

EMPLOYING PRIVATE MILITARY COMPANIES

A QUESTION OF RESPONSIBILITY

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Foreword

On 23 May 2007, the Dutch government asked the Advisory Council on International Affairs (AIV) to prepare an advisory report on the employment of civilian service providers in operational areas (see Annexe I for the request for advice). Although it is not new, this practice has recently become newsworthy, due to a sharp increase in its scale and scope, and experiences involving its use in Iraq and Afghanistan. Outsourcing and privatising military tasks are becoming increasingly common. During the preparation of this advisory report, the topical nature of the request for advice was further highlighted by the shooting incident involving the US private security company Blackwater in Baghdad on 16 September 2007, which left 17 Iraqi civilians dead, and its aftermath.

Iraq is currently home to the highest ever number of service providers, estimated at 180,000 people. At the beginning of the 1990s, during the liberation of Kuwait, the ratio of soldiers to private contractors was still 50:1. In Iraq it now stands at roughly 1:1. There and elsewhere, these service providers carry out activities ranging from infrastructural projects and logistical support to tasks in which the use of force is an explicit possibility, such as personal and transport protection and guarding bases and prisons.

The Dutch armed forces are also making increasing use of private service providers. In Afghanistan, for example, catering at Dutch military camps and the supply of food and fuel have been outsourced to private companies; civil aviation companies are frequently used for local transport needs; civilian mechanics repair military materiel in the operational area, and armed Afghan contractors perform guard duties around the Dutch bases. In Afghanistan, the Netherlands is also cooperating closely with a private party employed by the United States to train the local security services.

In its request for advice on civilian service providers in operational areas, the government posed five specific questions:

1. What services may, in principle, be outsourced and what preconditions should the Dutch government observe when doing so?
2. To what extent can and should the Dutch government accept legal and political responsibility for the activities of civilian service providers and their consequences? Should the Netherlands develop specific legislation in this area?
3. Is it acceptable for civilian personnel to be recruited from around the world for deployment in war zones? What should be the government's position on this issue?
4. To what extent do the Dutch government and its armed forces have a duty of care for the safety of civilian personnel?
5. What are the possible effects of the abduction, mistreatment and/or killing of civilian personnel?

In its request for advice, the government also asked the AIV to focus primarily on the political and ethical aspects of employing civilian service providers in operational areas, against the background of international law. The AIV believes however that international law should be at the forefront of such an evaluation, and this viewpoint is reflected throughout the report.

The report frequently refers to US experiences with private contracting in operational areas. One of the main reasons for this is that many recent developments in this area have involved the United States. However, the AIV is keen to emphasise that the conclusions and recommendations in this report are tailored to the situation of the Netherlands. In advance of what will be discussed in the report, the AIV believes that it is very much in the public interest to ensure that issues relating to the employment of private service providers by the Dutch armed forces in crisis areas are central in the political debate.

The report is structured as follows. Chapter I provides an introductory overview of the employment of civilian service providers in operational areas. Chapter II examines the issue from three perspectives: economic, political-military and legal and ethical. Chapter III then analyses private contracting by the Netherlands in Afghanistan. Against this background, Chapter IV, which evaluates private contracting by the Netherlands, responds to the government's five specific questions. The report ends with a summary.

The report was prepared by a joint committee, which consists of the following members of the AIV: A.L. ter Beek (chair), Professor A. van Staden (vice-chair), Professor T.C. van Boven, Ms A.C. van Es (during the first stage of the advisory process), Dr P.P. Everts, Professor M.T. Kamminga (corresponding member), Rear Admiral R.M. Lutje Schipholt (retd.), Lieutenant General H.W.M. Satter (retd.), Ms H.M. Verrijn Stuart and E.P. Wellenstein. The civil service liaison officers were M.A. Veenendaal and Lieutenant Colonel G. de Gooijer of the Ministry of Defence. The executive secretary was J.M.D. van Leeuwe, assisted by Ms S. Çoker and Ms E. Jansen (trainees).

In connection with this report, Lieutenant Colonel G. de Gooijer and Lieutenant Colonel G. van Kuijck of the Ministry of Defence gave a presentation on private contracting by the Netherlands in Afghanistan. Background discussions were conducted with various officials from the Ministry of Foreign Affairs and the Ministry of Defence. The committee met with Sir Malcolm Rifkind (non-executive chairman of the British private security company Armorgroup), C. Beese (chief administrative officer of Armorgroup) and R.R.K. Hiemstra (director of Acestes Public Sector Strategy). The executive secretary of the committee met with L.C. van Dijke (public affairs officer of the construction company Volker Wessels), W. Sniijders (director of Volker Stevin Materieel bv) and T. Herkemij (chair of the Logistics Support Group). Professor T.D. Gill (professor of military law at the University of Amsterdam and the Netherlands Defence Academy) responded to written questions from the committee. Finally, two of the AIV's four permanent committees – the Human Rights Committee and the Peace and Security Committee – were involved in the preparation of this report. The AIV is grateful to everyone it consulted for their input.

The AIV finalised this report on 7 December 2007.

I The private military industry

I.1 The scope of private contracting in operational areas

Since the end of the Cold War, Western armed forces have been making increasing use of private companies in support of military operations. The United States leads the way in this area, but the Netherlands is also increasingly employing such companies. At present, the Netherlands is gradually implementing ideas that until recently were entirely hypothetical. Against this background, the government asked the AIV to prepare an advisory report on the preconditions for, and the consequences of, employing private service providers.

The request for advice refers to 'civilian service providers in operational areas'. In this report, operational areas are understood as including assembly areas and operating bases in neighbouring regions or countries.

Civilian service providers include, firstly, companies that specialise in providing services under difficult and dangerous conditions in operational areas: private military companies (PMCs) and private security companies (PSCs).¹

The influential Geneva Centre for the Democratic Control of Armed Forces (DCAF) defines PMCs as:

businesses that offer specialised services related to war and conflict, including combat operations, strategic planning, intelligence collection, operational and logistic support, training, procurement and maintenance.²

This definition covers the provision of many services, ranging from maintenance work to combat operations. PMCs thus also perform tasks that used to be carried out by the military and can be counted among the core tasks of the armed forces. For the sake of clarity, despite the terminological diversity in the literature, this report will henceforth use the general term private military companies (PMCs), which is widely used at international level.

The report focuses primarily on the employment of PMCs by the Netherlands, as the political, legal and ethical questions discussed below apply primarily to these organisations. However, the report also examines, *mutatis mutandis*, the employment by the Netherlands, in the framework of military operations, of all other private companies that do not define themselves as PMCs or PSCs, such as fuel suppliers, tent builders and construction companies.

The problem of mercenaries, in the strict sense of the term, and the actions of small private

1 Proponents of the term private *security* companies, in particular, emphasise the distinction from private *military* companies because they believe that 'military companies' focus mainly on more offensive tactics, while security companies limit themselves strictly to defensive tasks. In practice, however, this distinction is not so clear, since the activities of the various companies tend to overlap. Incidentally, other terms, such as private military contractors and private military firms, are also used.

2 Geneva Centre for the Democratic Control of Armed Forces, *Private Military Companies*, DCAF Backgrounder, 04/2006. For more information on this organisation, see: <<http://www.dcaf.ch>>. This is not the only definition of PMCs that appears in the literature.

armies that are independently capable of carrying out entire military operations at the request of a government or a local ruler, such as staging a coup or crushing a rebellion, are beyond the scope of this report.

1.2 Global rise

In his standard work *Corporate Warriors: The Rise of the Privatized Military Industry* (2003), the American Peter Singer, a Senior Fellow at the Brookings Institute, examines in depth the growth of the privatised military industry since the beginning of the 1990s. He maintains that the global rise in the use of private companies to perform tasks that were once reserved primarily for national militaries can be explained by three simultaneous developments:³

1. The gap in the security market: changes in supply and demand after the Cold War. The end of the East-West conflict generated positive expectations regarding cooperation between the members of the Security Council and the potential role of the United Nations in maintaining international peace and security. As a result, the number of international peace operations increased significantly, providing the emerging privatised military industry with room for growth, initially in Africa (Angola, Congo and Sierra Leone) and soon afterwards also in Europe (the former Yugoslavia).
2. The transformation of warfare. Due to technological developments in the field of weaponry, small groups nowadays also have considerable firepower. In addition, technical advances mean that private companies are increasingly responsible for the maintenance of complex weapons systems and information and communications technology (ICT), including in operational areas. In some cases, the United States has even placed the control of military systems that are vital to combat operations in the hands of civilians, as in the case of the Predator and Global Hawk unmanned aircraft.
3. The power of privatisation and the privatisation of power. During the 1990s, the privatisation of government tasks became increasingly common. The key assumption behind this development, which was particularly prevalent in the United States, was that all traditional government tasks that could be outsourced would – almost by definition – be carried out more efficiently and more effectively. This even applied to the armed forces, especially in the US. Between 1994 and 2002, for example, the US Department of Defense signed more than 3,000 contracts, with an estimated value of over USD 300 billion, with US private military companies.⁴

The AIV agrees with this analysis, but adds a fourth explanation that, in its view, is especially applicable to countries like the Netherlands:

4. The gap between political ambitions and military capabilities. Since the end of the Cold War, certainly insofar as the Netherlands is concerned, there has been an increase in the frequency of military deployments for expeditionary crisis management operations⁵

3 P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, (Ithaca: Cornell University Press, 2003), pp. 49-70.

4 Ibid, p. 15.

5 Expeditionary operations are operations carried out at a relatively large distance from the home base by a military force that is for the most part logistically self-sufficient.

(e.g., in Cambodia, Bosnia-Herzegovina, Kosovo, Ethiopia-Eritrea, Iraq and Afghanistan). Such operations, in distant countries where the infrastructure is poor and host nation support (HNS) leaves much to be desired, require additional logistical support.⁶ In preparation for these new tasks, such as humanitarian intervention and military intervention in intra-state conflicts, as well as due to substantial cutbacks in funding, the military has undergone – and is still undergoing – a radical transformation of its size and structure that has included the abolition of compulsory military service. Moreover, current expeditionary operations have generated new requirements and shortcomings, particularly in the area of logistical and technical support. Employing private service providers is one of the potential solutions to this problem.

I.3 A multi-faceted issue

Since the 1990s, this large and growing industry has taken many forms and encompasses much more than – and much that is different to – what we traditionally refer to as mercenaries. It is estimated that there are currently more than 180,000 contractors operating in Iraq, including approximately 30,000 armed security guards. Nobody seems to know exactly how many contractors are in the country or what they are doing there, not even the Pentagon.⁷ This is illustrative of the general lack of insight into this industry. The AIV notes, incidentally, that even less is commonly known about the involvement of private companies in Afghanistan, where the Netherlands is now chiefly active.

As already noted, private service providers in Iraq and Afghanistan perform a large number of wide-ranging tasks. In practice, however, it could be argued that there are two clearly distinguishable types of PMCs: ‘those with guns and those without’, or, in other words, security contractors and logistics contractors.⁸

The reliability and service records of companies in this sector vary considerably. In addition to companies that act in a professional, decent and responsible manner, there are others of which the opposite is true. Due in part to the shooting incident referred to in the foreword, the controversial US company Blackwater casts a pall over the entire industry. However, this affair could also pave the way for a serious international debate on the potential and limits of private contracting. This affair and others like it highlight the political, military, legal and ethical risks associated with such contracting. These risks are addressed in Chapter II.

The consumers of private military services are just as varied as the providers of those services. There is more than one kind of customer: ‘Their customers [...] ranged across the moral spectrum from “ruthless dictators, morally depraved rebels and drug cartels” to “legitimate sovereign states, respected multinational corporations, and humanitarian

6 *NATO policy on contractor support to operations*, 12 January 2007, p. 1. See also the Budget Day Letter of the Minister of Defence, *Wereldwijd dienstbaar* [Providing services worldwide], 18 September 2007, p. 6.

7 Estimates of the total vary greatly. During the advisory process, for example, the AIV saw estimates of the total number of contractors in Iraq rise from 100,000 to 180,000, of whom more than 100,000 are believed to be of Iraqi origin. It is also unclear how many of these contractors are armed security guards. Different sources give estimates ranging from 10,000 to 50,000.

