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Book Review of Jeremy Scahill, *Blackwater: the Rise of the Most Powerful Mercenary Army* (2007/2008) and *From Mercenaries to Market: the Rise and Regulation of Private Military Companies* (Simon Chesterman & Chia Lehnardt, eds., 2008)

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Book Review

BLACKWATER: THE RISE OF THE MOST POWERFUL MERCENARY ARMY. By Jeremy Scahill. New York: Nation Books, 2007/2008. Pp. 452. \$26.95, Cloth (2007); \$16.95, Paper (2008). FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES. Edited by Simon Chesterman and Chia Lehnardt. Oxford, New York: Oxford University Press, 2007. Pp. Xx, 287. Index. \$150, £65, Cloth; \$55, £24.99, Paper

Gregory E. Maggs*

In his provocative book, *Blackwater: The Rise of the Most Powerful Mercenary Army*,¹ journalist Jeremy Scahill has several key goals. He principally seeks to expose the conduct of Blackwater Worldwide (formerly called Blackwater Security Consulting), a private contractor that provides security services to the U.S. government in Iraq and elsewhere. Scahill sees Blackwater, which has now secured over \$1 billion in diplomatic security contracts from the U.S. government, as thoroughly lawless, and he argues that Blackwater's employees should face criminal charges for a variety of incidents. Second, Scahill condemns the Departments of State and Justice and the Bush administration more generally for their collective "refusal to hold mercenary forces accountable for their crimes in Iraq" (p. 47). Finally, Scahill presents several powerful arguments against the United States' heavy reliance on private contractors in carrying out its foreign policies and its military operations.

From Mercenaries to Market: The Rise and Regulation of Private Military Companies, edited by Simon Chesterman (of New York

* Professor of Law, George Washington University Law School. Since I am a U.S. Army (JAG) reserve officer and judge, I should note that this review is not intended to express any views as to the wisdom or constitutionality of any provision of the Uniform Code of Military Justice. The views expressed here are my own and do not necessarily reflect those of the Department of Defense, the U.S. Army, or the Army Court of Criminal Appeals.

¹ This book was originally published in 2007. The author subsequently added an important introduction and epilogue in 2008. I have reviewed the revised edition.

University and Singapore National University) and Chia Lehnardt (a doctoral student previously in charge of an NYU research project on private military companies), is a collection of fourteen scholarly essays on political, legal, and economic aspects of using private security contractors. Unlike *Blackwater*, the essays do not focus on any particular companies. But *From Mercenaries to Market* and *Blackwater* overlap in their consideration of a number of issues, and each identifies several of the same problems arising from employing private armed forces.

While both books have much to say, they each are remarkably silent on what I consider—especially in view of the facts recited in *Blackwater*—one of the most serious problems with the United States’ heavy reliance on private military companies. Quite simply, these contractors may have become our nation’s Achilles heel. Essential and yet extremely vulnerable, contractors and the institution of contracting present a perfect target for opponents of America’s foreign policy. By successfully attacking prominent security contractors like Blackwater Worldwide, whether through law or public opinion, an opponent could paralyze American diplomatic and military initiatives.

Before discussing the main themes of *Blackwater*, one important, initial point requires mention. Although *Blackwater* is a well-researched book, it is not a scholarly work but a polemic, through and through. And while the book is often entertaining, it is also frequently annoying in tone and rhetoric. “Blackwater is a private army,” Scahill tells us breathlessly, “and it is controlled by one person: Erik Prince, a radical right-wing Christian mega-millionaire who has served as a major bankroller not only of President Bush’s campaigns but of the broader Christian-right agenda” (p. 55). These common, over-the-top utterances regrettably make substantial portions of the book unreadable.

But putting all that aside, Scahill offers some important insights. Consider first his contention that Blackwater is lawless and that its employees should face criminal charges. The most significant example appears in the lengthy introduction to the 2008 version of the book. It concerns a notorious incident that occurred in Nisour Square in Baghdad on September 16, 2007.

There are differing accounts of what happened that day. Attorneys for the Blackwater personnel involved insist that their clients did

nothing wrong.² They say a Blackwater team was sent to assist a State Department official after her own security detail was attacked with a roadside bomb. In Nisour Square, the Blackwater team came under fire by insurgents and fired back, “fighting for their lives.” In the process, civilians were killed in the “crowded, dangerous and chaotic environment.” But the attorneys insist that their clients are not culpable: “These casualties are not the fault of our military and security forces . . . , but rather the fault of the insurgents who use women and children as shields, behind which they launch their cowardly attacks.”

