themselves doubling as combat soldiers in Afghanistan and Iraq. Most of them, even former soldiers, lacked up-to-date 'urban counter-insurgency' training. Most of the Blackwater employees emptying their guns on Nisour square were young former U.S. Marines with little 'crowd control' and combat experience. In some operations, like the one on 24 November 2004 to secure a mosque – Blackwater assisted the U.S. military especially during that year, in apparent violation of their State Department contract – its contractors exhibited professional restraint, firing warning shots at a suspect vehicle rather than riddling it with bullets. Unfortunately, such rare accomplishments derived from individual qualities rather than overall policy and training. Thus at Nisour square a couple of guards tried to stop their colleagues from continuing firing on civilians, even pointing their weapons at the former; yet their disciplining attempts were in vain. Still, just five or six of the convoy's nineteen guards fired their weapons according to FBI investigators, not the picture of a 'gun culture' completely gone haywire. Between 2005 and 2007 Blackwater fired (though protected them from prosecution) 122 personnel for brutalities and lesser misdeeds, a sizable chunk of its personnel in Iraq.¹⁴

A possible, almost incredible contributor to Blackwater's excesses was the alleged rightwing 'Crusading' ideology expounded by Prince and other leading company executives, pressuring the rank-and-file to share their zeal. On 3 August 2009 a former Blackwater employee, and a former US Marine who worked as a freelance operative for the company, anonymously submitted sworn affidavits to a Virginia federal court, accusing Prince of murdering or facilitating the murder of former employees cooperating with federal authorities investigating Blackwater. The former employee also alleges that Prince "views himself as a Christian crusader tasked with eliminating Muslims and the Islamic faith from the globe," and that Prince's subsidiary companies "encouraged and rewarded the destruction of Iraqi life".¹⁵ In other words, Blackwater guards were ordered to kill Iraqi civilians once in a while in order to destabilise Iraqi society – and thereby Islam in the region. This could explain why some people fleeing from Nisour square were deliberately shot, execution-style. Obviously, Blackwater spokespersons dismissed these allegations as ridiculous slander.

Prince and his associates certainly are Neoconservatives who had close links with the Bush-Cheney Administration; some former government officials now work for the company, nicknamed the 'Republican Guard'. However, one should be careful about the Crusader allegations; at this stage it is uncertain whether this 'conspiracy theory' has any merit.

¹³ The Blackwater defendants and their superiors conceivably could be charged with 'obstruction of justice' by giving false or misleading information – even in the former's original, 'inadmissible' statements.

¹⁴ Esp. *Blackwater Memorandum*, 1 Oct 2007, pp.8-9,13-4 (2004 incident description from a Blackwater report).

¹⁵ Jeremy Scahill, 'Blackwater Founder Implicated in Murder' *The Nation* 4 Aug 2009 (www.thenation.com).

External influences certainly undermined Blackwater's ethos. Excesses by some American and Allied military in prisons – think of Guantanamo Bay, Abu Ghraib, and Bagram in Afghanistan – gave a bad example. Moreover, Blackwater's rules of engagement (ROE) were an almost exact replica of the ROEs of American soldiers during Iraq's early occupation years, born from the priority assigned to 'force protection' through quick 'escalation of force' even if that leads to 'collateral damage'. Stricter rules came into force after U.S. Marines reportedly massacred twenty-four civilians at Haditha in November 2005 – but not for the contractors. All this made them believe that they could get away with almost anything. Uncertain jurisdiction over and hazy liability of mercenaries solidified this belief and made it a reality, at least until September 2007. In contrast, enlisted soldiers committing (war) crimes can be court-martialled, and occasionally were, like in the Abu Ghraib scandal – while contractors hired by the CIA to carry out 'robust' interrogations in that prison went scotfree.

End game: back to base?

Alarmed by the fallout of the scandal, Blackwater announced on 21 July 2008 that it would refocus on its old expertise of private security training and assistance. It received hardly any new 'soldiering' contracts anyway. On 30 January 2009 the State Department, exasperated by the company's excessive use of force, overcharging, arms smuggling and other fraud (not discussed here), communicated to Blackwater that it would not renew its contract in Iraq. It also had little choice as Baghdad revoked the company's license a few days earlier. However, in late March most of the company's local employees went over to Triple Canopy, which kept its license and got an enlarged contract to take over the rival's security tasks. It seems that nothing much has changed, though the contractors now have to operate under stricter rules.