8 David Isenberg, ‘Challenges of Security Privatisation in Iraq’, in Alan Bryden and Marina Caparini (editors), *Private Actors and Security Governance*, LIT & DCAF, 2006, p. 155.

NGOs".⁹ On the basis of its own research, the International Peace Operations Association (IPOA), the US trade association for PMCs, concludes that national governments are the largest consumers of PMC services (62%). Others include the private sector (29%), non-governmental organisations (3%) and even individuals (6%).¹⁰ The war in Iraq provides the most telling example of the current scale of private contracting, although at least 25 different security companies are currently operating in Kabul as well.¹¹ According to a local observer, 'local and international aid organisations, international donor organisations, the United Nations, the peace forces, diplomatic missions and contractors from companies involved in reconstruction projects are glad to make use of these private armies.'¹²

1.4 A billion dollar market

Not only is it unclear how many PMCs are operating in Iraq and Afghanistan and exactly how many workers they employ, but the sums of money involved are also no more than estimates. The US State Department reportedly spends USD 4 billion a year on PMCs in operational areas,¹³ while the US Department of Defense supposedly spends a similar amount on PMCs.¹⁴ It is known, for example, that the US government's contract with Kellogg Brown and Root (KBR), which until the beginning of 2007 was part of Halliburton, the US government's main private partner at the beginning of the invasion of Iraq, has been worth more than USD 20 billion since 2003. Other examples include the now notorious Blackwater company, which has secured approximately USD 1.2 billion in joint contracts since 2003. Finally, the US company DynCorp, which among other things employs hundreds of contractors in Afghanistan and also has dealings with Dutch nationals there, reportedly has an annual turnover of approximately USD 400 million.

Huge interests are at stake, and the pressure on political leaders from the industry is therefore also increasing. In such circumstances, the use of PMCs is determined not only by demand but also by supply. This gives rise to thoughts about the emergence of a new 'military-industrial complex',¹⁵ which places the interests of private parties, the military bureaucracy and political leaders above the general interest. The fact of the matter is that companies are motivated by profit. The main objective of contractors is to please their shareholders, not to serve some higher political purpose. On the contrary, the private military industry thrives on international tension.

9 Doug Brooks and Hussein Solomon, 'From the Editor's Desk', *Conflict Trends*, no. 6, July 2000. As cited in Singer, 2003, p. 9.

10 These percentages are derived from IPOA's own research into the state of the industry in 2006. IPOA, *State of the Peace and Stability Operations Industry Survey 2006*, p. 11.

11 Linda Polman, 'De bavianen van Kabul' [The baboons of Kabul], *Wordt Vervolgd*, monthly magazine of Amnesty International in the Netherlands, no. 6, June 2007, p. 16.

12 Ibid.

13 'Use of Contractors by State Dept. Has Soared', *The New York Times*, 24 October 2007.

14 'Panel Faults Army's Wartime Contracting', *The New York Times*, 1 November 2007.

15 This term was coined by President Eisenhower in his farewell address to the American people on 17 January 1961. Another frequently used term is 'iron triangle'.

It is therefore not surprising that a substantial amount of literature that addresses these developments has recently emerged. This literature also contains increasingly critical comments to the effect that the scale of the privatisation of security and the dependency on PMCs has spiralled out of control, while supervision of their activities is wholly inadequate.¹⁶ However, this does not change the fact that private service providers have become a permanent fixture in operational areas. The key issue is therefore to regulate the use of PMCs as effectively as possible. In this context, special attention should be devoted to the political accountability and legal liability for and supervision of PMCs.

¹⁶ Whistleblowers are not popular, however. In the foreword to a recent publication, P.W. Singer notes that his controversial conclusions not only generated a number of lucrative offers but also two death threats. P.W. Singer, *Can't Win With 'Em, Can't Go To War Without 'Em: Private Military Contractors and Counterinsurgency*, Policy Paper, The Brookings Institute, no. 4, September 2007.

II Three perspectives on private contracting

II.1 A more general view

In this chapter, before moving on to answer the five specific questions from the government's request for advice, the AIV takes a more general view of the issue of private contracting in operational areas by examining it from three perspectives: economic, political-military and legal and ethical. Depending on the circumstances, each perspective may lead to a different assessment, for example of the five questions submitted by the government. In practice, of course, the three perspectives cannot be separated from each other. The examination commences with the economic perspective, since the phenomenon of private contracting is often explained on the basis of the savings it makes possible.

II.2 The economic perspective

It is possible to approach the employment of private companies to carry out certain military tasks, or tasks connected to military operations, from a purely economic or business perspective. In that case, the main criteria are efficiency and effectiveness. The key questions are: which tasks meet the criteria for privatisation or, alternatively, which tasks cannot be carried out by the military, or only at a higher cost or less effectively, either in general or in the context of a specific operation that has already been approved at the political level?

For example, it may prove useful or necessary to purchase additional private capacity or outsource certain tasks at times of peak demand (which is also common business practice). It may also be deemed too expensive to independently maintain certain capabilities, such as strategic air transport. Another consideration might be that outsourcing leaves members of the armed forces available for more complex tasks for which civilian replacements are hard to find.

In practice, it will often be difficult to work out whether purchasing additional capacity is really cheaper, as this assessment is obviously linked to such issues as the cost of running down one's own resources, the estimated lifespan of certain investments (e.g., transport aircraft) and the quality of the product provided. Sometimes there is no choice, because the political decision to participate in an operation has already been taken. In such cases, the cost evaluation is less important, since the operation must be carried out no matter what.

The war in Iraq and other recent conflicts have provided a number of experiences with the use of PMCs that are also applicable in a wider context. First of all, the private sector has demonstrated that, in principle, it can meet the governmental demand for its services. This led the chairman of IPOA to declare that 'it is due to innovative utilisation of the private sector that coalition operations in Afghanistan and Iraq are the best supported, best supplied military operation in history.'¹⁷

The Pentagon now regards PMCs as an integral part of its total force.¹⁸ Since the 1990s,

¹⁷ Doug Brooks, President of IPOA, *JIPO*, vol. 3, no. 2, September-October 2007, p. 4.

¹⁸ 'Privateers under fire', *The Economist*, 22 September 2007, p. 49.

US military doctrine has been based increasingly on the theoretical desirability of outsourcing at the very least auxiliary services to specialised private companies (see Chapter I). This is compatible with the philosophy that has gained broad acceptance in the business world, namely that outsourcing is economically advantageous. Even without former Secretary of Defense Donald Rumsfeld's well-known preference for a military that is as 'lean' as possible, logistical support in Iraq would still have been placed in the hands of private companies. The armed forces focus mainly on their operational tasks.

However, the immense scale of private contracting in Iraq, which as already noted involves billions of dollars, has also shown that this method is vulnerable to fraud if the client is unable to monitor it closely.¹⁹ This is particularly true if the parties have concluded cost-plus contracts (in which costs are not fixed), as is often the case in Iraq and probably also in Afghanistan. These contracts are long-term agreements in which the allowable or otherwise defined costs are reimbursed by the customer, together with a percentage of these costs or a fixed fee. In contrast to contracts based on fixed cost agreements, in which the contractor bears most of the risk, service providers run almost no financial risk with cost-plus contracts. In addition, there is no incentive to work efficiently. On the contrary, if a PMC stands to receive a percentage of the costs, its profits will rise as the expenses claimed increase.

Thus, as the extent of contracting increases, so do the financial risks, and the monitoring agency has to expand its activities accordingly. This did not happen in the United States. According to the Comptroller General of the US Government Accountability Office (GOA) in September 2006, 'the Pentagon's overworked acquisitions staff has been mismanaging contractors, resulting in lost time and money and shortchanging the war fighting capabilities of the troops'.²⁰ The State Department came to a similar conclusion in October 2007.²¹

It is therefore impossible to verify the prediction that PMCs would save money in existing conflicts. Neither the Pentagon nor the State Department is able to provide any information – either positive or negative – on the cost effectiveness of using contractors instead of military logistical units in Iraq.

In fact, choices relating to the scale and structure of the armed forces and the related investment structure, which have long-term implications, determine whether more or less reliance will have to be placed on private contracting in a given situation. This situation is unpredictable, but once made, the choices cannot be reversed, even if they prove to have been regrettable. Whether or not a different choice would ultimately have saved money is a purely hypothetical question.

19 'U.S. Says Company Bribed Officers for Work in Iraq', *The New York Times*, 31 August 2007. See also various US investigative reports published since the Blackwater incident of 16 September 2007.

20 Statement of David Walker, Comptroller General of the United States, Before the Subcommittee on Defense, Subcommittee on Appropriations, House of Representatives, *DOD Acquisitions Contracting for Better Outcomes*, 7 September 2006.

21 *The New York Times*, 24 October 2007. At the State Department, according to this article, just 17 compliance officers had monitored the implementation of complex contracts worth USD 4 billion.

Our conclusion is therefore that cost effectiveness is not a decisive factor – either in advance or in actual operational situations – in the extent of civilian contracting. This is without factoring in unforeseen costs such as liability for the misconduct of contractors, not to mention non-material costs such as a worse reputation due to loss of prestige and authority. In short, in addition to its economic aspect, outsourcing has political-military and legal and ethical aspects that must definitely be considered in making decisions about it. These are discussed in the following sections.

II.3 The political and military perspective

From a political and military-operational perspective too, the war in Iraq and other recent conflicts have yielded a number of experiences that should be included in the evaluation. A key political advantage of PMCs is obviously that they enable governments to manage their objectives in a flexible manner, for example at times of peak demand or in cases where the armed forces completely lack certain capabilities.

Besides the fact that PMCs are a means of reaching political objectives, they also enable governments to circumvent political constraints, such as political or other limits on military action. They thus help to increase the government's flexibility. The drawback, however, is that they can – intentionally or unintentionally – obscure the government's true objectives.²²

This makes it difficult to exercise democratic control, primarily because it is often unclear who is responsible for what (see the next section on the legal perspective). In situations involving the deployment of regular troops, by contrast, political responsibility and legal liability are clear-cut. Incidents involving PMCs and casualties among PMC employees make the news less frequently and are often not included in official statistics. For example, the fact that approximately 1,000 contractors have been killed in Iraq in recent years has received much less coverage than the number of soldiers that have been killed (approximately 3,500). The fact that nobody appears to know exactly how many contractors are in Iraq and Afghanistan or precisely what they are doing there also contributes to this general lack of transparency. The PMCs themselves are far from lavish with information. Be that as it may, government reports and the media focus more on the deployment of troops and its consequences than on contractors: 'While private forces make up over 50% of the overall operation in Iraq, they have been mentioned in only a quarter of one percent of all American media stories on Iraq.'²³

The Blackwater affair has further highlighted the serious risks connected to the use of PMCs. The reckless and irresponsible conduct of certain PMCs, in particular the security companies, which enjoy immunity from local prosecution in Iraq, undermines the hearts and minds campaign and thus jeopardises the entire counterinsurgency operation.

But war changes everything

The US armed forces, or at least their operational units, have now become dependent on the private sector – in this case private military companies – for large-scale operations,

22 A well-known example is the use of the US company Military Professional Resources Incorporated (MPRI) in Bosnia-Herzegovina in 1995, as described, for example, by Singer, 2003, p. 5.

23 Singer, September 2007.

including in high-risk environments.²⁴ Experiences gained in this area during the 1990s seemed to indicate that this would be a win-win situation.

During extended periods of peace, employing PMCs to meet the logistical needs of combat units seems to become more attractive. The argument is that governments only need to pay private companies when they require their services, while they must always continue paying military personnel even when they are not on deployment. 'But war changes everything,' as two US generals say who were closely involved in logistical support to US troops in Iraq.²⁵ Experiences in Iraq have shown that PMCs in high-risk situations are actually not able to provide the same logistical services as the military: 'contractors are better suited to peacekeeping scenarios, such as Bosnia, than to war or peace enforcement situations [...] and an insurgency eliminates the idea of secure territory.'²⁶

Furthermore, military commanders have no command authority over PMCs, which can say 'no' to life-threatening assignments and even strike on the battlefield. As already noted, PMCs protect the interests of their shareholders rather than the general interest. This inherent and fundamental conflict of interests can get in the way of the political and military objectives of crisis management operations and cause serious harm to such operations.²⁷

A commander should have full control over all his or her resources. The idea that contractors will do their work under all circumstances is wishful thinking. As noted by the Dutch Ministry of Defence, 'It is important to limit our dependence on leasing civilian aircraft. [...] Furthermore, they are not always available or suitable for operational deployment, for example in the case of operations in dangerous regions or if runways are short and badly paved. Private leasing also entails restrictions on load capacity, special cargoes and the *usual termination clauses* in contracts.'²⁸ This specific example can be extrapolated to all types of civilian services.