But Scahill reports something entirely different based on his investigation. A Blackwater convoy entered the square, made an abrupt U-turn, tried to drive the wrong way on a one-way street, came to an abrupt halt, and began shooting at random into the crowd. The Blackwater guards continued to fire even though a uniformed police officer signaled them to stop. The fifteen-minute shooting spree killed approximately seventeen Iraqis, wounded twenty others, and destroyed fifteen vehicles. The victims included women and children. Witnesses said that Blackwater had no grounds for shooting and that those firing weapons ignored shouts by their own colleagues to cease fire.

Who is correct? Surely, no one can tell just by reading the conflicting accounts, one by defense attorneys and the other by a polemicist. Fortunately, we have grand juries to look into allegations of this kind of wrongdoing and to determine whether probable cause exists for a criminal trial. But even skeptics should agree that Scahill has performed a highly valuable function in pressing the matter, articulating the issues, and uncovering at least one version of the facts. And no one should deny that if federal government contractors are unlawfully using force, justice requires an accounting.

This leads to Scahill’s second general theme: the State Department, the Justice Department, and the Bush administration were unjustly shielding Blackwater and ignoring its wrongdoing. At the time that Scahill wrote the 2008 version of his book, Blackwater personnel faced no criminal charges or civil liability for their actions at Nisour Square

² See the press release issued by the attorneys for the former Blackwater employees involved in the incident, at <http://www.raven23.com/uploads/Press_Statement_12-8-08.pdf>. The material in this paragraph is all drawn from that source.

or elsewhere in Iraq. The only thing concrete that had happened was that the State Department had bungled (or possibly intentionally botched) part of the investigation of the September 2007 incident.

After the shooting became headline news, the State Department sent investigators to Iraq to interview the Blackwater personnel involved. The investigators promptly gave the principal suspects “use and derivative use immunity” in exchange for their agreeing to answer questions.³ A grant of this form of immunity guarantees that nothing that a criminal suspect says can be used against him either directly or indirectly.⁴ For example, a confession could not be used in court against the suspect, and if facts revealed by the suspect lead to further discoveries, those further discoveries also could not be used against the suspect.

The grant of use immunity makes Scahill apoplectic.

Normally when a group of people alleged to have gunned down seventeen civilians in a lawless shooting spree are questioned, investigators will tell them something along the lines of: “You have the right to remain silent. Anything you say can and will be used against you in a court of law.” (P. 28)

³ The immunity agreement signed by the witnesses contained this provision: “I further understand that neither my statements nor any information or evidence gained by reason of my statements can be used against me in a criminal proceeding, except that if I knowingly and willfully provide false statements or information, I may be criminally prosecuted for that action under 18 United States Code, Section 1001.” Jonathan Karl & Kirit Radia, *Exclusive: ABC News Obtains Text of Blackwater Immunity Deal: State Department Grants Immunity to Guards Investigated for Shooting Iraqi Civilians* (Oct. 30, 2007), at <<http://abcnews.go.com/Politics/Story?id=3795318&page=1>>.

⁴ See 18 U.S.C. §6002 (a witness granted use and derivative use immunity may not refuse to testify, but “no testimony or other information compelled . . . (or any information directly or indirectly derived from such testimony or other information) maybe used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.”).

He believes that the “State Department was apparently corrupting or stifling the investigation or hindering a successful prosecution of Blackwater” (*id.*). Scahill is probably correct to be critical of the use-immunity agreement, but he seems to have misunderstood the precise problem. Grants of use and derivative use immunity are not always bad for the prosecution and good for defendants. This type of immunity sometimes can be a valuable tool for prosecuting multiple collaborating defendants who otherwise refuse to talk. In theory, each defendant can be given use immunity and then forced to make damning statements against all of his accomplices or coconspirators. The government thus can build a case against everyone. If a witness refuses to talk or tells lies, he can be convicted of contempt or perjury.⁵ The Supreme Court has held that this form of immunity does not violate the defendant’s privilege against self-incrimination.⁶ Use and derivative use immunity in this sense is an ingenious law-enforcement tactic that can break a conspiracy of silence, especially when physical evidence may be inadequate.

