



PRIV-WAR Report - The United States of America

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The American Way: Private Military Contractors & U.S. Law After 9/11

An Update - 2010

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PRIV-WAR

Regulating privatisation of “war”: the role of the EU in assuring the compliance with
international humanitarian law and human rights

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INTRODUCTION*

Upon his appointment as Secretary of Defense, following President Bush's electoral victory in 2000, Donald Rumsfeld began a process he called "Transforming the Military" in an article he later authored in *Foreign Affairs* magazine.¹ Instituted prior to the terrorist attacks of September 11th, the premise of his movement to "transform" the military centered on downsizing the number of active military personnel and accelerating the military's movement to the utilization of high technology. The goal of the plan was to create a smaller, more nimble fighting force less concerned with the ability to fight a two-front war against a Soviet-esque threat, and more capable of handling low-intensity conflict for short periods of time.²

By 2004, with the conflict in Iraq causing greater strain on military resources than originally anticipated, the U.S. military realized it had neglected to give proper respect to Carl von Clausewitz's admonition, "not to take the first step without considering the last." With an open-ended commitment unfolding in Iraq and substantial and stable military commitment to fighting the Taliban in Afghanistan, the military possessed insufficient forces and resources to sustain and complete the mission. The U.S. government found private military contractors "an attractive answer to many of their problems."³ Responding to the obvious need in Iraq, the private military industry capitalized on this opportunity and the industry quickly entered into a period of exponential growth. It was, as P.W. Singer puts it, as if the private military services industry "was put on steroids."⁴ Not only did this surge of hyper-active growth increase the sheer scale of the private military industry, but also the great need for security

* This 2010 Report was prepared by Kristine A. Huskey, Clinical Professor and Acting Director of the National Security Clinic, University of Texas School of Law. It updates a report originally prepared in 2008-2009 by Professor Huskey, who was Director of the National Security Clinic from 2007-2009, and Scott M. Sullivan, who was an Assistant Professor, University of Texas School of Law, Emerging Scholars Program, with the assistance of Robert Hamilton, U.S. Army Captain (Ret.). Both reports are available on www.priv-war.eu.

Additionally, the author would like to recognize the extensive work done by the Congressional Research Service (CRS) and the Government Accountability Office (GAO) for their numerous and comprehensive reports on this subject. In writing this Report, the author found particularly instructive: Jennifer K. Elsea, *Private Security Contractors in Iraq and Afghanistan: Legal Issues*, CRS, Jan. 7, 2010; Moshe Schwartz, *Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis*, CSR, July 2, 2010.

¹ Donald Rumsfeld, *Transforming the Military*, FOREIGN AFFAIRS, May/June 2002.

² *Id.*

³ P.W. Singer, *CORPORATE WARRIORS (THE RISE OF THE PRIVATIZED MILITARY INDUSTRY)*, Cornell University Press, 2003, at 244.

⁴ Singer (*CORPORATE WARRIORS*) at 243.

and people with specialized technical expertise pushed the private military industry to create, develop and fill new services.

In many ways, the growth of the privatized military industry reflects the demands of U.S. policy, but such policy should not be confused with partisan politics. As mentioned below, the increasing reliance on private contractors began under President Clinton and was previewed in the U.S. military action in Kosovo. This preview, however, was insufficient to presage the extrapolation of the Kosovo use of contractors to conflicts of the size and scope of current U.S. conflicts. Indeed, the heavy reliance on contractors in current contingency operations, begun during the Bush Administration, has effectively grown during the Obama Administration. At the same time, the previous policies and practices have come under review with the new Administration and the changeover in Congress, and in many cases, visible changes aimed at tighter regulations and actualized accountability have occurred. As a matter of policy, this evolving framework has proved highly influential in the development of U.S. foreign affairs, and, indirectly, the contours of international law.

Scope of the Report

This Report provides a comprehensive discussion of the use of private military contractors (firms, companies, etc.) and their personnel (individuals) by the United States since 9/11 and the applicable legal regimes, with particular attention paid to the use of such firms in Afghanistan and Iraq. Section One seeks to describe the incorporation of contractors into the larger coalition military presence. It provides a detailed qualitative and quantitative analysis of the use of contractors, specifically, the number of contractor personnel working overseas, the governmental departments and agencies with which they are involved, the cost of contractor operations, and the various roles played by contractors. Sections Two, Three, and Four unveil the full universe of legal mechanisms that regulate, govern, and hold accountable the private contractor firms and their personnel. Section Two examines the statutes and guidelines that provide for both the process of contracting with the U.S. government and the review and oversight of military contractors. Sections Three and Four address the criminal and civil legal regimes that attempt to hold private military firms and their personnel accountable for misdeeds while working overseas in a zone of armed conflict. These sections outline statutes, regulations and active and concluded litigation. The Report ends with an Appendix, which is a detailed annotation of a majority of the civil law cases.

