OP-ED CONTRIBUTOR

Blackwater and the Limits to Outsourcing Security

By SIMON CHESTERMAN

SINGAPORE — As the Obama administration struggles to find a policy on Afghanistan and Pakistan, private contractors have emerged as the latest concern. Pakistan objects to the role assigned to DynCorp in providing security to U.S. diplomats, with accusations that U.S. contractors are setting up an intelligence network and have “roughed up” Pakistani civilians. One of DynCorp’s local subcontractors has been raided and its owner arrested.

This follows revelations over the summer that employees of the company formerly known as Blackwater were the go-to guys when the C.I.A. set up a covert program to assassinate al Qaeda leaders. Less spectacular, but no less troubling, is the news that Blackwater (now rebranded as “Xe”) continues to play a role in assembling and loading the C.I.A.’s Predator drones at hidden bases in Pakistan and Afghanistan. Last year, the C.I.A. director, Michael Hayden, told Congress that contractors employed by the C.I.A. had waterboarded detainees.

Debate over these issues tends to focus on criticism of the private military and security industry, with analogies to mercenaries and harsh words about the dogs of war. But a more appropriate challenge would be to the governments that pay the contractors.

For the most part, governments have shown little interest in in regulating this industry. The most energetic at the international level has been Switzerland, working with the International Committee of the Red Cross. The “Swiss initiative” culminated in a document that essentially reiterates existing obligations under international humanitarian law of states, companies and their personnel.

The most aggressive at the domestic level has been South Africa, which adopted legislation aimed at ending its troubled history of mercenarism — but which inadvertently threatened to end the careers of 600 South Africans in the British armed forces and made even humanitarian work in conflict zones legally precarious.

Meanwhile, debate has been led by the companies themselves. Much as Blackwater changed its name in an attempt to leave behind some of the negatives associated with it, so the industry is...
responding to market pressures to separate legitimate from illegitimate activities.

These three approaches — general guidelines for conduct, criminalizing certain behavior, and cultivating the legitimate market — are important components of a regulatory framework. But the Blackwater assassination scandal suggests the need for this to be complemented by a prohibition on outsourcing certain public functions entirely.

In fact, U.S. law forbids the outsourcing of ‘inherently governmental’ functions, though a definition of what that covers is maddeningly hard to find. This is partly because the U.S. attitude to privatization is radically different from the European understanding. In Europe, there is a debate over whether public functions should be transferred to private actors. In the United States, the question is framed as whether certain functions should be public in the first place.

In the United States, then, the ‘inherently governmental’ label operates not as a protected area of public interest so much as an increasingly narrow exception to the presumption that all aspects of government should be considered for privatization. This has undermined accountability and justified some terrible policies.

There are two basic reasons why certain functions should never be outsourced. First, it would make effective accountability impossible — as in the case where a program operates in secret and has the potential for abusive conduct. Second, if the public interest would require oversight by a governmental (and therefore politically accountable) actor. Both situations would apply to many of the programs considered here — leaving aside the question of whether assassinations and waterboarding should be allowed at all.

The first is really a legal argument for the possibility of accountability. Allowing the delegation of covert action to private actors undermines even the limited checks on intelligence operations. That may, of course, be the point: It is clear that no one intended the assassination program to be made public until Leon Panetta, President Obama’s director of the C.I.A., was briefed on it four months into his tenure. He sensibly terminated the program, briefed Congress, and successfully blamed the whole thing on his predecessors.

The second argument is a political one. It accepts that even in a democracy it is sometimes necessary to push at the limits of law to deal with threats. But such actions can only be justified if they are linked to the democratic structures they are intended to protect.

A workable definition of “inherently governmental” would cover the exercise of discretion in actions that significantly affect the life, liberty, or property of private persons. Such a definition would prohibit the Blackwater assassination program and severely restrict the role of contractors in interrogations.
Unfortunately, debates about the U.S. reliance on contractors tend to focus on questions of cost and periodic outrage at corruption. Last year a consensus appeared to be emerging that contractors should not be in charge of “enhanced” interrogation, but this seemed to be driven by the fact that each of the alleged torturers cost the U.S. taxpayer about double the salary of a Federal employee.

Even the assassination program failed to start a meaningful debate on what should and what should not be outsourced. At the very least, the responsibility to determine what is and is not ‘inherently governmental’ should itself be an inherently governmental task.

*Simon Chesterman is director of the New York University School of Law Singapore Program and the editor, with Angelina Fisher, of “Private Security, Public Order: The Outsourcing of Public Services and Its Limits.”*