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**Risk and the Fabrication of Apolitical, Unaccountable Military  
Markets: The Case of the CIA “Killing Program”**

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Abstract :

“Risk” has become a major theme in the social sciences over the past two decades. It has been argued to reshape social and political life not only by placing new issues on the agenda but also by generating new “governmental rationalities”. These debates have in various forms also began to influence international studies. It has already been shown that the introduction of risk has altered strategic rationality. An uncertain imagined future of Rumsfeldian “unknown unknowns” has become integral to military strategic thinking. In the process technologies used to wage war and the actors involved have also evolved. Continuing the discussion, this article moves on to look at the implications of these changes for legal and political boundaries in one specific area of international politics; it traces the link between the spread of risk rationality (or governance through risk) and the development of apolitical and unaccountable military markets. Risk rationality creates what I will tentatively term a *preventive imperative* that tends to spread across areas and is assisted in the process by the rapidly expanding ranks of risk professionals. The preventive imperative is key to the rapid growth of private military markets as well as to the difficulty of politicizing—in the sense of creating a critical public debate—about the market as opposed to about the a given scandal (e.g. Nisour Square incident) or firm (e.g. Blackwater). The difficulty of politicizing the market has strong implications for the (non-)working of accountability. It creates what I will dub an *accountability paradox* where the way accountability is pursued reinforces the impunity of markets and of specific market actors. The reason is that it pre-empts serious consideration of the public/private enmeshment which is the “blind spot” of present legal instruments and it positively reaffirms existing “regulation” in all its defectiveness. Neither security professionals nor lawyers are susceptible to resolve this paradox. Reference to the CIA “Killing Program” anchors and illustrates the argument.

# Risk and the Fabrication of Apolitical, Unaccountable Military Markets: The Case of the CIA “Killing Program”

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## **Working Paper:**

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## Introduction

“Risk” has become a major theme in the social sciences over the past two decades. It has been argued to reshape social and political life not only by placing new issues on the agenda but also by generating new “governmental rationalities”. These debates have in various forms also influenced international studies, albeit to a lesser extent than one might have expected and certainly to a lesser extent than warranted.<sup>1</sup> As pointed out by those who have drawn work on risk into international studies the implications are momentous in many fields (see editors’ introduction to this special issue). It has already been shown that the introduction of risk has altered strategic rationality. An uncertain imagined future of Rumsfeldian “unknown unknowns” has become integral to military strategic thinking.<sup>2</sup> In the process technologies used to wage war and the actors involved have also evolved.<sup>3</sup> Continuing the discussion, this article moves on to look at the implications of these changes for legal and political boundaries in one specific area of international politics; it traces the link between the spread of risk rationality (or governance through risk) and the development of apolitical and unaccountable military markets.

Risk rationality creates what I will tentatively term a *preventive imperative*<sup>4</sup> that tends to spread across areas and is assisted in the process by the rapidly expanding ranks of risk professionals. The preventive imperative is key to the rapid growth of private military markets as well as to the difficulty of politicizing—in the sense of creating a critical public debate—about the market as opposed to about a given scandal (e.g. Nisour Square incident) or firm (e.g. Blackwater). The difficulty of politicizing the market has strong implications for the (non-)working of accountability. It creates what I will dub an *accountability paradox* where the way accountability is pursued reinforces the impunity of markets and of specific market actors. The reason is that it pre-empts serious consideration of the public/private enmeshment which is the “blind spot”<sup>5</sup> of present legal instruments and it positively reaffirms existing “regulation” in all its defectiveness. Neither security professionals nor lawyers are susceptible to resolve this paradox. To anchor the claims, the article will draw on the CIA “Killing Program”.

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<sup>1</sup> A search of the *Review of International Studies* on articles with the word “risk” in the abstract gives a meager five hits.

<sup>2</sup> Claudia Aradau, Luis Lobo-Guerrero and Rens Van Munster, 'Security, Technologies of Risk, and the Political: Guest Editors' Introduction', *Security Dialogue*, 39 (2008), pp. 147-154.

<sup>3</sup> Mikkel Vedby Rasmussen, *The Risk Society at War. Terror, Technology and Strategy in the Twenty First Century* (Cambridge: Cambridge University Press, 2006).

<sup>4</sup> “Preventive” drawing on Bush and Rumsfeld’s terminology (not Ewald’s which would be “precautionary”).

<sup>5</sup> The term is borrowed and inspired by the more general discussion in Gunther Teubner, 'In the Blind Spot: The Hybridization of Contracting', *Theoretical Inquiries in Law*, 8 (2006), pp. 51-72.

## Apolitical Military Markets

The CIA “Killing Program”—a name the media reportedly borrowed from agency insiders—was set up to arrest or kill targeted Al-Qaeda operatives wherever they were found.<sup>6</sup> It was launched in 2001, briefly suspended in 2004 (in relation to an internal CIA review) and then resumed in a version including outsourcing parts of the program to the private security firm Blackwater (now Xe). In June 2009, Leon Panetta then director of the CIA, decided to discontinue the program and brief Congress which had been kept uninformed. The “Killing program” had cost \$20 million over the eight years of its existence.<sup>7</sup> Panetta’s revelations sparked an intense public debate which touched many issues including the outsourcing of parts of the programme to Blackwater. This highly critical public debate may appear to belie the idea that risk driven governmental rationalities have contributed to the development of “apolitical” military markets. Yet, the CIA Killing Program nicely makes the point that military *markets* as opposed to individuals, companies or scandals are depoliticized by risk thinking.

### a. The preventive imperative of risk thinking

The overarching reason risk thinking makes it difficult to politicize military markets is that it frames action in terms of an unknown future as essential. The resulting “imperative” to act is hard to question once risk thinking becomes (as it has become) central. If the necessary action then requires the reliance on markets and market actors which in view of the penchant to govern through markets it often does<sup>8</sup>, it becomes correspondingly difficult to create a public debate about this reliance.