Another potential problem of the split command structure is the absence of any real contact between the military and civilian worlds. In a dynamic and risky environment, in particular, this can literally endanger lives. There have already been cases in which soldiers and contractors have opened fire on each other (known as blue-on-blue incidents).²⁹ In

24 See also 'Contractors on the Battlefield' (Field Manual (FM) No. 3-100.21), drafted by the Headquarters Department of the US Army, 3 January 2003. Cooperation between the army and PMCs was shaped chiefly by the Logistics Civil Augmentation Program (LOGCAP), an initiative of the US army to employ private contractors to provide logistical services and to construct, supply and maintain bases, even in times of crisis.

25 Lieutenant General Paul Kern, commanding general of the Army Materiel Command from 2001 to 2004, and Major General Wade McManus, commanding general for the US Army Field Support Group in Rock Island, Illinois from 2000 to 2004. Both quoted in Dina Rasor and Robert Bauman, *Betraying Our Troops: The Destructive Results of Privatizing War*, (New York: Palgrave MacMillan, 2007), p. 225.

26 Ibid.

27 Rasor and Bauman, 2007, p. 8.

28 The Minister of Defence and the State Secretary for Defence, answers to parliamentary questions on the policy letter *Wereldwijd dienstbaar*, 22 October 2007, p. 36 (emphasis added).

29 US Government Accountability Office (GOA), *Rebuilding Iraq: Actions Still Needed to Improve the Use of Private Security Providers*, Testimony, 13 June 2006.

addition, private convoys frequently drive through a military commander's area of responsibility (AOR) without his knowledge. This makes it difficult to provide military assistance when a convoy requests such assistance in an emergency. It should be clear that each party must be aware of the other's movements and that information needs to be exchanged systematically. The command and information structure should facilitate this.

II.4 The legal and ethical perspective

The growth in the number, scale and scope of activities engaged in by PMCs also has major legal and ethical implications. Here, too, the key issues are transparency, monitoring and responsibility. They lead inevitably to the conclusion that the use and actions of PMCs can have important ethical implications and that they are only advisable and acceptable under strict legal conditions.

International law on PMCs

Employees of PMCs are not part of the armed forces and do not fall under the discipline or command structure of the military. If they are deployed during an armed conflict, they are accordingly regarded as civilians, not combatants, under international humanitarian law.³⁰ It makes no difference in this regard whether they are employed exclusively for defensive or also for offensive tasks. This also means that private contractors are not entitled to prisoner of war status.³¹ However, the Third Geneva Convention does contain an exception to this rule that companies could use. By virtue of Article 4(4), certain civilians who accompany the armed forces, including supply contractors, have a right to be treated as prisoners of war. In such cases, they must have authorisation from the armed forces in question, which should be apparent from a special identity card. Incidentally, according to the Ministry of Defence, the distribution of such cards to contractors employed by the Netherlands in Afghanistan is not under discussion at present.

International law contains no other provisions on the potential use of PMCs by states in conflict situations. An attempt to adopt provisions in a related field (mercenaries) has proved unsuccessful. Although mercenaries are explicitly beyond the scope of this advisory report, the AIV notes that only 30 states, including hardly any Western states, have ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989.³² The Netherlands is not party to this Convention. It is generally acknowledged that the term 'mercenary' is very difficult to define and that no usable definition has been found. States must therefore rely on their own (or, in the case of allied

30 Emanuela-Chiara Gillard, 'Private Military/Security Companies: The Status of Their Staff and Their Obligations under International Humanitarian Law and the Responsibilities of States in Relation to their Operations', in Andrew Alexandra et al., eds., *Private Military and Security Companies: Ethics, Policies and Civil-Military Relations* (New York: Routledge, 2008).

31 According to Article 47 of the First Protocol to the Geneva Conventions on international humanitarian law, to which the Netherlands is party, mercenaries are also not entitled to prisoner of war status during an international armed conflict. However, the definition of mercenaries is so restrictive that it does not cover PMCs, and the article is therefore not relevant in this context.

32 The 30 states are: Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cuba, Cyprus, Georgia, Guinea, Italy, Liberia, Libya, Maldives, Mali, Mauritania, Moldova, New Zealand, Peru, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan (as of 16 August 2007).

action, collective) definitions for the limits on and conditions for employing PMCs.

Experiences in Iraq and Afghanistan: PMCs under the jurisdiction of sending states

Experiences in Iraq and Afghanistan may once again be instructive. In June 2004, for example, in his capacity as head of the Coalition Provisional Authority (CPA) in Iraq, Ambassador L. Paul Bremer III provided all contractors with immunity from Iraqi prosecution by means of Order 17, in order to make up for the absence of a status of forces agreement (SOFA) due to the non-existence of an Iraqi government at that time.³³ The Order does provide that foreign employees should comply with all Iraqi laws and that immunity can be waived. The latter has never occurred, however, due to a lack of faith in the Iraqi justice system. In accordance with Order 17, all contractors fall under the exclusive jurisdiction of the sending states. Section 4(6) of the Order provides that 'the Sending State shall be the state of nationality of the individual or entity concerned'. This means that the sending state is not necessarily the state that employs the individual or entity concerned. As it happens, the two are more likely to coincide in the case of the United States than in the case of the Netherlands.

A similar situation also applies in Afghanistan, where ISAF/NATO and the Interim Administration of Afghanistan concluded a Military Technical Agreement (MTA),³⁴ which states that ISAF 'and supporting personnel' (read: private contractors)³⁵ enjoy immunity from prosecution in Afghanistan (Annex A, section 1, para. 1). ISAF and the supporting personnel fall under the exclusive jurisdiction of their respective states. Locally employed personnel by contrast fall under Afghan law, except when performing the tasks they were hired to carry out, in which case they also enjoy immunity (Annex A, section 4, para. 14(a)). The Netherlands has made a reservation to the effect that this immunity can be waived.³⁶

This imposes a special political and moral responsibility on the troop-contributing states to ensure that nobody enjoys *de facto* immunity and that every person who commits an offence can be prosecuted. In this regard, it is problematic that each troop-contributing state has jurisdiction over its own nationals and only very limited jurisdiction over persons with other nationalities.

In short, there are three different situations in which states can have some kind of legal relationship with PMCs: (1) troop-contributing states that employ PMCs; (2) host states where PMCs operate; and (3) sending states in general, i.e., the state of nationality of the contractor or the state from which a PMC operates and where, for example, its headquarters are located.

33 Coalition Provisional Authority Order No. 17 (revised), 27 June 2004, p. 4, section 2 (1).

34 Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan.

35 'Contractor support is covered in the MTA with Afghanistan', *Instructions to NAMSAs contractors deployed at Kandahar Airfield Afghanistan*, 9 November 2006.

36 The Ministers of Foreign Affairs and Defence, answers to parliamentary question from Alexander Pechtold (MP) on private security companies, 7 November 2007.

Individual liability and loopholes in the prosecution process

In the case of the Netherlands, the situation described above creates the following picture in cases in which the host state grants immunity to the Dutch armed forces as well as to private service providers employed by the Netherlands:

Deployed by the Netherlands	Dutch jurisdiction
Members of the Dutch armed forces.	Fall entirely under Dutch criminal law and disciplinary procedures.
Dutch contractors in operational areas.	Fall under Dutch criminal law to a lesser extent than Dutch troops, only in the case of serious offences (see Arts. 3-8 of the Criminal Code and several provisions in specific Acts).
Foreign contractors in operational areas.	Fall under Dutch criminal law to a very limited extent, only in the case of very serious offences, such as torture. In other cases fall under the criminal law of the country of their nationality.
Local contractors in operational areas.	Fall under Dutch criminal law to a very limited extent, only in the case of very serious offences, such as torture. Fall under local criminal law in principle, but enjoy immunity when acting in the performance of their tasks.

Table 1: Overview of Dutch jurisdiction in cases where the host state has agreed to grant immunity.³⁷

Based on this overview, which inevitably offers a somewhat simplified picture of a complex reality, the AIV notes that there are potential loopholes in the prosecution process. Firstly, there is a greater chance that a Dutch soldier will be prosecuted and punished for an offence than if the same offence is committed by a Dutch or non-Dutch service provider. In addition, to prosecute non-Dutch contractors in the operational area, the Netherlands is dependent on the effective application of the relevant national legislation of third countries. There are no guarantees that this will result in a prosecution. At the very least, the legislation of the contractor's country of origin needs to provide for this possibility. Moreover, there needs to be a reasonable expectation that the country in question is actually willing and able to prosecute in such cases. The only legal remedy that the Netherlands has at its disposal in such cases is to demand the resignation of the person concerned and/or terminate the entire contract with the company in question – as long as this option was laid down in the contract beforehand.

³⁷ This table serves purely to illustrate the loopholes in Dutch jurisdiction in cases where an immunity agreement has been concluded with the host country. It does not aim to provide an exhaustive picture of all cases in which Dutch law applies in foreign countries. In addition, it does not take account of the possibility of universal jurisdiction, which can apply to contractors in the case of very serious international crimes (e.g., torture). In the case of the Netherlands, these are the offences listed in the International Crimes Act (WIM).

In fact, this picture is the same for all countries, as there are a number of specific problems that keep appearing in relation to national legislation:³⁸

- Evasive behaviour: PMCs can easily evade national legislation by moving to another country. In addition, foreign contractors essentially operate in a legal no man's land that exists between the legal systems of the host state, the troop-contributing state and the contractor's country of origin.
- Extraterritorial jurisdiction: problems arise when a foreign PMC employed by the Netherlands or another country operates in an operational area in a third country. In addition, to put it mildly, the exercise of legal authority by a troop-contributing state or the country of establishment of a PMC in another sovereign state is not a simple matter. For example, the collection of evidence at the scene of an offence in one country by investigators from another country is extremely complicated.
- Complex subject matter: the private military sector, with its wide range of global activities, has numerous loopholes that are difficult to control with national laws.

National legislation, especially of a country the size of the Netherlands, can therefore at most be very partially effective in regulating an industry that is based almost entirely abroad and also operates in foreign countries.³⁹ To a certain extent, the United States is an exception to this rule, as it is the country where most PMCs are based and currently employs far more PMCs than any other country. In practice, however, even the United States runs into serious legal problems in this area, as explained below.

The situation of the United States

In 2000, in response to misconduct by various PMCs during the 1990s, the United States adopted the Military Extraterritorial Jurisdiction Act (MEJA) to bring contractors within the reach of the US legal system. However, the Act applies only to contractors working for the Pentagon. Neither Blackwater nor any of the other PMCs working for the US State Department in Iraq falls under the MEJA, and they therefore enjoy at least *de facto* – and possibly even *de jure* – immunity. The Act has also proved ineffective in other respects. According to US Congressman David Price (D-NC), the MEJA has been applied just once in recent years, while there have been more than 60 court martial cases concerning Iraq alone.⁴⁰

In October 2007, in order to change this situation, the US House of Representatives agreed to extend the application of the MEJA to all contractors employed in operational areas by US government agencies. However, the bill includes two restrictions: (1) it only applies to US nationals; and (2) it only applies to offences that carry a custodial sentence of at least twelve months in the United States.