On 23 February 2009 Blackwater announced it would rename itself *Xe* ('Xe Services LLC' in full), eager to get rid of the negative associations attached to the word 'Blackwater'. Yet we remain sceptical of its claim that it recruits "highly qualified .. personnel", looking for "people of the utmost caliber" with "accountability, integrity, and respectability" as "mandatory requirements".¹⁶ For one thing, it is no longer listed as a member of IPOA, though one must be vigilant given the industry's notorious labyrinth of overarching, affiliate and subsidiary companies.¹⁷ One should monitor its future operations to determine whether the company finally takes seriously its 'core value' to protect the 'defenseless and provide a safe environment for all'. The signs are not good, if only because the company fails to reiterate these and other core values on its new website.¹⁸

Preconditions for employing 'mercenaries'

Despite the worrying findings about Blackwater and their counterparts, one should not give up on the idea to employ and deploy mercenaries for peacekeeping – and enforcement missions and humanitarian interventions, for two reasons.

¹⁶ <http://www.xecompany.com>, link 'professional resources' (accessed 2 October 2009). Its retreat from combat operations is evident: "Xe operates in nine countries delivering critical assistance to clients focused on *post* conflict and *post* disaster stabilization efforts"(link 'About us'; italics added).

¹⁷ At least *Xe* is not shown among the 61 IPOA members: <http://ipoaworld.org/eng/ipoamembers.html> (accessed 23 October 2009). Whether it left IPOA voluntarily, was 'disbarred', or hides under another name remains unclear.

¹⁸ <http://www.xecompany.com>, 'professional resources'; 'core values' and 'ethics' paragraphs of old 'blackwaterusa' website are entirely absent.

First, some major companies seem to operate professionally and decently. Lt. Col. Tim Spicer's *Aegis Defence Services* (ADS), at least in 2005 the largest private military contractor in Iraq, contributing up to 20,000 personnel ranging from bodyguards to intelligence gatherers, seems to uphold a good reputation. Stricter contractor ROEs introduced after the Nisour incident already "resulted in a more professional security operation and .. curtailment of overly aggressive actions".¹⁹ In the future one may urgently need private military companies that are not just morally and operationally reliable, but also capable to operate independently from large state armies. There probably will be situations like the 1994 genocide in Rwanda, in which outside states refuse to intervene in another state to rescue people from misery and annihilation.

Second, mercenaries are willing to take risks and pay with their lives, often more so than many soldiers sent to do peacekeeping or peace-enforcement in countries without sufficient understanding of their mission or the country they are in. Tragically, many in the 'Dutchbat' contingent, as revealed during the July 1995 massacre in the UN-designated 'safe area' of Srebrenica, Bosnia, of 9,210 men and boys (latest estimate Yugoslav Tribunal in The Hague) by the Bosnian-Serb army, were woefully unprepared (lacking the required insights and training), numerous individual exceptions notwithstanding. One may well ask oneself whether the "to-be-expected scale of the crimes is essential for one's judgment on the actions of the UN-batallion" in that enclave – certainly many experts disagree with the conclusion in the 2002 Srebrenica report of the Netherlands Institute for War Documentation (NIOD) that the genocidal massacre was 'atypical' of the Bosnian war, and thus an unforeseeable event for the 'Dutchbatters' and other military and decisionmakers involved.²⁰ Be as it may, even if the military sent abroad do grasp their mission and environment, and are willing to fight, they are hampered by the home state's and public's "intolerance for casualties in conflicts that do not directly threaten the core of the nation".²¹ Consequently, humanitarian intervention, indeed any military mission, by states beyond their own borders will never be guaranteed when the going gets tough. By the time of the Nisour tragedy over a thousand contractors (at least a hundred on security and combat duties) had lost their lives in Iraq, their deaths often unreported and uncounted in casualty figures. There is "no avoiding the fact" that they "do work that is both extremely hazardous, and indispensable" – no American diplomat has ever been killed while under Blackwater's protection or that of its competitors.²² The challenge must be to maintain this achievement without resorting to premature and disproportionate force. Therefore, mercenaries can help to save a people or a country, or even help to safeguard regional and international security, but only under the following four preconditions and circumstances:

Strengthen and clarify the definition, rights and duties of mercenaries under international law

One should not perceive mercenaries as actors occupying a 'grey area' between combatants and non-combatants, as so many experts seem to do.²³ Mercenaries are combatants, just like

¹⁹ Harold W. Geisel, State Department's acting inspector general, in: Scott Shane, 'Iraq May Ban Blackwater' *NYT* 18 Dec 2008.

²⁰ Erna Rijdsdijk, 'Srebrenica, genocide en de reterritorialisering van de internationale verantwoordelijkheid (Srebrenica, genocide and the reterritorialisation of international responsibility)' *Vrede en Veiligheid (Peace and Security)* Vol.32 No.3, 2003, p.316; translated from Dutch. Rijdsdijk: the Bosnian war was a "genocidal war – of which the signs were observed long before the fall of the enclave"(p.317; *ibid*).

²¹ Singer, *Corporate Warriors*, 2003, p.58. Intervention "requires the willingness to make real sacrifices, but such readiness is no longer in ready supply. This opens greater leeway for PMFs [private military firms]"(*ibid*).

²² John F. Burns, 'Risky Business: The Deadly Game of Private Security' *NYT* 23 Sep 2007.

²³ Eg. Frank Kuitenbrouwer, 'Controleer militaire 'uitzendkrachten' (Curb military 'temps') *NRC* 13 Dec 2007.

the military and other armed actors. It is deplorable that a “mercenary shall not have the right to be a combatant or a prisoner of war” (art. 47.1 Protocol I Geneva Conventions), giving it as few rights as ‘enemy combatants’ in the so-called War on Terror. Geneva’s well-structured yet one-sided definition (art. 47.2) presumes that *all* mercenaries are motivated by a “desire for private gain”. The 1989 Convention Against the Recruitment, Use, Financing and Training of Mercenaries reflects the same biases and erroneous assumptions. A more objective definition would be that mercenaries are *combatants paid through a contract by one or more state or non-state parties for whatever reason, and accept this pay to fight or otherwise assist their employer for whatever reason, for as long as the contract counts or lasts; private gain may not be the sole or primary motivation, yet the pay is such that this can be satisfied.*

Probably most mercenaries are motivated by private gain, yet that can be said of many soldiers, rebels and other fighters as well. True, the former may endanger the state’s monopoly of violence or at least the state-military’s prerogative to apply it. Yet that can be no reason to withdraw from them the “legal protections that soldiers enjoyed in warfare”.²⁴ Rebels and other non-state armed actors endanger this monopoly just as much, if not more so. Yet Common article 3 and additional Protocol II of the Geneva Conventions still grant the latter combatant status, with full rights and obligations. *One should extend these provisions to mercenaries as well.* Blackwater’s security guards squarely are combatants. State and *non-state* employers should be able to discipline, hold accountable or prosecute contractors for *jus-in-bello* (justice-in-war) means violations, and be judged themselves for any *jus-ad-bellum* (justice-of-war) violations. Unfortunately, international law is largely mute on the responsibilities of mercenaries and their employers, and by whom they can be tried if in they commit war crimes.

Strengthen the disciplining powers of accredited Private Military Companies

Blackwater’s chief Eric Prince had a point when he argued before Waxman’s investigative committee, in response to a question why the man who killed the bodyguard of Iraq’s vice-president on Christmas Eve 2006 was ferreted out of the country, that “we, as a private company, cannot detain him. We can fire, we can fine, but we can’t do anything else”.²⁵ In principle, the self-regulating International Peace Operations Association (IPOA) should have given the assurances we need. After all, IPOA’s one-time yet diminished focus to alleviate the suffering of “innocent civilians” in “low-intensity conflicts”, and “bringing long-lasting solutions to these conflicts”, seems just what the doctor ordered. Unfortunately, most observers dismiss the trade association as an ingenious, self-serving lobby firm for the private military industry, despite its claim that it was founded by “individuals .. in the non-governmental, academic and business sectors who recognized the benefits brought by the private sector to the victims of conflict”.²⁶ Even if its founders were and are selflessly motivated, subscribed companies like Blackwater repeatedly have flouted its Code of Conduct. IPOA’s founding member and president Doug Brooks initiated this Code with lawyers and aidworkers, all impressed by how