Consequently, giving Blackwater personnel use and derivative use immunity would not necessarily be an unreasonable investigation tactic, especially when the crime scene was not immediately sealed. The real problem is that the State Department does not appear to have taken all of the precautions necessary to insure that the government would make no incriminating derivative use of statements obtained from immunized speakers. The *United States Attorneys’ Manual*, which guides Justice Department investigations, stresses the difficulty of prosecuting someone who has been giving use immunity.⁷ But apparently the State Department did not do all that it might have done to protect potential criminal cases against the Blackwater personnel.

⁵ See, e.g., *United States v. Papadakis*, 802 F.2d 618, 619 (2d Cir. 1986); *Sates v. Seltzer*, 794 F.2d 1114, 1120-21 (6th Cir. 1986).

⁶ See *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

⁷ See UNITED STATES ATTORNEYS’ MANUAL § 9-23.400 (requiring the express written authorization of the attorney general before prosecuting a witness who has been given use and derivative use immunity and require prosecutors to “indicate the circumstances justifying prosecution and the method by which the government will be able to establish that the evidence it will use against the witness will meet the government’s burden under *Kastigar v. United States*, 406 U.S. 441 (1972).

That seems more like an error by inexperienced and ill-advised investigators than a corrupt conspiracy.

But whether Scahill is right or wrong about the State Department's motivations, time has overtaken his complaint that the Bush administration was protecting Blackwater. On December 4, 2008, federal prosecutors obtained an indictment against five former Blackwater employees allegedly involved in the shooting. The indictment charges them with voluntary manslaughter of fourteen persons who were killed, attempt to commit manslaughter of twenty persons who were wounded, and using and discharging a firearm during a crime of violence.⁸ This indictment suggests that the Bush administration did, in fact, take the charges very seriously.

Obtaining an indictment, of course, is easier than winning a conviction. As the statement by their attorneys indicates, the defendants already are arguing that they acted in self-defense or defense of others. We can anticipate that they also will argue that the prosecution has made improper derivative use of their immunized statements. In addition, they may argue that they have not committed any federal offenses because the charged misconduct occurred in Iraq, outside of U.S. jurisdiction.

The indictment addresses the jurisdictional issue by citing the Military Extraterritorial Jurisdiction Act, which states, in relevant part:

Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States . . . while employed by or accompanying the Armed Forces outside the United States . . . shall be punished as provided for that offense.⁹

A key issue will be whether the defendants were “employed by or accompanying the Armed Forces.” In reality, we know that they were

⁸ See *United States v. Slough*, No. Cr-08-360 (D.D.C. Dec. 4, 2008) (indictment), at <<http://news.findlaw.com/cnn/docs/iraq/blackwater-indictment1208ind.html>>.

⁹ 18 U.S.C. §3261(a)(1).

employed by Blackwater and that they were generally accompanying State Department personnel, not members of the Armed Forces. But a special definition in the Military Extraterritorial Jurisdiction Act may preclude this line of argument by the defense. That act says that “employed by the Armed Forces outside the United States” means, *inter alia*, “an employee of a contractor . . . of . . . any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.”¹⁰ An unresolved question is what the phrase “supporting the mission of the Department of Defense overseas” means. The State Department may well not see its task as being to support the Department of Defense; rather, it may see things the other way around.

A third theme in Scahill’s book is his general objection to the extensive use of military contractors. By now, everyone knows that America relies heavily on private companies in Iraq and Afghanistan. But the extent of such reliance may still be surprising. According to Scahill, in August of 2007, there were more private contractors than U.S. soldiers working for the United States in Iraq (180,000 vs. 160,000). Of these contractors, Scahill says that “[t]ens of thousands” are “armed operatives,” but “exactly how many [is] unknown, because neither the administration nor the military could or would provide those numbers” (p. 46).

Scahill points out a number of problems with relying heavily on security contractors. Perhaps the most serious is that many of the incentives are potentially at odds with the interests of (in this case) the U.S. government or Iraq. Security contractors like Blackwater, for example, do not necessarily have a strong reason to further the overall mission of the United States. In Iraq, the United States’ overall goal is to pacify the country. But contractors like Blackwater may view their task more narrowly; they are paid to transport diplomats or other VIPs from one place to another without injury. They do not necessarily care if they anger Iraqis in the process. Scahill quotes an Army colonel who laments: “If they push traffic off the roads or if they shoot up a car that looks suspicious, they may be operating within their contract, but it is to the detriment of the [overall U.S.] mission, which is to bring people over to our side” (p. 23).

¹⁰ 18 U.S.C. §3267(1)(A)(iii)(II).