The MEJA Expansion and Enforcement Act of 2007, as this supplementary bill is known, further proposes that the US Federal Bureau of Investigation (FBI) establish a Theater Investigative Unit in every operational area to investigate alleged offences *in situ*. According to the bill, the US Department of Justice must inform Congress of the state of affairs on a regular basis.⁴¹ The US Senate is expected to pass this bill in the near future. In the

38 Singer, 2003 pp. 534-537.

39 Sarah Percy, *Regulating the Private Security Industry* (Adelphi Paper) (New York: Routledge, 2006).

40 David Price, 'Uphold Accountability for Security Contractors', Speech, 3 October 2007.

41 MEJA Expansion and Enforcement Act of 2007, passed by the US House of Representatives on 4 October 2007.

meantime, it was decided at the end of October 2007 that all convoys protected by PMCs fall under the responsibility of the Pentagon and thus under the MEJA of 2000.⁴²

Another instrument that the US government recently acquired to prosecute contractors in foreign countries is the Uniform Code of Military Justice (UCMJ) – the US code of military discipline. Since the beginning of the 2007 US fiscal year, this Code also applies to private contractors deployed during contingency operations. Although the Code was amended at the end of 2006, the Pentagon has so far not taken any steps to implement this legal change in practice.⁴³ No contractors have so far been prosecuted under the new Code. In January 2007, in response to this amendment to the US Code, Eimert van Middelkoop, now Minister of Defence but then a member of the Dutch Senate, asked the Dutch government ‘to examine whether it would be advisable to amend Dutch military criminal law in a similar way’. In its response, the government referred to its intention to ask the AIV for advice on this issue.⁴⁴ The present report examines this issue in section IV.2.

The Iraqi government is meanwhile working hard on legislation to annul Order 17 and ensure that contractors will in future fall under Iraqi law. It is not known how the United States, in particular, will respond to this.

Political accountability and state responsibility

The AIV believes that granting PMCs immunity from the jurisdiction of the host country, if doing so is in practice tantamount to granting impunity, is all the more unacceptable in cases involving serious offences constituting grave violations of human rights or international humanitarian law. Immunities and impunity in this area constitute violations of international law as it has developed over recent decades. In this connection, the AIV refers to the principle of state responsibility.

State responsibility should not be confused with the political accountability of governments.⁴⁵ Due to the complex nature of international relations, political accountability does not always imply state responsibility. The extent to which political accountability for the actions of privately employed service providers entails state responsibility for their potential misconduct depends on the applicability of the basic rules discussed below.

The basic premise of state responsibility is that states cannot evade their international law obligations by privatising state tasks.⁴⁶ The following comment of the UN Human Rights Committee from 2004 is instructive:

the positive obligations on States Parties to ensure Covenant rights will only be fully [...] discharged if individuals are protected by the State, not just against violations of

42 ‘U.S. Military to Supervise Iraq Security Convoys’, *The New York Times*, 31 October 2007.

43 ‘In turn, while the UCMJ legal change happened in Fall 2006, the Pentagon is yet to issue a guidance on how JAG [Judge Advocate General’s Corps] officers should use it in the field.’ Singer, September 2007, p. 12.

44 Answer of the Minister of Defence to questions from Eimert van Middelkoop concerning the application of military criminal law to private companies and their employees that provide services on a contractual basis to the army during military operations, 2 February 2007.

45 International Court of Justice (ICJ), 26 February 2007, para. 378.

46 European Court of Human Rights (ECHR), 25 March 1993, *Costello-Roberts v. the United Kingdom*, para. 27.

Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.⁴⁷

Common Article 1 of the Geneva Conventions provides that states should ensure respect for the Conventions 'in all circumstances'. This means, for example, that a state that employs a private security company to guard a military object should ensure that the employees of this company have been properly trained, that they have been given appropriate instructions governing the use of force and, if necessary, that repressive action is taken against violations. International law violations perpetrated by PMCs can be attributed to the employing state if:

- a. The company or person in question acts as an organ of the state, for example because it has been incorporated into the armed forces.⁴⁸ The key issue is whether there is complete dependence, which means that the company or persons in question can be regarded as an instrument of the state.
- b. The company or person in question is empowered to exercise elements of governmental authority, for example questioning detainees or using force in the context of an armed conflict.⁴⁹ It is irrelevant in this context whether the conduct in question contravenes instructions given by the state.⁵⁰
- c. The company or person in question is acting under the instructions or control of the state.⁵¹ The relevant case law uses the term 'effective control' in this context.⁵² In each case of wrongful conduct, it will be determined whether the privately employed persons or entities were actually acting unlawfully under the effective control of the state, as represented by the armed forces. This is not about the legal arrangements, which may serve as a smokescreen. States can also be held responsible for failures to intervene.
- d. The state takes on responsibility by acknowledging and adopting the wrongful act of the privately employed persons or entities. This possibility also includes state conduct that implies acknowledgement and adoption of responsibility for the actions of privately employed persons.⁵³ If it is unconditional and unequivocal, this implied acknowledgement and adoption can also have retroactive force.⁵⁴

47 General Comment No. 31 of the UN Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights (ICCPR). UN doc.CCPR/C/21/Rev.1/Add.13, para. 8, 26 May 2004.

48 Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts, UN General Assembly res. 56/83, 12 December 2001.

49 Article 5 of the Articles on Responsibility of States.

50 Article 7 of the Articles on Responsibility of States.

51 Article 8 of the Articles on Responsibility of States.

52 ICJ, 26 February 2007, para. 399. In this context, the ICJ also cites Article 8 of the Articles on Responsibility of States: conduct 'under the direction or control of that State'.

53 It is interesting that the example mentioned in Article 11 of the Articles on Responsibility of States is very similar to the above-mentioned political responsibility that can be acknowledged by states.

54 That was the case in the Iranian hostages case (*US Diplomatic and Consular Staff in Tehran*), ICJ Reports 1980.

The basic rules summarised above constitute an underdeveloped aspect of international law, however, and leave ample room for interpretation. Furthermore, state responsibility may also arise if a state fails to take adequate measures to prevent, or fails to take repressive action against, wrongful acts that are perpetrated by PMCs with the knowledge of the employing state. Although case law is gradually developing in this area, the judgment of an international court in a specific situation will depend heavily on the factual circumstances.

Given that the cases discussed here relate to services linked directly to the state's exercise of its monopoly on the use of force, rather than services in ordinary social and economic life, the AIV has opted for a broad interpretation. In the AIV's view, this implies that the Dutch government should assume that state responsibility can be invoked relatively easily in relation to PMCs. The government should accordingly start from the assumption that the Dutch state is ultimately responsible under international law for the consequences of serious forms of misconduct by PMCs employed by the Netherlands.⁵⁵

Jurisdiction and procedures for claiming damages

The vast majority of crisis management operations are carried out by coalitions. That is one of the reasons why the responsibility of the troop-contributing states for potential violations of human rights during international operations, in particular by PMCs, is such a complex issue. In practice, it has emerged that claims by victims can fall between two stools if the troop-contributing state refers them to the United Nations and the UN rejects its liability.⁵⁶

There is still no effective claims system for the negative consequences of actions by UN troops during missions. Although there has been some development in this area, a comprehensible and accessible procedure that applies uniform rules for various types of violations of human rights or humanitarian norms is still a long way off. The current claims system still falls under the jurisdiction of the troop-contributing states, and the chance of receiving compensation varies substantially from country to country. As in other countries, it is possible in the Netherlands to bring a civil action for damages against the state.

Self-regulation by the private military industry

Self-regulation means that the industry voluntarily conforms to a code of conduct that lays down standards with which participating companies must comply, albeit only on pain of 'excommunication'. The underlying idea is that this makes sense because companies want to avoid damage to their reputation in a market where customers put a premium on a flawless record of service. Self-regulation can make a useful contribution if imposed as a condition in contracts. In such cases, governments should only employ companies that subscribe to such codes.

Self-regulation guarantees nothing, however. It so happens that Blackwater, one of the most aggressive PMCs operating in Iraq, was a member of the US interest group IPOA until October 2007 and had endorsed the group's code of conduct.⁵⁷ Such codes should accordingly include a proper monitoring mechanism to ensure compliance.

55 Willem van Genugten, Marie-José van der Heijden and Nicola Jägers, 'Inzet huurlingen riskant' [Using mercenaries is dangerous], *De Volkskrant*, 13 November 2007.

56 European Court of Human Rights, 2 May 2007, *Behrami v. France*.

57 IPOA press release stating that Blackwater had resigned its membership of IPOA, 12 October 2007.

The Director General of the British Association of Private Security Companies (BAPSC) acknowledges that there is a limit on what such interest groups can achieve. There is no silver bullet that can be used to regulate the industry, he says, and in the absence of national and international legislation a voluntary code can bring about a change in behaviour.⁵⁸ However, such codes are in no way a panacea.

⁵⁸ Interview with Andrew Bearpark, *International Review of the Red Cross*, vol. 88, no. 863, September 2006.

III Employment of PMCs by the Netherlands: Afghanistan

III.1 Public information on private contracting is limited

The Netherlands is one of several countries hiring private services in Afghanistan, 'some of which may even include the use of force', according to the government's request for advice. Using public sources, this chapter describes the tasks and functions that the Dutch armed forces are currently outsourcing as part of their operations in Afghanistan.⁵⁹ The public information on private contracting by the Netherlands and the private organisations with which it works internationally is scarce and fragmented. Like its US counterpart, the Dutch government thus seems unable to provide any information – either positive or negative – on the cost effectiveness of using contractors instead of military units.

The AIV therefore advises the government, firstly, to supplement this overview, make it public and update it continually during the operation.

Task	Organisation/ Nationality	Number of persons	Value of contract in € millions
Fuel transport from Baluchistan, Pakistan, to Tarin Kowt and Deh Rawod. Armed security is subcontracted. ⁶⁰	Shell: ⁶¹ British/Dutch.	Unknown, but at least 100 persons according to the AIV's estimates.	12 (as of March 2007). ⁶²
Food transport from Kabul/Kandahar to Tarin Kowt and Deh Rawod. Armed security is subcontracted.	Supreme: ⁶³ headquarters in Switzerland, Dubai and Germany.	Unknown, but at least 100 persons according to the AIV's estimates.	71 (including next row, as of March 2007).
Catering services at Kamp Holland (Tarin Kowt).	Supreme (see above).	30 ⁶⁴	See above.

59 The Ministry of Defence granted the AIV access to a confidential overview of civilian service providers in Afghanistan.

60 Interview with Colonel J.M. Harts, head of material logistics (J4) within the Directorate of Operations of the Dutch Defence Staff, *Carré*, 12-2007, p. 16.

61 'Task Force Uruzgan en zijn logistieke keten' [Uruzgan Task Force and its logistical chain], *Defensiekrant*, 21 June 2007, p. 6, available at: <<http://www.mindef.nl>>.

62 See the table in the parliamentary letter from the Ministers of Foreign Affairs and Defence with supplementary information on Afghanistan, 24 August 2007.

63 Report of the parliamentary debate on the financial statements for 2005, 26 June 2006, pp. 16 and 18 (Parliamentary Paper 30 550, no. 10). See also *Defensiekrant*, 21 June 2006, pp. 6-7.

64 *Defensiekrant*, 21 June 2007.

Task	Organisation/ Nationality	Number of persons	Value of contract in € millions
Employment of local personnel. ⁶⁵	?	?	3 (status as of March 2007).
Helicopter maintenance. ⁶⁶	?	?	?
Maintenance of Bushmaster armoured vehicles. ⁶⁷	?	?	?
Local air transport: MI-26 helicopter supplying Tarin Kowt and Deh Rawod.	PANH – Russia. ⁶⁸	?	42 (total cost of air support for operations in Afghanistan, as of September 2007). ⁶⁹
Local air transport: two Antonov AN-12 transport aircraft supplying Tarin Kowt.	PANH – Russia.	?	See above.
Local air transport: Hercules L-100 cargo aircraft.	SAFAIR – South Africa.	7 ⁷⁰	See above.

65 Letter to parliament, 24 August 2007.

66 Joop Voetelink, 'De status van contractors bij de ondersteuning van Nederlandse troepen in het buitenland' [The status of contractors providing support to Dutch troops in foreign countries], in *Militair Rechtelijk Tijdschrift* [Military Law Journal], special issue on contractors, vol. C, July-August 2007 (no. 7), p. 233.

67 Ibid.

68 *De Vliegende Hollander* [The flying Dutchman], June 2007, p. 9. See also *Defensiekrant*, 21 June 2007, p. 6.

69 The Minister of Defence and the State Secretary for Defence, answers to parliamentary questions on the policy letter *Wereldwijd dienstbaar*, 22 October 2007, pp. 37-38. In a previous response to the Permanent Committee on Defence, the Minister of Defence wrote that leasing civilian transport aircraft accounted for approximately 20% of the financial estimate for the entire operation in Uruzgan, 26 June 2007, p. 3.

70 'Meer transport Afghanistan' [More transport in Afghanistan], *Defensiekrant*, 6 September 2007, p. 11.