Risk thinking is geared towards the future and more specifically towards the need to take action to prevent some looming danger (the risk) from materializing. As has been discussed in considerable detail in the literature on risk, the kind of danger one is acting upon and how one

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<sup>6</sup> The program is not unique but has parallels not only in other targeted assassination programs, including the Israeli targeted assassinations Oliver Kessler and Wouter Werner, 'Extrajudicial Killing as Risk Management', *Security Dialogue*, 39 (2008), pp. 289-308.

<sup>7</sup> For discussions of the program see Rachel L. Swarns, 'Cheney Offers Sharp Defense of CIA Interrogation Tactics', *New York Times*, 31 August 2009; Mark Mazzetti, 'CIA Sought Blackwater's Help to Kill Jihadists', *New York Times*, 20 August 2009; Joby Warrick and Jeffrey R. Smith, 'CIA Hired Firm for Assassin Program', *Washington Post*, 20 August 2009; Mark Zanetti and Scott Shane, 'CIA had Plan to Assassinate Qaeda Leaders', *New York times*, 14 July 2009; The Economist, 'CIA Interrogations and the Blackwater affair: Who should be held accountable for anti-terrorism's dirtiest business?' *The Economist*, 27 August 2009; Der Spiegel, 'Blackwater accused of creating 'Killing Program'', *Der Spiegel*, 22 August 2009.

<sup>8</sup> This will not be discussed here but see e.g. Mary Kaldor, Ulrich Albrecht and Geneviève Schméder (eds.), *Restructuring the Global Military Sector. The End of Military Fordism* (London: Pinter, 1998) or Anna Leander, 'Securing Sovereignty by Governing Security through Markets', in Rebbecca Adler-Nissen and Thomas Gammeltoft-Hansen (eds.) *Sovereignty Games: Instrumentalising State Sovereignty in Europe and Beyond* (London: Palgrave, 2009), pp. 151-170.

conceives of adequate action evolves in time and space. Different societies focus on different forms of risk and invent ways of preempting them, reflecting and reproducing political and institutional rationales of governance. This has been illustrated not only in Douglass anthropological work on how societies deal with risk but also for example in Hacking's genealogy of risk or Ewald's genealogy of insurance.<sup>9</sup> Variety and change is significant for a number of reasons but it does not alter that risk thinking leads to action directed towards preventing a specific future.

Future orientation makes action taken on the basis of risk thinking difficult to contest and debate. The future cannot be known. But if a risk is immanent it would be irresponsible not to take the prudent, preventive and/or precautionary (using Ewald's wording) measures necessary to protect oneself (and others) from it. It would also be irresponsible to critique those who were offering protection from the risk and taking the necessary measures. More than this, even with hindsight actions justified by risk scenarios are hard to contest. It is impossible to know whether or not the measures taken were the justified/adequate. The only sign of success is that nothing happens; the nonevent. However, the non-event may be drawn back to the fact that there was no risk rather than to successful action preventing risk, just as the event can be tracked back to the insufficiency of the preventive action, rather than to its mistaken nature. Since there can be no certain knowledge about what interpretation is right, the responsible strategy is to act on the risk. Critique of risk scenarios in other words strand on unknowables that come cloaked in the scientific and technical authority of risk managers/analysts. In combination with the responsabilization embedded in risk thinking, this poses serious obstacles to critical assessments of risk scenarios and the actions they invoke. Risk thinking creates something akin to an imperative to act on the future.

This "preventive imperative" is central to the debate about the CIA Killing Program as well as to the process of outsourcing it. Cheney explained (and defended) the program and the decision to outsource parts of it with reference to the necessities created by the war on terror, underscoring that there was no need to inform Congress since the program formed part of a general policy that already had political backing.<sup>10</sup> The risk scenario had been accepted, outsourcing to Blackwater was just the practical solution to the imperatives for action that followed. Along similar lines, CIA officials suggested that the program "was born partly out of desperation: the agency had tried to

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<sup>9</sup> Mary Douglas and Aaron Wildawsky, *Risk and Culture: An Essay on the Selection of Technical and Environmental Dangers* (Berkeley: University of California Press, 1982); Ian Hacking, 'Risk and Dirt', in Richard V. Ericson and Aaron Doyle (eds.) *Risk and Morality* (Toronto: University of Toronto Press, 2003), pp. 22-48; Francois Ewald, 'The Return of Descartes' Malicious Demon: An Outline of a Philosophy of Precaution', in Tom Baker and Jonathan Simon (eds.) *Embracing Risk* (Chicago: University of Chicago Press, 2002), pp. 273-301.

<sup>10</sup> Quoted in Swarns, 'Cheney Offers Sharp Defense'.

operate the program in house and failed”<sup>11</sup> and hiring Blackwater a matter of acting efficiently: “Blackwater’s successful track record in outsourcing made it logical to rely on it.”<sup>12</sup> The assumption about the need for preventive actions inscribed in these statements is shared far beyond the defenders of the program. Even leading critics have found contesting it difficult. Senator Diane Feinstein (chairwoman of the Intelligence Committee<sup>13</sup>) for example felt “ambivalent” about the critique of the CIA as well as about the judicial inquiry into the way the program has been handled. Overall, the preventive rationale—which is after all the key reason the CIA Killing Program was adopted—has filled a marginal space in the public debate.

#### b. The Self-Sustaining Expansion of Risk

If preventive imperative created by risk scenarios are singularly difficult to politicize once the risk scenarios are accepted, the question is why there is so little discussion about these scenarios in the first place. A key reason is the self-sustaining way risk technologies spread and frame new areas of thinking. New risks—and the techniques for analyzing and managing these—are imported as technical almost mechanical matters that do not seem to warrant much debate. This makes them pass largely unnoticed and makes them hard to question. The same goes for the markets that are created as part of these technologies.