Another inherent problem is that outsiders have great difficulty obtaining a good assessment of the performance of security contractors. The people whom they protect certainly have no incentive to say anything bad about them; their lives are on the line. Scahill quotes U.S. Ambassador Ryan Crocker: after questions were raised about Blackwater's conduct at Nisour Square, Crocker said that Blackwater's employees guarded his back—and did it very well indeed.

Private security contractors also have a deleterious effect on the morale of service members in the armed forces. Security contractors generally make far more money. A person with the skills of a sergeant may make \$50,000 in the army but \$400,000 working for Blackwater. Scahill quotes Secretary of Defense Robert Gates as saying, "I worry that sometimes the salaries they are able to pay . . . lures some of our soldiers out of the service to go to work for them" (p. 24).

I agree with these observations. These are all problems that have a far-ranging effect and that do not have simple solutions. But Scahill may be missing a larger concern about military contractors, in general, and about private security contractors, in particular. The problem is that they have a very dangerous combination of attributes: at present, they are both indispensable and vulnerable.

Security contractors have become necessary in dangerous places where the government attempts to maintain a diplomatic presence. If the United States is to have ambassadors and other State Department officials in Iraq and Afghanistan, it must protect them as they travel around the country. But the State Department does not have the employees or even the capability for training employees who can transport ambassadors or other diplomats across Baghdad or Kabul. The military could take on this mission, but only at the cost of taking the necessary assets from some other essential missions. Certainly, this reassignment could not happen instantly. The military itself uses contractors for a great deal of its own transportation needs.

But there is no guarantee that contractors will always be available. Given that the contracting companies are private, they could at any time refuse to continue to provide service. Putting a few of their employees in prison or slapping them or the company with large civil liability might encourage them to quit the business altogether.

In addition, as valuable as security contractors are, political considerations might prompt our own government to send them packing in a hurry. They are not like the armed forces, which are

widely seen as always necessary and which have a strong reputation developed over the centuries. Misbehavior by a few miscreants in the army usually does not reduce the public opinion of the army as a whole. The army's reputation is based on a long and proud history, in which a great many Americans have taken part.

But Blackwater did not winter over at Valley Forge; it did not endure the Wilderness Campaign; and it did not land on the beaches at Normandy. Whereas no one thought of getting rid of the army after the criminal incidents at Abu Ghraib, the public might have less patience with a private security contractor like Blackwater. Enough bad press might cause the public to demand that the federal government fire Blackwater and other security contractors immediately.

Scahill gives only scant attention to this point. He recognizes:

If the government started slapping mercenary firms with indictments for war crimes or murder or human rights violations—and not just in a token manner—the risk for the companies would be tremendous. This, in turn, would make wars like the one in Iraq far more difficult and arguably impossible. (P. 47)

But Scahill appears to miss a key implication. He makes this comment only to explain why President Bush fought so vigorously to defend contractors. I would be more concerned with something far more serious: how our enemies might come to realize that contractors are an easy, high-value target. If they can turn the tide of opinion against security contractors—causing the public to demand that the U.S. fire them or punish them so much that they voluntarily ceased working for the government—our enemies could quickly cripple U.S. diplomatic missions and U.S. foreign policy. Public relations in the United States is not the only venue of attack. The United States is constantly negotiating status-of-forces agreements when it deploys personnel to foreign countries. A key issue is always whether U.S. forces or contractors will face criminal liability under local law. Many persons in former nations oppose giving contractors immunity from local law enforcement. For some, this refusal to provide immunity is simply a matter of justice. They do not trust the United States to prosecute, and they do not want Blackwater and others to escape punishment. But is it too speculative to imagine that some have a different goal? Putting pressure on U.S. contractors may be politically easier than actually fighting U.S. forces, but it can have major

ramifications. Our enemies surely can see, and will exploit, this opportunity. Indeed, in November 2008, the United States and Iraq entered into a new status-of-forces agreement that, for the first time, subjects contractors to Iraqi jurisdiction.¹¹

A more scholarly book than Scahill's *Blackwater* is the collection of essays in *From Mercenaries to Market*. This work, which was produced as a project of the Institute for International Law and Justice at the New York University School of Law, contains fourteen essays about private security companies. The essays are grouped in four categories: concerns, challenges, norms, and markets. They do not present a comprehensive treatment of the subject, but they do hit upon a number of important topics. Still, like *Blackwater*, they also appear to miss the point of how vulnerable the United States has become by relying so heavily on contractors.