Task	Organisation/ Nationality	Number of persons	Value of contract in € millions
Local air transport: DASH-7 for passenger transport. Aircraft will be equipped with self-protection devices. ⁷¹	Voyageur: Canada.	6 ⁷²	See above.
Afghan Security Guard (ASG) for armed security on the outer perimeter of Tarin Kowt and Deh Rawod.	Afghan nationals employed on an individual basis by the Netherlands. ⁷³	?	?
Security for embassy and diplomats in Kabul.	Identity of company unknown. However, all the security guards have Dutch diplomatic passports. ⁷⁴	?	?

Table 2: Employment of PMCs by the Netherlands in Afghanistan, based on public sources (as known to the AIV until mid-December 2007).

Information not included in the table

The table does not include PMCs that work closely with the Netherlands in the framework of ISAF or PMCs employed by the Netherlands together with other NATO member states through NATO and NAMSA (NATO Maintenance and Supply Agency). In this context, it is worth noting that the Dutch Military Police is working closely in Uruzgan with the US company DynCorp, which has been hired by the United States to instruct and train the Afghan security forces.⁷⁵ This organisation encountered controversy in Bosnia-Herzegovina

71 *De Vliegende Hollander*, June 2007.

72 *Defensiekrant*, 6 September 2007. See also 'Vergroting transportcapaciteit Afghanistan' [Increasing transport capacity in Afghanistan], *De Vliegende Hollander*, no. 9, October 2007, p. 35.

73 The Ministers of Foreign Affairs and Defence, answers to parliamentary questions from Alexander Pechtold (MP) on private security companies, 7 November 2007. The outer perimeter is located at a distance of more than one kilometre from the inner perimeter, which directly encircles the camp. The outer perimeter is approximately ten kilometres long and consists of a physical barrier. The landing strips are located within the outer perimeter.

74 According to the Minister of Foreign Affairs during a debate in the House of Representatives on 13 November 2007.

75 *Defensiekrant*, 13 September 2007, p. 11.

at the end of the 1990s, when several of its employees were accused of sexual abuse, illegal arms trading and selling counterfeit passports. The investigation into these allegations never got off the ground, in part because the relevant legal framework was vague or non-existent.⁷⁶

Comments on the table

The food (class 1) and fuel (class 3) delivery in Afghanistan is carried out by PMCs, or by 'local personnel employed by private service providers', in the Dutch government's words on 7 November 2007 in reply to parliamentary questions on private security companies.⁷⁷ The AIV wonders whether this response is entirely consistent, given that the government notes in the preceding paragraph that, insofar as possible, civilian employees are not deployed outside the bases because there is no fixed front line. According to the government, the basic principle in this regard is that civilian service providers 'should be able to carry out their work under the safest possible conditions'.

According to the government's responses, however, the employer has primary responsibility for the safety of transport personnel. 'In any case, the companies themselves also hire the necessary protection for these transports,' said the head of materiel logistics (J4) within the Directorate of Operations of the Dutch Defence Staff.⁷⁸ The Netherlands pays local contractors for force protection.⁷⁹ This means that PMCs operating on assignment from the Netherlands (either alone or in cooperation with other ISAF partners) can use force without any further involvement or knowledge of the Netherlands. This is at odds with the minister's political accountability for private contracting and the principle of state responsibility.

III.2 Legal aspects

As described in Chapter II, the MTA between ISAF/NATO and the Interim Administration of Afghanistan grants immunity from local prosecution to members of the armed forces as well as private service providers. Dutch soldiers fall under Dutch military criminal law and disciplinary procedures, which means there is no uncertainty regarding the possibility of prosecution. There is uncertainty, however, regarding the possibility of prosecuting private service providers employed by the 38 troop-contributing states of ISAF (including several non-NATO member states)⁸⁰ and by NATO and NAMSA (see Chapter II).

Various letters to parliament note that Dutch soldiers have been involved in fatal and non-fatal shooting incidents.⁸¹ The Dutch Military Police investigates these incidents as a matter of standard procedure. In its letter to parliament of 7 November 2007, the

76 Singer, 2003, p. 525.

77 The Ministers of Foreign Affairs and Defence, answers to parliamentary questions from Alexander Pechtold (MP) on private security companies, 7 November 2007.

78 Carré, 12-2007, p. 16.

79 Colonel H.M.J. van Lamoen et al., 'Operationele verwerving' [Operational procurement], *Militaire Spectator*, vol. 176, 11-2007, p. 484.

80 As of 22 October 2007, source: NATO website.

81 See, e.g., the letter to parliament of 24 August 2007.

government notes that the private security personnel guarding the Dutch embassy have so far not been involved in security incidents in which they caused any casualties. Should a serious incident occur, these Dutch personnel, who enjoy diplomatic immunity, would fall under Dutch law.

In contrast, according to the letter to parliament of 7 November 2007, the Afghan Security Guard (ASG) has indeed been involved in violent incidents. In this context, the peculiar situation applies that the ASG is subject to Afghan law, but that it is immune from Afghan law when acting in the execution of its duties. These ASG incidents were reported to the Dutch authorities 'in accordance with existing procedures'. According to the government's letter of 7 November 2007 mentioned above, the available information indicates that the ASG members in question acted in accordance with the existing rules of engagement, which are based on the right of self-defence. The letter contains no other information on any victims there may have been or as to whether the Dutch Military Police or the Public Prosecution Service are involved. The AIV does not know whether other contractors for which the Netherlands is politically and perhaps legally responsible have ever been involved in violent incidents. This applies mainly to the fuel and food transporters, who look after their own security.

III.3 The Netherlands is operationally dependent on PMCs

The Netherlands is thus operationally dependent on private contracting for military operations in Afghanistan. Although this has been known for some time in the case of strategic transport – from the Netherlands to the operational area – it now also appears to apply increasingly to tactical support in the operational area itself. Besides the fact that the maintenance of transport vehicles and aircraft (helicopters and Bushmasters) is carried out partly by civilian personnel (but who maintains this equipment when the civilians are evacuated due to security risks?), the supply of essential resources like fuel and food has also been outsourced to private parties.

The official Dutch position is that the armed forces could take over the above-mentioned tasks in an emergency, for example if private parties were to pull out due to increasing risks (contingency planning). However, the Netherlands does not currently appear able or willing to release a large enough unit from the existing military contingent to safeguard these supply lines without seriously disrupting the current operation. It is no accident that in September 2007 the government sent out two additional platoons (approximately 80 soldiers) to temporarily help boost local security. The current number of troops in the operational area is based on the premise that a large share of the logistical tasks can be outsourced to private companies. If the Netherlands wanted to take over these tasks, it would have to substantially increase troop numbers, which is politically sensitive.

Private contracting may thus be motivated by a desire to take account of political objections to what could be regarded as an overly large deployment of troops. Another factor is that private contracting in operational areas is funded not from the defence budget, but rather from an interministerial fund (the Homogeneous Budget for International Cooperation (HGIS)) that is used among other things to finance crisis management operations. For example, it is used to finance the costs of outsourcing catering services to the Swiss company Supreme, which come to over EUR 71 million. For the reasons set out in section II.2, the question of whether employing Supreme is actually cheaper than allowing the military to perform all catering services is almost impossible to answer.

Both the nature and the scale of the above-mentioned examples from Afghanistan show that, in the case of the Netherlands, the problems associated with employing PMCs have also clearly moved beyond the theoretical stage. The extent to which the Minister of Defence can give effective expression to his political accountability in this area, given the inadequate nature of the legal frameworks – except with regard to the military personnel posted abroad – is particularly problematic.

IV Evaluation of private contracting by the Netherlands in operational areas

IV.1 An in-depth and wide-ranging political debate is needed

Section I.2 briefly considers the fact that the increased dependence on private contracting is also a direct result of the political choice to carry out expeditionary operations, the intrinsically limited capacity of the armed forces and the limited budgetary flexibility of the armed forces as a result of prior political commitments. However, there has not been much political discussion in the Netherlands regarding the consequences of these developments, which some observers already regard as inevitable. Even the House of Representatives has only devoted a few parliamentary questions to the issue.

In the AIV's view, however, a more in-depth and wider-ranging debate on the provision of private services in operational areas is sorely needed, as this is by no means a purely technical issue. As argued above, it raises a whole range of important questions on such issues as political accountability, state responsibility, the state's monopoly on the use of force, operational dependence on PMCs and democratic control in general.

In this context, the AIV refers to the government's recent proposal to spend the next several months examining the desired level of long-term defence spending from various perspectives, including its current level of ambition and the interests of NATO.⁸² The AIV emphatically advises the government to devote explicit attention to the relationship between its level of ambition and the structure of the armed forces, as well as the related problem of relying on private contracting to fill the gaps between political ambitions and military capabilities.

The AIV believes that the Ministers of Foreign Affairs and Justice should also participate in this investigation due to its political and legal dimensions. The Ministry of Foreign Affairs has so far kept largely aloof from private contracting by the Ministry of Defence and all that goes with it. Now that the Netherlands is employing more and more PMCs, however, the involvement of the Ministry of Foreign Affairs is becoming increasingly important.

In the following sections the AIV examines the government's five specific questions.

IV.2 The Netherlands is responsible in all cases

Question 1: What services may, in principle, be outsourced and what preconditions should the Dutch government observe when doing so?

Question 2: To what extent can and should the Dutch government accept legal responsibility and political accountability for the actions of civilian service providers and their consequences? Should the Netherlands develop specific legislation in this area?

The AIV has chosen to answer these two questions in conjunction, since the question of what services may be outsourced cannot be separated from the government's political

⁸² The Minister of Defence and the State Secretary for Defence, *Wereldwijd dienstbaar*, policy memorandum, 18 September 2007. See also the policy letter on this issue from the Minister of Defence and the State Secretary for Defence of 16 November 2007.

accountability and legal responsibility for the actions of the providers of those services.

In the AIV's view, the answer to the question of to what extent the Dutch government is politically accountable for the actions of private service providers employed by the Netherlands in operational areas is clear: the government is always politically accountable for the actions of service providers employed by the Netherlands or by an alliance or coalition that includes the Netherlands.

The AIV also answers the question whether the Dutch government is legally responsible for such actions in the affirmative. The Dutch state is responsible in principle, as explained in section II.4. This applies all the more strongly as the situation in the host country becomes increasingly chaotic, if the host country does not have an effective legal system of its own or if it has agreed to grant immunity from local prosecution. It should be possible to prosecute every person who has committed an offence. A situation in which certain people enjoy *de facto* – let alone *de jure* – immunity is unacceptable. This means that the Dutch government should only hire a PMC if it is able to control the way in which the company in question performs its agreed task, especially since there are loopholes in the prosecution process (an accountability gap), as pointed out in table 1 (section II.4).

For the AIV, the basic political and military precondition for the employment of PMCs is that the state's monopoly on the use of force be maintained. This serves not only to guarantee domestic law enforcement but also to curb the collective use of military force in foreign countries and ensure that it remains an occasional and unfortunately unavoidable exception to the general prohibition. Only states are entitled to use force, only under certain circumstances, and every state is and remains responsible and liable for the use of force – either directly or by others on its behalf – in or against another state. This responsibility cannot be evaded through contracts with PMCs. As Eimert van Middelkoop said in June 2004, this would amount to 'capitalism in uniform and that is a very risky combination'.⁸³

The position of victims also deserves attention. After all, if private contractors enjoy immunity from local jurisdiction, victims cannot submit claims against them. It would be unacceptable if, in cases where it employs the services of PMCs, the Netherlands had no obligations towards the victims of the actions (or inaction) of those PMCs. It is important to remember that, according to international definitions, a person can be classified as a victim even if the perpetrator of the offence in question has not been prosecuted or convicted.

In the AIV's view, if the protection provided by international law is manifestly deficient, the Netherlands should where possible provide adequate procedures for claiming some form of financial compensation, in accordance with the general principle that 'the payment of claims in a fair manner was considered to further the rule of law, enhance the reputation [of the international military forces] and to serve the interests of force protection'.⁸⁴

What can be outsourced, what can't be and why?

The AIV believes that it is impossible to determine in advance which services can or cannot be used in operational areas. First and foremost, however, the AIV notes that employing PMCs becomes increasingly problematic as the services concerned move closer towards the active use of force and core military tasks.