The question of why risk thinking has become so dominant in our contemporary world—why risk seems to “spiral” and “colonize” ever new areas<sup>14</sup>—has attracted considerable scholarly attention. Many of the mechanisms and processes that have been uncovered in the search for an answer are self-sustaining. Two clusters of ideas have been particularly central. One is the idea that risk processes are reflexive and that this reflexivity drives an expansion of risks. This might be understood (as it is by e.g. Giddens and Beck) on a macro level where it is tied to the process of discovering ever new risks because of the scientific discoveries, the uncertainty about science and the risk inspired thinking dominating late (or reflexive) modernity.<sup>15</sup> But reflexivity can also be understood on a micro level as related to the processes by which action taken to prevent specific risks create new risks. This is pivotal for example in Power’s account of the growing

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<sup>11</sup> CIA official quoted in Mark Landler and Mark Mazzetti, 'US Still Using Security Firm it Broke with', *New York Times*, 22 August 2009.

<sup>12</sup> Mazzetti, 'CIA Sought Blackwater's Help'.

<sup>13</sup> Swarns, 'Cheney Offers Sharp Defense'.

<sup>14</sup> Henry Rothstein, Michael Huber and George Gaskell, 'A theory of risk colonization: The spiralling regulatory logics of societal and institutional risk', *Economy and Society*, 35 (2006), pp. 91 - 112.

<sup>15</sup> Ulrich Beck, 'The Reinvention of Politics: Towards a Theory of Reflexive Modernization', in Ulrich Beck, Anthony Giddens and Scott Lash (eds.) *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Oxford: Polity Press, 1994), pp. 1-56.

centrality and ever increasing grip of “enterprise risk management” schemes in private companies. ERM is important not only for coordinating risk management across a company but also for ensuring that the risks that are created by taking action on risks are in turn integrated acted integrated into the risk management structure.<sup>16</sup> These “reflexive” processes capture a snowballing of risk logics from one sphere to the next.

The self-sustaining snowballing logic is even more explicit in the second cluster of ideas used to explain the spread of risk; namely explanations centered on risk technologies or assemblages. The logic here is that risk governance technologies tend to spread from one area to the next just because they exist. For some scholars this is an almost autonomous process. Haggerty and Ericsson compare it to the spread “rhizomatic” plants, i.e. plants that spread horizontally along the ground and set new vertical roots in the process that may (or may not) eventually be severed from the original plant.<sup>17</sup> For others, the development of new risk technologies opens new possibilities and scope for action at risk that suggest to those involved the possibility of diffusing, adapting and transforming the risk technology to a new area. In Actor Network fashion risks technologies are “actants” in that they suggest actions and make them possible; they are “boundary objects” suggesting themselves for transport across areas.<sup>18</sup> This process is anchored—not in a critical reflection about risk selection—but in the logic of the risk technologies that act in ways that produce a snowballing of risk thinking. The consequence is a spread of risk logics to “everything” which may ultimately turn out to be “nothing” if the risks prove fictitious.<sup>19</sup>

This self-sustaining aspect of risk diffusion is important for understanding the diffusion of the military markets. The expansion of preventive imperatives that go with the spiraling of risk thinking accentuates overstretching and the need to resort to markets in all areas of activities. This fuels the expansion of military markets. Looking at intelligence by way of illustration, the growth in outsourcing has been exponential: 70% of the budget of US intelligence agencies was spent on contracting in 2007 and the amount (in dollars) spent on contracting had more than doubled between 2001 and 2006.<sup>20</sup> It should also be recalled that risks—including military ones—concern

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<sup>16</sup> Michael Power, *The Risk Management of Everything* (London: Demos, 2004); Michael Power, *Organized Uncertainty: Designing a World of Risk Management* (Oxford: Oxford University Press, 2007).

<sup>17</sup> Kevin D. Haggerty and Richard V. Ericson, 'The surveillant assemblage', *British Journal of Sociology*, 51 (2000), pp. 605-622.

<sup>18</sup> Actant is a term is borrowed from Bruno Latour, *Re-assembling the Social. An Introduction to Actor Network Theory* (Oxford: Oxford University Press, 2005). The idea of a boundary object is taken from Michael Power, *Organized Uncertainty*.

<sup>19</sup> Power, *The Risk Management of Everything* and Michael Power, 'The risk management of nothing', *Accounting, Organizations and Society*, 34 (2009), pp. 849-855.

<sup>20</sup> Tim Shorrok, *Spies for Hire: The Secret World of Intelligence Outsourcing* (New York: Simon & Schuster, 2008):

not only states but also private companies, international and non-governmental organizations and individuals and that their demand also fuels market growth.

From this perspective, the role of Blackwater in the CIA Killing Program could be expected; it stands as an example among many. The multiple, ill-defined risk scenarios that made the program appear necessary in the first place stand out as yet another illustration of the self-sustaining spread of risk technologies.<sup>21</sup> The surprise and outrage both the killing program and the role of Blackwater in it provoked when they were revealed, confirms the degree to which the spread of risk thinking, the actions associated with them, including the creation of markets has a tendency to pass unnoted.