Among the most interesting essays is "Private Military Companies Under International Humanitarian Law" by Louise Doswald-Beck of the Graduate Institute of International Studies, Geneva. The author addresses various questions, including whether private military companies can be combatants who may use force, who can be targeted, and who are entitled to prisoner-of-war status.

On the issue of POW status, Doswald-Beck is skeptical. She doubts that the employees of security contractors can have POW status, even under the very generous provisions of the Additional Protocol I.¹² (The United States has not ratified the Protocol, but parts of it may have the status of customary international law.¹³)

¹¹ See Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, Art. 12(2) (Nov. 23, 2008) (giving Iraq the "primary right to exercise jurisdiction over United States contractors and United States contractor employees"), at <http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf>.

¹² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts June 8, 1977, 1125 UNTS 609 [hereinafter Additional Protocol Additional I].

¹³ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006) (Stevens, J.). But see *United States v. Yousef*, 327 F.3d 56, 92 n.25 (2d Cir. 2003)

Additional Protocol I reduces the distinction in the Third Geneva Convention of 1949 between members of regular military forces and members of other groups who take up arms.¹⁴ In general, both kinds of fighters can have POW status under the Protocol. But the Protocol still imposes some limitations; one is that members of an armed group can have POW status only if they “are under a command responsible to [a state] for the conduct of its subordinates.”

Addressing this limitation, Doswald-Beck writes:

[An] issue is whether responsibility needs to include criminal jurisdiction by a state over such groups. This is not clear, although the negotiators of both these treaties probably presupposed that this was so because typically such groups would have consisted of persons of their nationality fighting for their country. This is not necessarily the case for [private military companies]. Not only may its members not be of the hiring state’s nationality, but also the group itself could be incorporated in another state, or in a part of the state enjoying specific jurisdictional exemptions, precisely in order to escape its jurisdiction (P. 121, footnote omitted)

The author may have had the United States in mind when discussing how private military companies are not necessarily subject to the criminal law of any state. At the time of the essay’s publication, the United States had not brought criminal charges against any contractor in Iraq. But the Military Extraterritorial Jurisdiction Act and the Uniform Code of Military Justice both, she argues, impose criminal liability on contractors. In 2008, the United States used each of these acts to bring charges against contractors. The Blackwater personnel, as described above, face criminal charges in federal court. And a contract interpreter for the Army pleaded guilty before an Army

(explaining that “it is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States and/or other prominent players in the community of States could be deemed to qualify as a bona fide customary international law principle”). See William H. Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE L.J. 319, 322 (2003).

¹⁴ See Protocol Additional I, *supra* note 12, Arts. 43, 44.

court-martial to various offenses arising out of stolen knife.¹⁵ Whether there are constitutional or other legal problems with the cases remains to be seen.

Some readers may be engaged by Doswald-Beck's legal analysis of whether members of private military companies have the rights of POWs. They may believe that it would affect U.S. decisions whether and in what circumstances to use military contractors. Others might view the whole issue as irrelevant. After all, neither Al Qaeda nor other Iraqi insurgents who capture Blackwater employees are likely to afford them humane treatment, let alone POW status, regardless of what the Additional Protocol I or any other treaty may say. When Blackwater employees were captured in Fallujah in May 2004, they were promptly killed and burned, and their bodies were hung from a bridge over the Euphrates.¹⁶

But it is both important and refreshing to see careful parsing of international treaties on POW status. While the immediate object of the analysis might be to raise questions about the protection of private military companies (and their employees) under contract to the United States, the analysis also has broader implications. Over the past half decade, there has been substantial debate about whether the Third and Fourth Geneva Conventions should be read broadly to confer certain protections to captured members of Al Qaeda and the Taliban even if these foes do not meet the express requirements for such protection.¹⁷ If the Conventions are now read strictly to exclude American contractors, as Doswald-Beck advocates, surely the same approach should be applied when determining everyone else's status. I doubt that our enemies are in favor of that.

¹⁵ See *Civilian Contractor Convicted at a Court-Martial (Baghdad)* (June 23, 2008) (describing the guilty plea to wrongful appropriation of a knife, obstruction of justice, and making a false official statement), at <http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=20671&Itemid=128>.

¹⁶ See *U.S. Expects More Attacks in Iraq: Residents Hang Slain Americans' Bodies from Bridge* (May 6, 2004), at <<http://www.cnn.com/2004/WORLD/meast/03/31/iraq.main/>>.

¹⁷ See GREGORY E. MAGGS, *TERRORISM AND THE LAW: CASES AND MATERIALS* 232-33 (2005).