83 Eimert van Middelkoop, 'Privatisation of warfare', presentation at IKV/Clingendael seminar on 2 June 2004. See: <http://www.ikv.nl/detail_page.phtml?page=privatisering>.

84 European Court of Human Rights, 2 May 2007.

Each case requires a political assessment as to whether the risks involved are acceptable. In the AIV's view, a rigorous assessment of these risks should make use of the following criteria:

- (1) the importance of the mission and the tasks that are to be outsourced;
- (2) maintainance of the state's monopoly on the use of force;
- (3) the security risks to which the personnel in question will be exposed;
- (4) the degree of operational dependence on PMCs;
- (5) the existence of military alternatives;
- (6) the legal framework pertaining to state responsibility;
- (7) the scope for monitoring the implementation of the tasks that are to be outsourced;
- (8) the financial and economic issues.

The specific circumstances will largely determine whether applying these criteria leads to a positive or negative decision on the employment of PMCs.

The AIV believes that the use of PMCs for offensive purposes is always unacceptable on the basis of these criteria. Any deployment of civilian personnel to operate military weapons systems⁸⁵ should also be prohibited, for example. Other high-risk activities that do not qualify for outsourcing, in the AIV's view, include strategic planning, questioning prisoners and prisoners of war and collating information from various intelligence sources.

Services that initially appear more suitable for full or partial outsourcing include logistical support, training facilities and the maintenance of military equipment. However, there may be cases in which such services should not be outsourced, for example in high-risk situations. In each case, the Netherlands should constantly ask whether the risks involved are acceptable, based on an awareness that the government is at all times politically accountable – and that the state is in principle legally responsible – for the actions of PMCs and individual service providers. The Netherlands' control over these actions must therefore be guaranteed.

The AIV believes that the government should evaluate the outsourcing of armed protection on a case-by-case basis according to the above criteria. However, it advises the government to exercise considerable restraint in this regard, at least so long as there is uncertainty about the legal implications. The AIV therefore questions the wisdom of employing the Afghan Security Guard (ASG). As noted, its members enjoy immunity from Afghan law when acting in the execution of their duties and only fall under Dutch jurisdiction to a very limited extent, because they are Afghan nationals. Incidentally, as also noted, the Netherlands can waive this immunity.

In this context, the AIV advises the government to report any incidents involving private contractors, such as the violent incidents mentioned above involving the ASG, as fully as possible. The information submitted to Parliament on such incidents should be of the same quality as the information on similar incidents involving the armed forces.

Informing Parliament

The fact that private contracting has now become inextricably linked to military missions means, in the AIV's view, that the government should treat it with equal seriousness in its correspondence with both Houses of the States General. Given the sensitivity of the issues involved, it is important to involve Parliament in the decision-making process as early and

85 This does not include the standard handguns issued to the personnel of PMCs employed to perform security tasks.

effectively as possible. The government should avoid creating the impression that it is trying to be completely open about the military aspect but not about the private aspect and thus hindering democratic control.

The AIV therefore advises the government to include information on the prospects of private contracting in every letter drafted in accordance with the Terms of Reference for decision-making for the deployment of military units abroad ('Article 100 letter'). The criteria mentioned above can serve as a starting point for this purpose. As private contracting moves closer towards the provision of armed services, this information should be more detailed. The AIV believes that, unlike now, the provision of private armed services should be subject, for example, to an explicit assessment by the House of Representatives.

The 'state of affairs' letters on current operations that the government regularly sends to both Houses – at present in respect of Afghanistan – should also devote systematic attention to the use of PMCs by the Netherlands, even if they are employed in the framework of NATO or other coalitions. These letters should report developments involving contractors that fall short of standards, as in the case of violent incidents. In addition, they could be used to report new needs for private contracting in operational areas that were unforeseeable at the time of the Article 100 letter.

During the discussion with both Houses, the government must demonstrate, among other things, that state responsibility is covered. In this context, the AIV refers once again to the subcontracting of fuel and food transports in southern Afghanistan, which are carried out on the instructions of the Netherlands, either alone or together with other countries, but take place largely beyond the government's scrutiny. The Netherlands pays local contractors to provide armed force protection. In view of the high risk of violent incidents in this dangerous environment, the government must be able to live up to its political accountability in this regard, given that these contractors are immune from local law as long as they are acting in the performance of their – Dutch – duties.

Private contracting is possible in certain cases

With due regard for the above, the AIV concludes that the employment of professional, responsible and well-regulated PMCs can in certain cases contribute to the effectiveness of military operations and the enhancement of stability, which may in turn facilitate reconstruction activities like security sector reform (SSR). This is because the option of hiring additional civilian capacity enables countries that lack capacity and cannot obtain it from their allies or via NATO to reduce the gap between their ambitions and shortages in transport and logistical capacity, in particular. However, private contracting must comply with several strict conditions.

Conditions and agreements

In the absence of international agreements on the deployment of PMCs and military jurisdiction over contractors, the government can follow two complementary paths to achieve a satisfactory legal regime: (a) by adopting concrete measures based on the general, easily explicable rules of state responsibility; and (b) by continuing to urge regulation of PMCs at international level. The present advisory report does not provide an exhaustive overview of all possible conditions and agreements – that would require further study – but does attempt to define what direction the employment of PMCs should take.

(a) Possible specific measures

With regard to the measures that the Dutch government should adopt, the AIV is thinking mainly in terms of strengthening existing instruments, such as contracts and national supervision of PMCs, and less in terms of drafting new legislation.

Contracts

To start with, the Netherlands should only do business with private parties that understand the Dutch approach and are willing to cooperate fully in its implementation and lay down agreements in the contract. In chapter III, the AIV advised the government to publish the fullest possible overview of Dutch civilian contracting in operational areas. Despite the understandable concerns of PMCs regarding the confidentiality of contracts, the AIV believes that the interests of transparency and regulation outweigh the private interests of companies in this particular case.

When drafting contracts, the state should bear in mind that they only cover the contractual relationship with private service providers. (The ASG forms an exception to this rule, since the Netherlands has concluded individual contracts with all its members.) A contractor's employees have no formal legal ties with the employing state; they are only under contract to the company in question.⁸⁶ From a legal perspective, the employing state therefore only has as much control over the contractor as determined by the contract.

Every contract should at the very least comply with the conditions laid down in the codes of conduct of the US and UK private military trade associations, which will preferably be tightened up even further by the industry.⁸⁷ These conditions include, for example, that PMCs and their employees may only use weapons in self-defence and that they must respect the international humanitarian and human rights conventions. Moreover, such contracts should include agreements on specific issues, such as the rules of engagement (ROEs). They should also provide that subcontracting can only take place with the client's permission and that it may never include the provision of armed services, as currently occurs in the case of food and fuel transports. For obvious reasons, subcontractors must comply with the same minimum requirements as the primary contractor. Finally, contracts should devote special attention to coordination with the forces in the operational area or, in other words, the clients. By the same token, the forces should be aware of the presence and activities of contractors in their operational area.

Given the need for accountability and in the light of US experiences in Iraq, the Ministry of Defence should deploy sufficient numbers of specially trained personnel. For example, given the Dutch interests that are at stake, if only the risk of damage to the Netherlands' reputation, it may be desirable to send qualified Dutch observers (for example from the Military Police) to accompany the fuel and food transports.⁸⁸

In addition, there should be established compensation and complaints procedures for people who feel they have been adversely affected by the conduct of PMCs. For example, contracts should provide that PMCs must conduct an internal investigation and cooperate fully with investigations by the competent authorities in such cases. If they do not, the state should be able to terminate the contracts in question.

⁸⁶ Voetelink, p. 247.

⁸⁷ Codes of Conduct of the US IPOA and the British BAPSC.

⁸⁸ The deployment of a PMC will be accompanied by the deployment of more military police, according to René Hiemstra, 'Strijdmacht in krijtstreep, implicaties van de private militaire industrie voor westerse krijgsmachten' [Armies in pinstripes: implications of the private military industry for Western armed forces], *Militaire Spectator*, vol. 174, no. 7/8, 2005.

Strengthening Dutch legal capacity in the operational area

Recent US proposals in response to the Blackwater affair have advocated the idea of Global Outreach Teams or Theater Investigative Units. Such teams would maintain a permanent presence in the areas where PMCs operate, so that they can swiftly move into place to conduct investigations into alleged offences. In this way, the US is seeking to reduce the risk that private personnel can commit offences without being punished.

The AIV believes that, in principle, this is a good idea for the Netherlands to apply in crisis management operations involving a substantial amount of private contracting, as in Afghanistan. Such permanent teams, which would be closely linked to the Dutch embassy, could consist of officers from the Dutch Military Police and Public Prosecution Service. In the course of their activities, they would have to work closely with the competent local authorities and would be able to assist them in maintaining the rule of law. These teams could publicly report their findings on a regular basis, for example in the state of affairs letters on current missions mentioned above.

Legal uncertainty in the host state

As noted in section II.4, an accountability gap emerges when private companies enjoy immunity from the jurisdiction of the host state. This gap disappears when contractors are subject to local jurisdiction, as there can be no jurisdictional uncertainty in such cases. The AIV believes that, in principle, it would therefore be better for contractors to fall under local jurisdiction. This means that, unlike members of the armed forces under a Status of Forces Agreement (SOFA), PMCs and their employees would not be granted immunity from criminal law in the host state⁸⁹ This is because granting immunity to PMCs in Iraq and Afghanistan has had complex legal implications as an unwanted side-effect, which has been conducive to misconduct. Where appropriate, PMCs should report to local commanders and request permits, for example for carrying weapons, which they will only be allowed to use for contractually agreed tasks in the context of strictly defensive security operations. In the case of a breach of the rules, the local authorities should therefore initially investigate – and if necessary try – the person concerned. However, this assumes that the local legal system functions reasonably well.

This is where the fact that the rule of law is often under threat or totally absent in the host state gives rise to a dilemma. Examples of this include the risk that the host state will torture contractors employed by the Netherlands who are suspected of offences once they have been arrested.⁹⁰

The preconditions for cooperating with the host state in this area must therefore be formulated very clearly, to increase trust in the administration of justice in the host state and facilitate the adoption of supervisory measures at international level. As a matter of fact, however, international companies (for example in the security sector but also in the construction and logistics industries) often have ample experience of operating under local criminal law and have learnt to put up with it. The AIV notes, incidentally, that the fact that contractors may be subject to local jurisdiction does not release the Dutch government from its political accountability or the Netherlands from its easily triggered legal responsibility for the actions of the service providers it employs.

89 Voetelink, p. 246.

90 See, e.g., Amnesty International, *Afghanistan: Detainees transferred to torture: ISAF complicity?*, November 2007.

When faced with this dilemma, the government must decide on a case-by-case basis whether to place the PMCs that it employs under local jurisdiction or whether to grant them immunity from the local legal system. (Sometimes the coalition in which the Netherlands is participating makes this decision on its behalf, as in the case of ISAF.) The government must then inform Parliament of its decision. If immunity is granted, the problem arises that violations of local or international humanitarian law may remain unpunished if the troop-contributing state that employs the PMC or the PMC's country of establishment have not adopted extraterritorial legislation or if they are unwilling to prosecute and try those concerned. Dutch Global Outreach Teams could also play a useful role in such cases, for example by bringing those concerned before a court in the sending state.

Extending Dutch jurisdiction

If it becomes apparent that measures such as sound contractual agreements and additional investigative capacity in operational areas are not sufficient to close the accountability gap, the government should examine whether it is feasible and desirable to extend the jurisdiction of Dutch courts over Dutch PMC employees, as recently done by the United States in relation to US PMC employees (see section II.4). However, given the inherent limitations on the effectiveness of national legislation in this area, such statutory changes do not solve all the problems involved (see also section II.4). For example, most of the PMC employees currently employed by the Netherlands in Afghanistan do not have a Dutch passport.

If the Dutch government nevertheless decides in favour of a statutory amendment, the AIV believes that the most appropriate option would be to amend the Criminal Code. The AIV considered at length whether, following the US example of amending the UCMJ, the Netherlands should place the contractors it employs under Dutch military criminal law and disciplinary procedures (see section II.4). The AIV ultimately decided against this option based on the following consideration. The main purpose of military criminal law and disciplinary procedures is to supplement 'ordinary' criminal law. Military law deals with issues such as absence without leave, the performance of military tasks and compliance with military orders. It makes little sense to subject the personnel of private companies to this kind of law, as they are not part of the military hierarchy (and that is without even considering whether PMCs would agree to such an arrangement in the first place).⁹¹ The AIV does however advise the government to closely monitor the effects of the new US legislation.