### c. Risk professionals and their strategies

To locate the entire link between risk thinking and the expansion of apolitical military markets in anonymous risk discourses and unnoted spread of risk technologies would be to disregard the strategies of risk professionals, including academics. They have tended to promote the spread of risk thinking, of the markets associated with this spread as well as an apolitical understanding of this process.<sup>22</sup>

The growth of a professional corps of risk analysts, risk managers and risk scenario builders has accompanied the expansion and extension of risk analysis. This group of analysts has developed its own techniques, rules and standards and become increasingly differentiated and specialized. Hacking dates the institutionalization of the professional risk analysis to 1969 and that of risk management to 1995 (following Power's analysis).<sup>23</sup> Professionals of risk work both in the public and the private, and often span the spheres. They think of their work as largely integrated.<sup>24</sup> A member of the US National Intelligence Council explained that non-state professionals had a central role in Intelligence. He underlined that the intelligence community referred to them as "intelligence community associates" rather than as commercial, private or non-state to reflect this closeness and to avoid the negative connotations of the term outsourcing.<sup>25</sup>

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<sup>21</sup> According to CIA officials: "the plans remained vague and were never carried" Zanetti and Shane, 'CIA had Plan'.

<sup>22</sup> Strategy is used in Bourdieuan fashion, as a reflection of the dispositions (taken for granted understanding and *habitus*) and positions (resources and strength at the disposal) of given actors. For further discussions and a contrast between the logic and the way most economic theories conceive of strategy see the introductory chapter in Pierre Bourdieu, *The Social Structures of the Economy* (Cambridge: Polity Press, 2005).

<sup>23</sup> Hacking, 'Risk and Dirt'.

<sup>24</sup> For examples from intelligence specifically, the detailed discussion of Boz Allen Hamilton in Shorrok, *Spies for Hire*.

<sup>25</sup> Mathew Burrows (the chief drafter of the National Intelligence Council report *Global Trends: The World at 2025*) at a the public conference 'Around the Report "Global Trends 2025: A Transformed World' at the *Danish Institute of*

Risk professionals (public, private, hybrid) are prone to support and promote the spread of risk thinking and the related markets. One reason may be banal self-interest: risk professionals support an expansion of their own institutions, their profit, the status of their profession and so on. Avoiding politics makes this easier. But there are most certainly also more complex and interesting processes at play here. The world view of risk analysts/managers (as of any professional group) reflects their training and their professional context. They may therefore promote the expansion of an apolitical technical understanding of risk (and the markets attached to it) just as much out of conviction as out of self-interest. Risk management is an important technical, scientific expertise that is best kept aloof of politics. This is the opinion of Vedby Rasmussen who has worked on risk in international relations. He explains that risk-analysis cannot easily be integrated in politics because policy-makers tend to be too short-termist, result oriented and simplistic in their judgment to deal adequately with risk rationalities that are long term, without visible results (success is the non realization of risks) and complex to judge.<sup>26</sup> Similarly, the many non-state “intelligence community associates” reportedly decline to charge for their services presumably do so because they believe in the significance of their contribution.<sup>27</sup> Whether articulated as self-interest or not, a steadily increasing number of risk professionals follow strategies spreading risk thinking and the associated apolitical markets.

The CIA Killing Program illustrates the argument. When the program was re-launched after the brief interruption in 2004, it was done with a role for commercial actors, Blackwater specifically. This decision coincided with the move of Alvin Bernard Krongard—former third from the top at the CIA—to the company. It points to a professional cohesion that spans the public and private and a willingness/interest/persuasion of this profession to back up around a risk scenario justifying the program and the measures taken to respond to the preventive imperatives it created (including the outsourcing). Those involved in the program no doubt share Cheney’s assessment that it was “directly responsible for the fact that for eight years we had no further mass casualty attacks against the United States.”<sup>28</sup> They probably also share senator Hoekstra understanding that outsourcing was therefore justified particularly since the contractors took on purely “mechanical” roles that did not require “a lot of judgment”.<sup>29</sup>

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*International Studies*, Copenhagen 7 September 2009).

<sup>26</sup>See Rasmussen, *The Risk Society at War. Terror, Technology and Strategy in the Twenty First Century.*: 199-200.

<sup>27</sup> Burrows, ‘Around the Report’.

<sup>28</sup> Swarns, ‘Cheney Offers Sharp Defense’.

<sup>29</sup> Quoted in Andrea Mitchell, ‘MSNBC Interview with Representative Pete Hoekstra (R-MI) about CIA Subcontracting Assassination Program’ (*Federal News Service* 21 August 2009).

To approach risk—and the contracting related to it—as merely technical is highly problematic. “The problems of risk perception [and one might add the outsourcing triggered by these] are essentially political. Congress and parliaments give away their rightful territory when they hand over such problems to risk experts. The public debates about risk are debates about politics”.<sup>30</sup> This insight has failed to make its way. Even in the debate in the wake of Panetta’s revelations about the Killing Program critique of the risk scenarios that created the imperative to act and justified the reliance on Blackwater has been scarce.<sup>31</sup> Discussion has focussed more on the question of how the regulation of companies (such as Blackwater) can be improved—including by delimiting “inherent state tasks” from which contractors should be barred. The link between markets and spiralling risk scenarios that create imperatives for action has been largely untouched. Yet, as will be argued in the next section, the narrow focus on improved regulation and accountability has the paradoxical consequence of entrenching the lack of accountability.

## Unaccountable War-Makers

The narrow conception of regulation and accountability tied to the difficulty of politicizing military markets has the effect of creating what I here term an accountability paradox whereby the quest for accountability and improved regulation is entrenching the fundamental lack of accountability of the markets. After a decade of what Kierpaul terms a “mad scramble” to bring contractors to justice, we still have very few cases where contractors have been convicted of anything.<sup>32</sup> This is not for lack of information.<sup>33</sup> Nor is the situation immobile. Rapid legal innovation is creating new instruments that will make it possible to try contractors and hence also to hold them accountable.<sup>34</sup> However, as long as military markets remain apolitical, accountability is bound to remain limited. The key reason is that an apolitical view on markets renders critique of the enmeshment of the public and the

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<sup>30</sup> Mary Douglas, 'Muffled Ears', in Mary Douglas (ed.) *Risk and Blame* (London and New York: Routledge, 1992), p. 79.