²⁴ Singer, *Corporate Warriors*, 2003, p.42; loss ‘public monopoly of war’: pp.6-8,18. I disagree that combat mercenaries only fight for “economic gain” and for “employers other than their home state’s government”(p.40). One should stick only with the provision that they are “recruited locally or abroad in order to fight in an armed conflict”(Geneva art.47.2(a) Protocol I). Otherwise we could not call Blackwater’s American employees as such!

²⁵ J. M. Broder, B. Knowlton a.o., ‘Blackwater Chief Defends Employees Before House Panel’ *NYT* 2 Oct 2007.

²⁶ Quotes from <http://ipoaonline.org>, ‘Mission’ and ‘History’ (acc. 17 Mar 2007) . IPOA now speaks obliquely of “enhancement of international peace, development and human security”, having dropped emotive claims to help protect ‘innocent civilians’: <http://ipoaworld.org/eng/aboutipoa.html> (acc. 23 Oct 2009).

between 1997 and 2000 mercenaries from especially *Executive Outcomes* (EO) and *Sandline International* held together the UN peacekeepers in Sierra Leone and beat back the atrocious Revolutionary United Front (RUF).²⁷ However, neither IPOA's code nor its non-binding enforcement mechanism (art.11.2) for complainants can punish violators beyond dismissal, fining, and judicial cooperation and referral to "relevant authorities".²⁸ The association's sanctions can hardly go beyond expulsion of a member company (enforcement section 5); it is up to the latter to discipline its own personnel if they wish to keep their membership. These companies and their associations should be able and willing to discipline their own, including temporary confinement for extradition to a proper court. One should bring the worst cases before the International Criminal Court (ICC) even if this requires treaty adaptations in mandate and judicial procedure.

Use mercenaries as auxiliaries only – unless there is no other way

In any true peace mission or humanitarian intervention to rescue defenceless people, the main force should preferably consist of either soldiers, insurgents or outside volunteers – think of the International Brigade in the Spanish Civil War. Mercenaries should form the force's nucleus only if other combatants can insufficiently be found – and certainly if they happen to be the best and most decent fighters available. Obviously, all humanitarian combatants should behave impeccably. Cruel, disproportionate and other immoral means will blemish the most hallowed ends, especially in humanitarian interventions.

Create, recruit and deploy one's 'own' mercenaries for lower yet decent wages

The questionable track records of Blackwater and so many other PMCs make one despair that one could ever rely on them fully. If necessary, one should create separate companies for humanitarian tasks and purposes. This conceivably could be done if one can establish a new type of warrior, an amalgam of the traditional mercenary and volunteer: the man or woman willing to fight the 'good war' not just for "material compensation .. in excess of that .. paid to combatants of similar ranks and functions"(Geneva art. 47.1, Protocol I). This 'humanitarian warrior' fights not for any state, nation or group *per se*, but for the best cause imaginable: the protection of *any* defenceless people against slavery and other grave humiliations and pain, torture and death. Admittedly, this proposition seems far-fetched, even utopian. Nevertheless, this proposition should be made, if only to offer food for thought and elicit further debate. Be as it may, such 'humanitarian warriors' must be decently provided for in order to fight wholeheartedly, without them having to worry about how to feed themselves and their kin. They deserve a decent wage beyond the pittance given to both traditional volunteers and mercenaries from poor countries (in violation of IPOA code art. 6.8). Incidentally, mercenaries usually lack health-care benefits and pensions, though IPOA code art. 7 demands health and life insurance.

²⁷ <http://ipoaworld.org/eng/codeofconducthistory.html>. See further David Shearer, *Private Armies and Military Intervention* Adelphi Paper 316: International Institute for Strategic Studies (IISS) – Oxford University Press, 1998.