(b) Strengthening international regulation

The limited national options available for ensuring the possibility of prosecuting offences committed by PMC employees ought to encourage the Netherlands to continue pressing for international legislation on PMCs, regardless of how much time and effort it takes to achieve this objective. With regard to the United Nations, this means that the Netherlands should devote more attention than it does at present to the work of the UN Working Group on the Use of Mercenaries, which replaced the Special Rapporteur on this issue in 2005. In the AIV's view, the fact that the Netherlands is not party to the 1989 UN Convention on Mercenaries, as noted above, does not mean that the Working Group is irrelevant. The AIV

⁹¹ On this issue, see also Voetelink, p. 233, and Peter van der Kruit, 'Noodzakelijke regulering van Private Militaire Compagnies: enkele mogelijkheden' [The necessary regulation of private military companies: some options], in *Militair Rechtelijk Tijdschrift*, special issue on contractors, vol. C, July-August 2007 (no. 7), pp. 258-259.

refers for example to a recent report of the Working Group from November 2007 that examines PMCs in depth.⁹² The Working Group also falls under the auspices of the UN Human Rights Council, of which the Dutch representative recently became Vice-President. It would be appropriate for the Netherlands to devote more attention to the working group of an organ for which it bears special responsibility.

The United Nations and NATO employ PMCs on a regular basis. As a member state of both organisations, the Netherlands shares responsibility in this area. The Netherlands should speak out in the United Nations and NATO/NAMSA about the requirements that need to be imposed on PMCs, as formulated in this report. These organisations are also subject to the principles of responsibility. It is important to ensure that offences do not go unpunished and that victims obtain redress.

NATO operations

Expeditionary action, especially in failed states, essentially requires an expeditionary logistical capacity that, in principle, should not be provided on the basis of incidental private contracting in individual cases. In the case of operations carried out by NATO, which is a military alliance, combined logistic support should be regulated jointly and effectively (and not just by hiring NAMSA as a contractor). This can only be achieved by pooling logistical capacity within NATO. In the case of the air force, for example, this applies to the developing air transport capacity. Another possibility is creating a joint logistic support agency to which the member states would contribute resources. Logistical capacity is also pooled for naval operations. The Netherlands should further the debate on expeditionary logistical capacity within NATO.

In this context, it is telling that NATO is currently drawing up plans to lease civilian transport helicopters in order to compensate for a lack of capacity in ISAF Regional Command South (RCS).⁹³ The Dutch government should make absolutely sure that, if implemented, these plans do not compromise the safety of military units or entail operational limitations. For example, private leasing does not include medical evacuations.

European Union

The Netherlands should place the employment of PMCs on the agenda of the European Union, which has not dealt with this issue until now, and encourage the Union to adopt a position on the subject. This also makes sense because, according to a recent IPOA report, 38% of all PMC headquarters are located in Europe.⁹⁴ For example, the European Union could adopt a code of conduct on the provision of armed services by PMCs along the lines of its Code of Conduct on Arms Exports. The Director-General for External and Political-Military Affairs of the Council of the European Union, Robert Cooper, mentioned a similar

92 Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination, A/62/301, 6 November 2007 (distributed internally at the United Nations on 24 August 2007). Although this Working Group was originally established to deal with the phenomenon of mercenaries, it is clear from its reports that it is also focusing increasingly on the growth market represented by PMCs.

93 The Ministers of Foreign Affairs and Defence and the Minister for Development Cooperation, state of affairs letter on Afghanistan, 24 September 2007.

94 IPOA Report 2007, November 2007, p. 15.

idea while expressing his personal opinion on the issue at a roundtable on PMCs.⁹⁵ This recommendation also appears in the above-mentioned report of the UN Working Group on the Use of Mercenaries from November 2007.

With regard to the need to strengthen the regulation of PMCs at international level, the AIV notes that a bottom-up approach might be more successful than a top-down approach. We refer to a joint initiative of the Swiss Federal Department of Foreign Affairs and the International Committee of the Red Cross (ICRC).⁹⁶ In the framework of this initiative, government officials and other experts meet regularly to discuss PMCs, with the aim of strengthening existing legislation and initially developing non-binding good practices.

The AIV accordingly advises the government to participate in such initiatives, especially now that it has to deal with the problems examined here quite often, as apparent from the above.

Consequences of privatisation for the provision of services in operational areas

This report focuses on the employment by the Netherlands of private service providers in operational areas. However, the AIV notes that, when deciding about the privatisation of logistical support services in the Netherlands, the government should also consider the potential personnel-related consequences of doing so in the event of a deployment. If the advanced maintenance of military equipment is outsourced in the Netherlands, for example, the government should bear in mind that civilian employees of the companies concerned may also have to maintain and repair this equipment in high-risk environments. The same applies to the outsourcing of catering and similar services. As stated in chapter II, such sourcing decisions not only have economic aspects but also political-military and legal and ethical aspects.

IV.3 A global market

Question 3: Is it acceptable for civilian personnel to be recruited from around the world for deployment in war zones? What should be the government's position on this issue?

The AIV interprets this question as emphasising the phrase 'from around the world'. International PMCs indeed recruit their personnel from around the world. However, it is ultimately the responsibility of the client to ensure that these personnel satisfy certain minimum criteria regarding their instruction, training, background and screening.⁹⁷ In addition, the countries of origin of these personnel should have legislation that makes it possible to prosecute their nationals. The AIV therefore recommended above that PMCs that do business with the Netherlands should not be allowed to conclude subcontracting agreements without Dutch permission, to ensure that the client does not lose oversight

95 Robert Cooper, 'The Private Security Phenomenon: Policy Implications and Issues', keynote address at a meeting of the Security & Defence Agenda (SDA), *SDA Roundtable Report*, 7 December 2006, p. 6.

96 See: <<http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html>>. The meeting of 13-14 November 2006 was attended by government representatives from several countries, including Afghanistan, Australia, Austria, Canada, France, Germany, Iraq, South Africa, Sweden, Switzerland, Ukraine, the United Kingdom and the United States.

97 The UN Working Group on the Use of Mercenaries also warns against the risks of subcontracting and recruiting personnel in poor countries. See, for example, its Report of 6 November 2007.

and control. Tasks involving the use of force cannot be subcontracted under any circumstances.

PMCs often try to limit their costs by recruiting personnel from developing countries and paying them very low wages by Western standards. This is undesirable by Dutch standards, but one could argue that, for the individual concerned, it often represents a reasonable salary and that the choice is between receiving that salary or having no work at all. The same applies to the employment (either directly or through local companies) of local personnel. Incidentally, this has the added benefit that the local population also profits economically from the Dutch presence. That is a legitimate consideration.

IV.4 The safety of private personnel employed by the Netherlands

Question 4: To what extent do the Dutch government and its armed forces have a duty of care for the safety of civilian personnel?

A distinction can be made between the duty of care during and after an operation. In both cases, it is important that the care (or aftercare) of personnel employed by the Netherlands is at an acceptable level. Insurance provided by the contractor should play a key role in this regard. If the security risks to which the prospective personnel would be exposed are too high, the Dutch government should not employ the company.

During the operation

The level of safety depends on the risks concerned. As the risks increase, the Ministry of Defence has to do more to ensure the safety of contractors, especially in the case of people employed to provide unarmed logistical services. As a rule, private security companies are responsible for their own safety, as well as for the installations or persons they are employed to protect. When they find themselves in a really dangerous situation, however, there must be procedures for providing swift military assistance.

If the risks become too great, the civilian personnel may have to be evacuated. It is therefore particularly important that the armed forces are able to provide back-up transport in high-risk scenarios, so that the entire operation is not jeopardised.

Aftercare

Bearing in mind the debate in recent years on the duty of care towards veterans, the AIV feels it is important to point out to the government that such a duty also exists towards the personnel of PMCs, as contractors also have to deal with the possible negative effects of operational deployment.⁹⁸ This is obviously first and foremost the responsibility of the PMCs concerned. At the very least, contractors should be properly insured against accidents that occur during the implementation of the contract, giving rise to various forms of aftercare, including medical treatment, and, if necessary, compensation. The Netherlands should ensure at the contract stage that PMCs are properly insured. It goes without saying that PMCs will incorporate all insurance-related costs into the tender. As the Netherlands raises its insurance-related demands, the price of contracts will therefore also rise. Incidentally, just as they have ample experience operating under local criminal law, private companies (including insurance companies) also have ample experience insuring such risks, even in dangerous areas.

⁹⁸ 'Contractors face combat-related stress after Iraq', *The New York Times*, 5 July 2007.

The AIV also points to another aspect of aftercare. This concerns the risk of reprisals against locally employed personnel (for example by the Taliban) after the Netherlands leaves Afghanistan at the end of the operation. If there are clear indications that the lives of its former employees (and their families) are in danger, the government should be generous in distributing temporary and permanent resident permits for the Netherlands.

IV.5 Political side-effects of the abduction of private personnel

Question 5: What are the possible effects of the abduction, mistreatment and/or killing of civilian personnel?

Assuming that this question focuses specifically on the political effects, the AIV comes to the following conclusion. Unlike in the case of members of the armed forces – who can also be taken hostage or mistreated in captivity but in whose case the ‘occupational hazard’ argument is likely to be invoked sooner – the abduction of civilian personnel is more likely to lead to alarm among the general public. Under these circumstances, such reactions might also undermine political support for the mission in question.⁹⁹

In the spring of 2007, an Italian journalist was abducted in Afghanistan. Italy subsequently secured his release in exchange for five Taliban fighters. A few months later, a group of approximately 20 South Koreans was abducted and eventually released following mediation. The Taliban appear to believe that taking hostages at the very least helps them to gain publicity. The risk of abductions is thus real and will probably continue to rise.

Earlier in this report, the AIV discussed the advisability of treating members of the armed forces and civilian service providers as equally as possible in terms of accepting responsibility for the consequences of their actions. It would therefore be hard for governments that employ PMCs in order to avoid difficult political choices to justify denying or avoiding responsibility in advance for the well-being of civilian employees in situations in which they might fall victim to abductions or other criminal acts.

IV.6 In conclusion

As is clear from the above, the AIV encountered many unsatisfactory grey areas in the course of its research pursuant to the request for advice. The experiences of the United States, which have been much more troubling, have revealed serious shortcomings. However, Dutch policy also requires clarification and improvement, especially with regard to the limits of acceptable civilian contracting and state responsibility.

The AIV advises the government to implement the proposed improvements in existing practice, if possible, and to refrain from entering into new commitments that do not comply with these proposals in the future.

99 See also AIV, *Society and the armed forces*, advisory report no. 48, The Hague, April 2006.

V Summary

This advisory report to the Dutch Government focuses chiefly on the political, legal and ethical aspects of employing private military companies (PMCs) during the preparation and implementation of military operations carried out by national armed forces, generally in an international framework or coalition. These PMCs provide services that not only include logistical support, security and the maintenance of weapons systems but may also involve training, intelligence gathering and even participation in combat operations. For various reasons, armed forces of Western countries operating in crisis areas are making increasing use of private players. These reasons include a perceived need to intervene in regional and local conflicts, the transformation of warfare due to developments in weapons technology, a political shift towards the privatisation of state tasks, and problems and shortages affecting modern armed forces, especially in the field of logistical and technical support.

As an active participant in the ISAF operation in Afghanistan (in the province of Uruzgan), the Dutch armed forces are also making use of the services of private companies on a relatively large scale. The experiences of the United States in Iraq, for example the shooting incidents involving the Blackwater company, have shown that the employment of PMCs can lead to unacceptable excesses. A careful consideration of the problems described in this report is therefore a matter of great public importance, all the more so because, whatever one's position regarding this phenomenon, the use of private companies has become a reality that cannot be ignored.

While preparing its report, the AIV encountered several significant problems. First and foremost, there is a conspicuous lack of information and transparency regarding the number of PMC personnel employed, the tasks they perform and the sums of money involved. For example, it is estimated that there are currently more than 180,000 private service providers in Iraq, including approximately 30,000 armed security guards. However, nobody seems to know exactly how many contractors are in the country or what they do there.