<sup>31</sup> Scarce leaves room for the commentators who have drawn attention to the problems and the issues involved more on which below.

<sup>32</sup> Ian Kierpaul, 'The Rush to Bring Private Military Contractors to Justice: The Mad Scramble of Congress, Lawyers, and Law Students after Abu Ghraib', *The University of Toledo Law Review*, 39 (2008), pp. 407-435.

<sup>33</sup> Reports abound both in the media, in law journals and by NGOs and IOs including the UN working group on mercenaries. For Iraq for example the NGO Human Rights first keeps a record of incidences Human Rights First, 'Private Security Contractors at War: Ending the Culture of Impunity', in (Washington: Human Rights *First*, 2008).

<sup>34</sup> For the US context the changes to the MEJA and the UCMJ as well as the possibility of using the Alien Tort Statute against contractor (currently tried out in Virginia against Blackwater employees involved in the Nisour incident) are significant changes. But they have yet to result in convictions. See Elizabeth K. Waits, 'Avoiding the 'Legal Bermuda Triangle': The Military Extraterritorial Jurisdiction Act's Unprecedented Expansion of U.S. Criminal Jurisdiction over Foreign Nationals', *Arizona Journal of International and Comparative Law*, 23 (2008), pp. 493-540.

private unlikely and difficult.

a. Accountability of Enmeshed Spheres

The ties between the market and the public are often perceived as a key problem for any effort to ensure that markets are accountable. A common rendering of this issue is as one of “revolving doors”. However, the picture of a revolving door presupposes that people walk in and out and belong to distinct contexts. It fails to capture professional who belong to both the public and the private at the same time and work in partnership. An image of enmeshed professional spheres is more adequate. A quest for accountability that does not recognize this blurring is bound to encounter difficulties.

Accountability of military market actors is hampered by the strong links and networks between private and public security professionals. Private actors are often doing the “dirty jobs” states wish to dissociate themselves from.<sup>35</sup> The other side of this coin has been that private market actors push their agenda onto the state. By lobbying officials or by creating *faits accomplis* they may change state positions on specific contracts but perhaps more generally foreign policy orientations.<sup>36</sup> However, the image of the public harnessing the private and vice versa understates the accountability issues involved. The present situation is one where the private and public are interwoven: the private is inside the public and the public inside the private. The common adage in the private military market that “everyone is an ex-something” is a way of indicating this. Similarly, the emphasis on creating “private-public-partnerships” and more generally on public private collaboration underscores it. The resulting public-private enmeshment is pursued enthusiastically both by the private and the public side than; sometimes even more enthusiastically by the public.<sup>37</sup>

The consequence is practices that make the applicability of an accountability system based on a conventional understanding of the distinction between public and private elusive. Examples abound of situations where companies have acted as their own controllers, authors of their own contracts, definers of (uncontrollable) performance benchmarks, and even have charged payment for non-defined and undocumented work.<sup>38</sup> It is important to underscore that these practices have

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<sup>35</sup> Major Todd S. Milliard, 'Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies', *Military Law Review*, (2003), pp. 1-95.

<sup>36</sup> Janice Thomson, *Mercenaries, Pirates, and Sovereigns: State-building and Extraterritorial Violence in Early Modern Europe* (Princeton: Princeton University Press, 1994): 59-63.

<sup>37</sup> Nicholas Dorn and Michael Levi, 'European Private Security, Corporate Investigation and Military Services: Collective Security, Market Regulation and Structuring the Public Sphere', *Policing & Society*, 17 (2007), pp. 213-238.

<sup>38</sup> GAO, 'DOD and State Department Have Improved Oversight and Coordination of Private Security Contractors in Iraq, but Further Actions Are Needed to Sustain Improvements', in (Washington: Government Accountability Office,

not taken place against the state but most often with the avail and full knowledge of the public officials involved. Markets are not taking over the state, the state is merging with markets and commercializing itself. The implication of the resulting enmeshed practices is that accountability based on regulations that presume a distinction between the public and the private become close nay impossible.

The CIA Killing Program bears the marks of the enmeshment of public and private. The Program can of course be read in conventional terms as case of the state harnessing the private and/or the private the state. According a to retired intelligence officer “outsourcing gave the agency more protection in case something went wrong”<sup>39</sup> and according to the *Spiegel*, Blackwater lobbying “created the program”.<sup>40</sup> However, on a closer look the issue becomes more complex. Krongard was an insider both in Blackwater *and* in the CIA. The outsourcing was clearly treated more as dealings with “intelligence community associates”, to use Burrows’ expression, than as an outsourcing of a specific set of limited tasks of a public agency to a commercial one. This was not a contract for which bidders were sought. Rather it was a relationship (the details of which remain unclear) between professionals. As an expression of this, the “outsourcing” was not based written contracts, with a clearly formulated service to be rendered at a specified. Rather the so called contracting in the case of the CIA Killing Program was based on “individual agreements”.<sup>41</sup> There are therefore bound to be few—if any—traces of the activities undertaken by Blackwater under the program or of the \$20 million paid for these. Holding the company and/or the involved CIA officials accountable is consequently a real challenge. The interaction has taken place on terms that differ radically from those presupposed by the law.

To hold companies accountable, the enmeshment of spheres that leads to the spread of this kind of practice cannot be seen as incidental or secondary. It has to be taken as a point of departure and placed in the centre of regulatory efforts if accountability is not to remain an empty word and effective regulation an unattainable goal.

#### b. The “blindspot” of legislation

Placing the enmeshment of the public and private at the centre of the quest for accountability is however not easily done. The reason is that modern legal systems operate on the assumption that

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2008); GAO, 'Intelligence Reform: GAO Can Assist the Congress and the Intelligence Community on Management Reform Initiatives', in (Washington D.C.: GAO, 2008).