²⁸ <http://ipoaworld.org/eng/codeofconduct/87-codecodeofconductv12enghtml.html>, artt.3.2-3. IPOA is "not a .. judicial organization, and will not attempt to prove the guilt or innocence of a member company in a criminal or civil legal case": <http://ipoaworld.org/eng/enforcementv01eng.html>, Preamble.

Decent pay is not such that private gain is satisfied or replaces the cause as a prime motive. Obviously, any state, rebel actor can recruit such warriors – even outside non-governmental organisations (NGOs). International and humanitarian (aid) organisations already hire mercenaries *outside* “the portal of a national authority”²⁹, mostly from IPOA-accredited companies in accordance with article 9.3 of its latest 11 February 2009 Code of Conduct. Yet they primarily protect the former’s personnel, property and aid materials to endangered people – not the endangered people themselves. Sooner or later, someone in the ‘aid industry’ will take the ‘small’ step from protection of aid workers to protection of aid recipients. A hybrid of these possibilities is a standing United Nations army. Yet such an army can intervene only even-handedly, and where and when most needed, if UN decisionmaking is drastically reformed so that spurious, self-interested and partisan vetoes become rare or impossible. Such reform is so far-off that NGO-organised intervention may happen before the former ever does.

Currently, private military companies, even the most reliable ones, are ill-suited to provide humanitarian warriors. Their profit motive and commercial outlook drive them to recruit personnel for much higher wages, and make their employers pay much more than strictly necessary. Last but not least, they remain dependent on host governments. Indeed, IPOA “does *not* seek to have the current leadership role of international and government organizations supplanted by private sector entities”.³⁰ Crucially, contracts “shall not be predicated on an offensive mission unless mandated by a legitimate authority in accordance with international law”(IPOA code art. 8.2).³¹ The association would never allow its members to intervene independently or be contracted by non-state actors to save ‘other’ people.

Conclusion

Private military companies have come under renewed scrutiny, criticism and wholesale condemnation. At the very least, the Blackwater and other contractor scandals suggest that private companies are often unable or unwilling to regulate themselves regarding proper conduct in and out of combat. State entities like the U.S. State Department and the Pentagon often fail to control them and punish misdeeds, like that of private contractors in the Abu Ghraib prison. Measures like requiring contractors to adopt less trigger-happy ROE – as the American government soon did after the Nisour Square incident – are welcome, yet insufficient. One must create transparent jurisdiction over the privateers, i.e. establish who can discipline and persecute them for violations of humanitarian and human rights law. Non-state entities should gain more disciplining powers as well. Yet there should be balance and fairness: the more mercenaries can be held accountable, the more rights they should get in return.

²⁹ R.R.K Hiemstra, ‘Krijgsmacht in Krijgstreep (Soldier in Stripesuit)’ *Militaire Spectator* Vol.174 No.7/8, 2005, p.307; quote translated from Dutch. Hiemstra deems it “desirable to limit direct contracting by NGO’s and .. even .. IGO’s”, whereby “only (national) military organisations are allowed to hire PMC’s”(p.307; translated). Personally I deem it thinkable and defensible to ‘violate’ the state’s monopoly on violence in extremely exceptional cases, like preventing and stopping genocide by non-state actors – if states and IGO’s are unable or unwilling to timely and forcefully intervene. Unfortunately there is no space here to discuss this sensitive issue more extensively.

³⁰ <http://ipoaworld.org/eng/ipoafaqs.html>, FAQ 16. Rather, IPOA’s goals are “better supervision of private companies operating under the umbrella of UN or government-led operations and better coordination between private organizations, government, NGOs and international organizations”(ibid).

³¹ <http://ipoaworld.org/eng/codeofconduct/87-codecodeofconductv12enghtml.html>. Signatories “shall only work for legitimate, recognized governments, international organizations, non-governmental organizations and lawful private companies”(art.4.1). See also art. 2.3 against any disclosures violating “applicable law”. One could argue that art. 9.4.3 against violating UN arms embargos is morally questionable; such embargos on Bosnia and Sierra Leone in the 1990s benefited the worst aggressors in these conflicts.

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