This observation applies not least to the companies employed by the Netherlands in Afghanistan. Not only are there no figures on the number of PMC employees working in Iraq and Afghanistan, but the same applies to the costs involved in employing these private companies. What is clear, however, is that a billion dollar market has emerged. The lack of insight into the costs of employing PMCs for specific operations or tasks is one reason why it is extremely difficult to verify the oft-made claim that employing PMCs is attractive from a business perspective because it supposedly costs less. Other reasons include the difficulty of measuring the cost of underuse of one's own capacity between periods of peak demand, the estimated lifespan of certain investments (e.g. transport aircraft) and the quality of the product provided.

A second problem derives from the fact that the interests of national armed forces and PMCs do not necessarily coincide. The main objective of private companies is to serve the interests of their shareholders, not the general interest in the sense of the success of a military operation, regardless of the risks involved. Given that PMCs are not subject to the authority of military commanders, they can refuse to carry out life-threatening assignments or even go on strike on the battlefield. While military commanders must have full control over their troops, experience has shown that private companies are unable to provide the same services as military units in high-risk situations (e.g. in Iraq), even when these services are limited to transport and logistical support.

The limited availability and deployability of the private companies' personnel lead to the conclusion that the reliance on PMCs should not exceed the critical point at which the practical feasibility of military operations is determined primarily by whether private companies are able and willing to take part. This point should be regarded as a general precondition when assessing whether or not certain tasks are suitable for outsourcing.

A third problem, which is perhaps the most intractable of all, concerns the loopholes in the existing national and international legal provisions relating to the activities of PMCs. These loopholes can be summed up by the term 'accountability gap'. In this context, it is important to understand that the PMCs operating in Iraq and Afghanistan have been granted immunity from the jurisdiction of the host country. This creates a particular problem in the case of employees who have a nationality other than that of the country that employs them in military operations. For example, the Netherlands cannot exercise extraterritorial jurisdiction in Afghanistan over employees who are South African nationals. As far as the AIV is concerned, a situation that essentially amounts to impunity with regard to serious forms of misconduct is unacceptable *a fortiori* when it comes to prosecution for serious offences that constitute grave breaches of human rights or international humanitarian law.

On the basis of the same international humanitarian law, however, employees of PMCs are not combatants but civilians, because they are not part of the armed forces. This means that contractors are not entitled to prisoner of war status, subject to an exception in the Third Geneva Convention. International law contains no other provisions on the use of PMCs by states in conflict areas. An attempt to adopt provisions in a related field (mercenaries) proved unsuccessful.

Another problem relates to the lack of clarity regarding the limits of state responsibility. To what extent does political accountability for the conduct of private service providers, which applies under all circumstances, also entail state responsibility in terms of international law for the consequences of potential misconduct on their part? Breaches of international law by PMCs can be attributed to the employing state if the company or person in question (a) acts as an organ of the state; (b) is authorised to exercise elements of state authority; or (c) is acting under the instructions or control of the state; or (d) if the state assumes responsibility. In practice, whether the application of one or more of these basic rules actually leads to a finding of state responsibility will depend very much on the specific circumstances.

Against this background, the AIV has arrived at the following conclusions and recommendations:

1. For its part, the Dutch government should provide as much information as possible concerning all relevant aspects of the employment of private companies that provide services to the Dutch armed forces in operational areas. Given that several fundamental issues are at stake in this context (e.g. political accountability, state responsibility, the state's monopoly on the use of force, operational dependence on PMCs, the ability to prosecute and punish serious offences and democratic control in general), the AIV believes it is vital for government and Parliament to conduct a debate on this issue of greater depth and breadth than they have conducted thus far. In light of the demonstrable importance of the political and legal dimensions of this issue, the Ministers of Foreign Affairs and Justice should also take an active part in this debate. Regarding the provision of information to the House of Representatives, the AIV advises the government to henceforth include information on the prospects of private contracting for the military operation discussed in every letter drafted in accordance with the Terms of Reference for decision-making for the deployment of military units abroad ('Article 100 letter').

2. As far as the AIV is concerned, the term 'acceptable risk' is key to deciding which services can – and which cannot – be outsourced to civilian service providers in operational areas. For obvious reasons, the AIV believes that employing PMCs becomes increasingly problematic as the services concerned move closer to the active use of force and core military tasks. In the interests of conducting a rigorous assessment of the acceptability of various risks, the AIV advises the government to take the following criteria into account: (1) the importance of the mission and the tasks that are to be outsourced; (2) maintenance of the state's monopoly on the use of force; (3) the security risks to which the personnel in question will be exposed; (4) the degree of operational dependence on PMCs; (5) the existence of military alternatives; (6) the legal framework pertaining to state responsibility; (7) the scope for monitoring the implementation of the tasks that are to be outsourced; and (8) the financial and economic issues. The AIV wishes to make it absolutely clear that, on the basis of these criteria, the use of PMCs for offensive purposes is unacceptable. The potential deployment of civilian personnel in the operation of weapons systems should also be prohibited.

3. In order to reduce the risk of potential misconduct on the part of PMCs and their employees and provide redress to the victims of potential offences committed by private companies, the AIV urges the government to establish better legal safeguards. In doing so, the government should pursue various tracks. First and foremost, it should make improvements in the field of civil law. Every contract concluded by the State of the Netherlands should at the very least satisfy the conditions laid down in the codes of conduct of the US and UK private military industry trade associations. This means, for example, that PMCs and their employees may only use weapons in self-defence and that they must respect the international humanitarian and human rights conventions. Moreover, such contracts should include agreements on specific issues, such as the rules of engagement. They should also provide that subcontracting can only take place with the permission of the client and that it may never include the provision of armed services. This is a departure from current practice, under which food and fuel transporters are responsible for their own security. In addition, following the US example to some extent, the AIV advises the Dutch government to establish permanent teams of observers who can be charged with investigating alleged offences committed by PMCs in the areas where they operate. These teams could consist of officers from the Dutch Military Police and the Public Prosecution Service (which falls under the Minister of Justice). In the course of their activities, they would also have to work closely with the competent local authorities. In addition to sound contractual agreements and additional investigative capacity, the government should also consider extending the jurisdiction of Dutch courts over Dutch PMC employees, as recently achieved in the United States by means of the Military Extraterritorial Jurisdiction Act. The AIV believes that the most appropriate option would be to amend the Criminal Code. It opposes the idea of placing contractors employed by the Netherlands under Dutch military criminal law and disciplinary procedures. Given the inherent limitations on the effectiveness of amending national legislation (the majority of employees concerned do not have Dutch passports), the Netherlands should also push for appropriate international rules governing the conduct of PMCs. The AIV believes that the Netherlands should support the initiative launched by the Swiss Federal Department of Foreign Affairs and the International Committee of the Red Cross. Though focused primarily on strengthening existing national legislation and developing non-binding good practices, this initiative could in due course lead to the adoption of one or more international agreements. In addition, the Netherlands should place the employment of private service providers on the agenda of EU deliberations on international security matters. In line with its Code of

Conduct on Arms Exports, for example, the European Union could adopt a code of conduct on the provision of armed services by PMCs. In view of the interests of potential victims, finally, the Dutch government should interpret the principle of state responsibility as broadly as possible. According to the AIV, this implies that the Netherlands should only hire PMCs if it is able to control their actions.

The AIV advises the government to implement the proposed improvements in existing practice, if possible, and to refrain from entering into new commitments that do not comply with these proposals in the future.

Annexes

Mr F. Korthals Altes
Chairman of the Advisory Council
on International Affairs
Postbus 20061
2500 EB Den Haag

Ministry of Defence

Directorate of General Policy
Affairs

Date 23 May 2007
Our ref. HDAB2007009751

Request for advice on deployment of civilian service providers in operational areas

Dear Mr Korthals Altes,

Increasingly, armed forces are making use of civilian service providers in operational areas. The United States and the United Kingdom are two well-known examples, but the Netherlands also employs such methods, albeit on a smaller scale. Examples include leasing ships and aircraft, as well as contracting with local businesses for various services, some of which may even involve the use of force. Civilian service providers cannot eliminate the need for core military logistical capability, as they cannot be deployed in certain situations, like a combat environment for instance. Yet civilian service providers can supplement logistical capability, which in turn can contribute to military flexibility and sustainability. Civilian services are becoming increasingly important as our armed forces engage in a greater number of operations, which are increasingly long term and complex in nature.

The government is well aware that deploying civilian service providers carries risks and obligations with it. The conditions under which they may be deployed in operational areas need to be set down clearly. Elements that require careful consideration are the legal context in which civilian service providers operate and the security situation in the area of operation. Of course this is especially critical in cases of armed conflict. The government therefore requests that the Advisory Council on International Affairs produce an advisory report on the conditions attached to, and the consequences of, contracting the civilian service providers. We request that you focus primarily on the ethical and political aspects, against the backdrop of the international law context in which such operations take place.

Questions

1. What services may, in principle, be outsourced and what preconditions should the Dutch government observe when doing so?

Companies offer all manner of services. The law of war clearly prohibits the use of mercenaries. It also describes which service providers enjoy legal protection through their association with the military. There is, however, a grey area in which a number of variants need to be considered, such as mechanics and security firms who might be deployed at the rear or close to the front line itself.

2. To what extent can and should the Dutch government accept legal and political responsibility for the activities of civilian service providers and their consequences? Should the Netherlands develop specific legislation in this area?

Unlike military units, civilian service providers are employed under contract. Agreements concluded by, or on behalf of, the Netherlands usually confer immunity from local law. It is not always possible, with the legal instruments currently available, to prosecute civilian personnel. The United States has developed special legislation for this purpose (the Military Extraterritorial Jurisdiction Act).

3. Is it acceptable for civilian personnel to be recruited from around the world for deployment in war zones? What should be the government's position on this issue?

Service providers in operational areas recruit personnel from all over the world. These workers often come from developing countries with a poor standard of living. Such workers are more likely to accept serious risks to their safety for a relatively low wage.

4. To what extent do the Dutch government and its armed forces have a duty of care for the safety of civilian personnel?

Civilian personnel are vulnerable and security levels in operational areas can vary greatly. It is in the military's own best interest that civilian personnel can operate in safety, and the armed forces can play both an active and passive role in improving safety. Such activities, of course, require the use of already-stretched operational resources.

5. What are the possible effects of the abduction, mistreatment and/or killing of civilian personnel?

Especially in Iraq, attempts have been made to put pressure on participating countries by publicly abducting and killing workers from civilian organisations. This could conceivably occur again during future conflicts.

I would be grateful if the AIV could present its advisory report before the end of 2007.

(signed)

E. van Middelkoop
Minister of Defence

List of abbreviations

AIV	Advisory Council on International Affairs
AOR	area of responsibility
ASG	Afghan Security Guard
BAPSC	British Association of Private Security Companies
DCAF	Geneva Centre for the Democratic Control of Armed Forces
D-NC	Democrat of North Carolina
DOD	Department of Defense
ECHR	European Court of Human Rights
EU	European Union
FBI	Federal Bureau of Investigation
FM	Field Manual
GAO	Government Accountability Office
HGIS	Homogeneous Budget for International Cooperation
HNS	host nation support
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICJ	International Court of Justice
ICT	information and communications technology
IKV	Interchurch Peace Council
IPOA	International Peace Operations Association
ISAF	International Security Assistance Force
JIPO	Journal of International Peace Operations
KBR	Kellogg Brown and Root
LOGCAP	Logistics Civil Augmentation Program
MEJA	Military Extraterritorial Jurisdiction Act
MP	Member of Parliament (House of Representatives)
MPRI	Military Professional Resources Incorporated
MTA	Military Technical Agreement
NAMSA	NATO Maintenance and Supply Agency
NATO	North Atlantic Treaty Organisation
NGO	non-governmental organisation
PMC	private military company
PSC	private security company
RCS	ISAF Regional Command South
ROEs	rules of engagement
SDA	Security & Defence Agenda
SOFA	Status of Forces Agreement
SSR	security sector reform
UCMJ	Uniform Code of Military Justice
UK	United Kingdom
UN	United Nations
US	United States
WIM	International Crimes Act

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