<sup>39</sup> Quoted in Warrick and Smith, 'CIA Hired Firm for Assassin Program'.

<sup>40</sup> Der Spiegel, 'Blackwater accused of creating 'Killing Program'.

<sup>41</sup> Mazzetti, 'CIA Sought Blackwater's Help'.

the spheres are separable. The pursuit of improved regulation and accountability logically draws on the existing body of law. In so doing it perpetuates the difficulty of directing attention to the problem of enmeshed spheres.

The modern legal system built on the assumption that there are clearly separated spheres to which specific bodies of law apply and that these bodies of law are themselves strictly separated and hierarchically related to each other. Multinational corporations for example span the inside/outside distinction on which international law rests, are effectively made “legally invisible” by the “analytical and theoretical foundations of international law”.<sup>42</sup> This image can be complicated by taking the so called “fragmentation” of law that has undermined hierarchy and unity into account.<sup>43</sup> This opens the possibility of shifting legal logics. If multinational corporations cannot be seen in international law they can perhaps be seen in the *lex mercatoria* or in other private international regimes.<sup>44</sup> Whether singular or fragmented, the legal system(s) makes processes, actors and issues that violate the distinctions on which it/they are built “invisible”. This “blindness”—the existence of “blind spots”—is in no way unique to the legal system and is the precondition for it to be functional. Distinctions are necessary. The eye that sees everything ultimately sees nothing.<sup>45</sup> However, the implication is that the legal system(s) cannot be used to regulate problems, issues and occurrences in their own blind spot.

This sheds light on the difficulty of placing the enmeshment of spheres at the heart of the efforts to improve accountability and regulation (and hence also on its relative ineffectiveness). The key accountability efforts have had the dual objective of holding military market actors accountable to existing law and of making sure that these laws are adapted “to restore consistency between the letter of the [existing] law and its spirit” where it has been lost.<sup>46</sup> The bodies of law most commonly discussed are international human rights law, national legislations (on contracting, on military services), military law, and a range of soft laws (including relevant code of conducts). The hindrance to focusing on the problem of enmeshment is that precisely the public/private boundary is a distinction which is defining for modern legal systems; it is a division used to categorize actors

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<sup>42</sup> Claire Cutler, 'Transnational Business Civilization, Corporations, and the Privatization of Global Governance', in Christopher May (ed.) *Global Corporate Power* (Boulder CO: Lynne Rienner, 2006), pp. 199-226.: 202.

<sup>43</sup> Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', *Michigan Journal of International Law*, 25 (2004), pp. 999-1045.

<sup>44</sup> Claire A. Cutler, 'Private international regimes and interfirm cooperation', in Rodney Bruce Hall and Thomas J. Bierstecker (eds.) *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002), pp. 23-40; Gunther Teubner, 'Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors in World Society', in Karl-Heinz Ladeur (ed.) *Globalization and Public Governance* (Aldershot: Ashgate, 2004), pp. 71-88.

<sup>45</sup> Teubner, 'In the Blind Spot': 59.

<sup>46</sup> James R. Coleman, 'Constraining Modern Mercenarism', *Hastings Law Journal*, 55 (2004), pp. 1493-1537.: 1494.

and to separate spheres. It is their blind spot which they cannot see and not be used to address. This is not the same as saying that they are useless in general or that no accountability/ regulation can be constructed on them; on the contrary.

What cannot be done is to use them to address the problem of enmeshment or to integrate enmeshment within them. This would take the development of legal systems not assuming away the enmeshment from the outset. But that in turn is linked to a willingness to accept that there are incompatible legal principles at work; it implies giving up on legal unity, hierarchy and perfection.<sup>47</sup> It presupposes a willingness to shift out of legal language, identifying enmeshment as a key issue and politicize the market. Not only the preventive imperative but also the professional “strategies” of security professionals, lawyers, journalists and policy-makers militate against this. The legal system is the legitimate, state sanctioned, language for discussing accountability and regulation.<sup>48</sup>

The CIA Killing program—and the role of Blackwater in it—is a good case in point. Accountability and regulation has been thought mainly in terms of whether or not these were in conformity with *existing* laws and regulations in place. For example, questions were raised about whether or not the program and Blackwater’s role in it violated national legislations and particularly the 1976 executive order banning assassinations [following plots against Patrice Lumumba and Fidel Castro],<sup>49</sup> about whether or not the targeted associations were in conformity with international law<sup>50</sup>, or about whether or not the failure to notify congress about the program violated the regulations about intelligence work.<sup>51</sup> A attorney general Holden leading the inquiry set up to investigate the Killing Program was careful and explicitly to underline that it would “target only those who acted beyond *legal* guidelines”.<sup>52</sup> Mirroring this, the defence of the program and the way it has been outsourced and remained unreported rested on references to conformity with the laws in vigour. Hence, those justifying that program and the role of outsourcing insisted that the ban on targeted assassinations did not concern terrorists; that killing a terrorist is equivalent to killing an

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<sup>47</sup> For a general argument to this effect Gunther Teubner, 'Societal Constitutionalism: Alternatives to State-centered Constitutional Theory', in Christian Joergs, Inger-Johanne Sand and Gunther Teubner (eds.) *Constitutionalism and Transnational Governance* (Oxford: Hart, 2004), pp. 31-50; Teubner, 'Global Private Regimes'.

<sup>48</sup> For the significance of institutional state sanctioning in the legal field see Pierre Bourdieu, 'Rethinking the State: On the Genesis and Structure of the Bureaucratic Field', *Sociological Theory*, 12 (1994), pp. 1-19.

<sup>49</sup> Zanetti and Shane, 'CIA had Plan to Assassinate Qaeda Leaders'.

