

Dogs of War: Military justice and PMCs

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WASHINGTON, April 11 (UPI) -- Two recent developments have highlighted different aspects of the accountability issue presented by the use of private military contractors by the U.S. government and military. This complex set of problems puts me in mind of Churchill's comment about the Soviet Union: "a riddle, wrapped in a mystery, inside an enigma."

First was the April 4 announcement that the State Department had renewed Blackwater's multimillion-dollar contract to protect its personnel in Baghdad. Blackwater shares an umbrella State Department contract to provide personal protection for U.S. diplomats all over the world with two other PMCs, and it is renewed each year. This is the third renewal for Blackwater.

The announcement came despite an ongoing FBI investigation into the fatal shootings of 17 Iraqi civilians in Baghdad by Blackwater contractors last Sept. 16.

Predictably, Iraqi Prime Minister Nouri al-Maliki called it "bad news."

Questioned about the issue this week on Capitol Hill, U.S. Ambassador to Iraq Ryan Cocker replied that since last September, there have been just three "escalations of force" incidents involving Blackwater personnel, none of them serious.

But he added that, depending on the results of the FBI investigation, he would not rule out canceling the contract in future.

As a side note, it bears pointing out that most people have very little understanding of the conditions that security contractors work under, beyond perhaps a general awareness that they are dangerous. In this regard, Human Rights First has done a public service by recently posting on its Web site 610 declassified Serious Incident Reports, a sample of those filed by PMCs between June 1, 2004, and April 6, 2005.

The documents, released by the U.S. Army under the Freedom of Information Act, give an idea of the incidents security contractors report and what their personnel say about when, why, and how they use force.

The reports should be read alongside a statistic from the recent congressional testimony of Jack Bell, the deputy under secretary for logistics and material readiness at the Pentagon.

He said that between August 2004 and February 2008, "a period of rampant insurgency and sectarian violence in Iraq," there were 19,268 contractor convoys run for the U.S. military. There were 1,441 attacks against them. But in only 151 cases -- less than 1 percent of convoys overall, and just over 10 percent of those that were attacked -- was the discharge of firearms by PMC personnel reported. And in some of these 151 incidents, only warning shots or disabling shots aimed at vehicles were involved.

Bell's figures do not include State Department contractors, such as Blackwater, who self-report incidents. Moreover, it is likely that even in the military the overall numbers of incidents are underreported. And the detail of many of the contractors' accounts may be self-serving.

Nonetheless, these figures and documents challenge the popular conception of PMCs as out-of-control "cowboys."

What it does reflect is that the culture and standard-operating procedures between Defense and State security contractors is radically different. How and why that has been allowed to happen is worth exploring.

The same Friday afternoon that the State Department announced the renewal of the Blackwater contract, the U.S. military announced it was charging a contractor with assault.

The case looks set to emerge as a major test of the military's jurisdiction, via the Uniform Code of Military Justice over civilians who accompany the armed forces into the field. The charge was made under expanded authority that the Congress provided to the military to crack down on contractor abuses. It is the first time since 1968 that a contractor has been charged under military law.

Last week, I identified problems with using the UCMJ. These include the question of whether Congress had the authority to make this change. Second is the question of a civilian's right to be judged by a jury of peers. Though the military system provides juries, they are comprised of military personnel, not civilians, and are often as small as five individuals compared with the average 12 in federal court.

What's more, a military jury needs only a two-thirds majority for conviction; federal courts require unanimity. There is also a question of the right to a grand jury, which does not exist in the military system. Regardless, it now appears there will be a test case sooner than anyone anticipated.

The contractor in question, Alaa Mohammad Ali, worked as an interpreter for the L-3 Communications Titan Group, at a combat outpost in Anbar Province. He was accused of stabbing a fellow contractor with a knife in the chest and sternum on Feb. 23. According to military officials, he has Canadian and Iraqi citizenship.

That raises another interesting issue, given that he does not have U.S. citizenship, it is unclear whether expanded UCMJ authority could constitutionally apply to non-Americans. One might also wonder why Ali was selected for prosecution, given past failures to charge and prosecute American contractors.

Why Ali's case is the first charged under the military system is unclear. Although the statute has been on the books for more than a year, Defense Secretary Robert Gates released internal implementing guidance on the law only last month. Those rules require the military to consult with the Justice Department before prosecuting a civilian. And that is what happened with Ali. But it was only after the Justice Department declined prosecution under the Military Extraterritorial Jurisdiction Act that the military took the lead.

MEJA was created to ensure contractors working with the military overseas could be held accountable for their misconduct. The fact is that in the past it was not effectively implemented and rarely used. But that seems a poor justification for turning to military courts -- and may seem that way to appeals court judges, too. Especially when you consider that MEJA did not exist when military jurisdiction over civilians was invalidated by the Court of Appeals for the Armed Forces in 1970.

That court concluded that the deprivation of fundamental constitutional rights could not be justified by the necessities of accountability in a time of de facto war even when no viable accountability alternative existed. If the justification was invalid in the absence of MEJA, the current availability of civilian prosecution surely must weigh against the claim of necessity for the use of the UCMJ.