<sup>50</sup> Mazzetti, 'CIA Sought Blackwater's Help'.

<sup>51</sup> Landler and Mazzetti, 'US Still Using Security Firm'.

<sup>52</sup> The Economist, 'CIA Interrogations and the Blackwater affair'; Josh Meyer, 'CIA Inquiry will Target Contractors', *Los Angeles Times*, 28 August 2009.

enemy in battle (and hence not illegal); that Congress had given its avail; that outsourcing did not involve inherent state functions etc.

This discussion is important. Some accountability is better than none. The point here is that pursuit of this kind of accountability is unlikely to get at the vexed issue of how to deal with enmeshment. Yet, since enmeshment is the Gordian knot of improved accountability in military markets the pursuit of accountability is likely to remain limited. Cutting that Gordian knot would require a thorough politicization of military markets and the way they have been integrated *inside* the state, including in intelligence work. However, as has just been argued the legal framing of the quest for accountability makes such a politicization move unlikely since enmeshment is in the “blind spot” of law.

### c. The Accountability Paradox

More strongly, if we displace our attention from the effectiveness of the quest for improved accountability to what that quest itself does, we run into something I am terming an accountability paradox. The point is that not only is the quest for improved accountability/regulation likely to remain rather ineffectual more than this (and hence the paradox) it may weaken accountability further.

The reason is that the pursuit of accountability itself triggers two kinds of processes that hamper the politicization of markets necessary for a development of more effective legal mechanisms directed specifically at enmeshment. The first process is of the familiar “crowding out” type. Framing discussions about improved accountability in terms of the existing system is a way of concentrating energy, attention and imagination on how to supplement or reform the existing legislation. Legal scholars, lawyers, journalists and policy-makers devote their time and energy to speaking and thinking within this frame. A mastery of (or better a pretense to master) relevant legal terminology becomes a *sine qua non* for participation. The flip side of this is to marginalize attention to alternative possibilities that might put the public/private divide in the centre as opposed to in the blind spot. But perhaps even more damaging, it tends to reduce attention (and critique) of the enmeshment itself. By framing the discussion in terms of existing laws observers are constantly lead to argue *as if* there was a real existing public/private divide and ignore the extent to which this is a legal fiction. This is an obstacle innovative imagination and of critical thinking. It amounts to a marginalization that is all the more effective as it rests on and transmits all the symbolic power (and violence) of established law and of professionals of accountability and regulation.

The second process set in motion by the quest for accountability is one of reinforcing and bolstering of the existing system. The process of accountability itself, leads to intense legal innovation that creates an increased number of instruments that can be use to address a range of issues in military markets. This has a reassuring effect: the issues can be dealt with. There is a legal/regulatory apparatus for the purpose. More than this, the process generates a new category of experts and expertise that have a vested interest in and conviction about the effectiveness of this system. The reinsurance might even be bolstered by some successful court cases. The overall consequence then of the pursuit of accountability/regulation is that existing regulatory assemblages are further entrenched and reinforced, not challenged. But in the process enmeshments and blind-spots are erased from the picture with the consequence that the prospects of better accountability/regulation are worsened; not improved.

Blackwater's presence in the CIA Killing program can be used to anchor also this point. One of the reasons the outrage around the role of outsourcing in this program has been so strong is precisely that the company it was outsourced to is Blackwater. Blackwater (now Xe) is one of the most controversial firms in the military market. In addition to its violence against civilians (epitomized by the 2007 Nisour Square incident<sup>53</sup>), Blackwater has been in the limelight for its treatment of employees,<sup>54</sup> for its dealings with clients,<sup>55</sup> for its relationship with the armed forces and the intelligence<sup>56</sup>, for its corporate culture and for its controversial leader—Eric Prince. The consequence has been a string of investigations, court cases, and ultimately a public pledge on the part of the US State Department that it would no longer collaborate with the company. In spite of this, we not only find the company involved in the CIA Killing program. It also turns out that there are contractual arrangements running forward in time (at least until 2011) and that many officials see “few alternatives to Blackwater” for specified tasks.<sup>57</sup> This context and the specificity of Blackwater raises the question how the company and its employees can enjoy such impunity? They have been in the legal limelight like no other military market actor. The company fills a scapegoat

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<sup>53</sup> See Peter W. Singer, 'Can't Win with 'Em, Can't Go to War without 'Em: Private Military Contractors and Counterinsurgency', *Foreign Policy at Brookings. Policy Papers*, (2007) and Heather Carney, 'Prosecuting the Lawless: Human Rights Abuses and Private Military Firms', *The George Washington Law Review*, 74 (2006), pp. 317-342.

<sup>54</sup> For example the Fallujah lynching where four Blackwater employees were killed has triggered court cases by the families of the employees in question.

<sup>55</sup> It has been investigated for overcharging and not respecting its engagements for example in relation to a plane incident in Afghanistan killing six people including three soldiers.

<sup>56</sup> It has been involved in several violent incidents of blue on white violence (military against contractors accidental or not).

<sup>57</sup> Neil Jr. King and August Cole, 'Few Alternatives to Blackwater', *Wall Street Journal*, 17 October 2007; Landler and Mazzetti, 'US Still Using Security Firm'; Ruben Navarette Jr., 'How will liberals react to Obama maintaining Bush-era security policies?' *San Diego Union-Tribune*, 28 August 2009.

function for the entire private security industry in the US.<sup>58</sup> It is widely perceived as “enmeshed” in the CIA, the Pentagon and the State Department.<sup>59</sup> Yet, the efforts mount legal cases against Blackwater have not only been singularly ineffective, they have crowded out the more general discussion about how enmeshment beyond the Blackwater case might be handled.<sup>60</sup>

More than this, the consequences of the many inquiries and court cases against Blackwater will probably perpetuate the lack of focus on enmeshment. The process will produce new regulatory instruments. It will make an increasing number of people who understand regulations in terms of these grow. Not only regulators, law enforces, but also policy-makers, journalists, advocacy groups and the rapidly growing industry consulting companies on regulation will integrate these measure into their arguments and thinking and hence entrench them further, increasing their centrality. Eventually Blackwater (Xe) may be convicted of something and/or be so damaged by the attention it attracts that it has to close and/or radically reform. This will then most probably be interpreted as confirming that the “culture of impunity” in private military markets is ending. We can remove the “bad eggs from the basket” and have accountable military markets grounded in existing regulatory systems. However, this conclusion may be misleading. Blackwater’s record is tainted record but there is little reason to suppose that other companies are better.<sup>61</sup> The most probable consequence of removing/marginalizing Blackwater will be a displacement of contracts to equivalent companies about which fewer questions are asked. At the same time success regulatory success will certainly heighten confidence in the present regulatory/accountability system and decrease the urgency of considering ways of improving it.

An “accountability paradox” is in other words a likely outcome of the present efforts to legal hold Blackwater and/or the CIA responsible for outsourcing in the frame of the CIA Killing Programs. The legal framing of the discussion and paradoxically even more so any success that it might have is likely to crowd out innovation and critique and perpetuate/entrench the blind spots and defects of the current legal/regulations system.

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<sup>58</sup> Ted Rall, 'Scapegoating Blackwater', *Boise Weekly (Idaho)*, 17 October 2007; Jeremy Scahill, *Blackwater: The Rise of the World's Most Powerful Mercenary Army* (Washington: Nation Books, 2007).

<sup>59</sup> Epitomizing this is the civil lawsuit is filed against Blackwater for Racketeer Influenced and Corrupt Organizations Act (RICO) violations Jason Leopold, 'Feinstein: CIA Assassination Program Went Beyond the Simple Planning Stage', *The Public Record*, 21 August 2009.

<sup>60</sup> It is perhaps telling that representative Jan Schakowski who has worked on privatization of security for a long time driven originally by an interest in contracts role in Latin America, is now on the intelligence committee, and has tried to introduce the Stop Outsourcing Security, SOS, Act, H.R. 4102 (see 'Stop Outsourcing Security, or SOS, Act, HR4102' at [www.janschakowsky.org/](http://www.janschakowsky.org/)) is at the margins of the discussion around the CIA Killing Program. She was given 1 minute to address the house of representatives on 16 Sept.

<sup>61</sup> On the contrary as argued e.g. by Steve Fainaru, *Big Boy Rules: In the Company of America's Mercenaries Fighting in Iraq* (Cambridge: Da Capo Press, 2008).

## Conclusion

To break out the accountability paradox it is important to politicize military markets; that is not merely to have a public debate and outrage over the latest scandal—such as Blackwater’s involvement in the CIA Killing Program—case but to have a public debate about the politics of military markets and particularly about the public/private enmeshment that it has created. This politicization is hampered by the (Bourdieuian) professional “strategies” of security professionals, lawyers, but also of journalists, academics, NGO activists and policy-makers who frame the accountability/regulation in legal terms. More than this, politicization is hindered by the “preventive imperative” created by risk thinking which frames the creation of markets as a technical necessity. This said, even if politicization of military markets and accountability of market actors are far from easily attainable they are not impossible. Both in politics and in civil society attempts have been made to politicize.<sup>62</sup> Drawing critical attention to the reasons why it is so difficult (as this article has attempted to do) is to participate in a reflexive process that might eventually make it easier.<sup>63</sup>

This article has highlighted the centrality of the preventive imperative tied to risk thinking in de-politicizing markets it has linked this de-politicization to the impunity of markets by insisting that accountability requires politicization. The question is how general this argument is. Drawing on the CIA Killing program and outsourcing to Blackwater to illustrate claims and arguments has given the article a strongly US American flavor. However, the intent has been to highlight some general processes and mechanisms linked to risk thinking and the creation of apolitical unaccountable military markets. The contention is that these processes and mechanisms are more general and of relevance beyond the US American context, the CIA Killing Program and Blackwater with the important caveat that the way that they play out varies by context.<sup>64</sup> Even more strongly, processes of depoliticizing military markets and creating unaccountable market actors are relevant to International Studies. They are processes moving the legal and political boundaries in the discipline. The disciplinary implication of the argument here is that the use of force increasingly is situated outside boundaries of the political and legal processes assumed to embed and regulate it.

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<sup>62</sup> See for example fn 60 and the civil society groups militating against commercial military services such as [www.blackwaterwatch.net](http://www.blackwaterwatch.net) or [www.stopblackwater.net](http://www.stopblackwater.net).

<sup>63</sup> As clear from the references above, this article is far from the only one reflecting on this.

<sup>64</sup> Europeans are far closer to the US logic than they usually think, but so are many other countries because technologies of government (in this case risk thinking and law) may be given a contextual content and structure but they also span borders as do the professional communities that implement them. Making this argument in detail is far beyond the scope of this article but see e.g. Marieke De Goede, 'Beyond Risk: Premeditation and the Post-9/11 Security Imagination', *Security Dialogue*, 39 (2008), pp. 155-176; Didier Bigo and Anastassia Tsoukala (eds.) *Terror, Insecurity and Liberty: Illiberal Practices of Liberal Regimes* (New York and London: Routledge, 2008); and Didier Bigo, Laurent Bonelli, Dario Chi and Christian Olsson, *Mapping of the Field of the EU Internal Security Agencies* (Paris: L'Harmattan, 2007).

Therefore, not only do we need to revise the way we think about it in international studies incorporating commercial actors; we also need to focus on the enmeshment of the commercial and the public—not to say the commercialization of the public—and its political implications.