Defined Terms

There are numerous terms and acronyms used by scholars, courts, the government, and the industry itself to refer to the corporate entity that enters into a contract with a government department or agency to provide equipment and/or services for use in zones of armed conflict, and the individual, who has some type of employment or contractual relationship with or through the corporate entity. The corporate entity is commonly called a private military company (PMC), private military firm (PMF), or private security company (PSC). Often the terms, contractor, military contractor, private contractor, government contractor, civilian contractor, or some combination thereof, such as private military contractor are used to describe *both* the corporate entity and the individual. The individual is also commonly referred to as contractor personnel. Even when the individual is technically an employee of the corporate entity, the term “contractor,” referring to the individual is still used. On the other hand, even when the individual is technically a contractor, and not an employee, courts tend to refer to such an individual as an employee of the corporate entity.

This Report will use the term “PMC” (private military company/contractor) to refer to the corporate entity and the terms “military contractor,” “contractor” or “contractor personnel” to refer to the individual. (Or, in the discussion of civil liability, the Report may refer to the individual as an “employee” when discussing a court’s analysis or holding.).

Setting the Stage: Noteworthy Incidents Involving PMCs/Military Contractors

While PMCs may have begun gaining in significance to the U.S. government since the 1990’s, it is really only in the last five years that they have become a topic for public consumption due largely to the attention given by the media to events involving these “private warriors.” Given the remarkable number of contractors operating in Afghanistan and Iraq in roles that have been traditionally reserved for the military, it is of no surprise that such individuals have found themselves in situations which resulted in their own bodily harm or death or in accusations of a criminal and/or civil nature against them for their alleged bad conduct. Such “headline” incidents, together with the large number of contractors in Afghanistan and Iraq and serious allegations of fraud and waste, inspired Congress to create the Commission on Wartime Contracting, which has held a number of investigative hearings, and to introduce various pieces of legislation aimed at regulation PMCs and their personnel.⁵

Many of the publicized incidents have involved the Blackwater company (now called “Xe Services”), which had contracted with the Department of State to provide security services to its employees in Iraq. The first, lesser known incident involved four Blackwater contractors who were escorting food supplies to a U.S. army base; they became lost in Fallujah and armed insurgents ambushed the convoy, beat and murdered the contractors, burned and dismembered their remains, and hung the bodies of two of the men from a bridge. The Blackwater company was accused of misleading the contractors and failing to provide the contractors with armored vehicles, weapons, maps and other equipment necessary for the route they were directed to take.

The most infamous Blackwater incident came three years later in 2007 when individuals who were employees and subcontractors of Blackwater opened fire in Nisoor Square, Baghdad, leaving 17 people dead and injuring at least 24 others. An Iraqi investigation concluded that the Blackwater convoy fired warning shots, then stun grenades. The Iraqi report continues by stating that Iraqi police and Army soldiers, mistaking the stun grenades for frag grenades, opened fire at the Blackwater team, to which the Blackwater team responded. According to Iraqi investigators, a Blackwater helicopter present during the attack fired several times from the air. A U.S. Department of State report states that eight to ten attackers opened fire "from multiple nearby locations, with some aggressors dressed in civilian apparel and others in Iraqi police uniforms."⁶ The report states that as the convoy tried to leave, its route was blocked by insurgents armed with machine guns. According to the report, "The team returned fire to several identified targets" before leaving the area. *The New York Times* reported that during the incident at Nisoor Square, one member of the Blackwater security team continued to fire on civilians, despite urgent cease-fire calls from colleagues. The incident was resolved after another Blackwater contractor pointed his own weapon at the Blackwater contractor still firing and ordered him to stop. U.S. military reports

⁵ See generally <http://www.wartimecontracting.gov/>. The Commission will be discussed in more detail later in this Report.

⁶ Bureau of Diplomatic Security, Department of State, U.S. Embassy Baghdad, September 16, 2007, available at <http://i.a.cnn.net/cnn/2007/images/09/16/17sept07.pdf>.

appear to corroborate the Iraqi government's contention that Blackwater was at fault in the incident.

Another well-known incident involving PMCs arose from the use of linguist/translator and interrogation services provided by Titan and CACI, respectively, under contract with the Department of Defense at the Abu Ghraib prison in Iraq. Numbers of Iraqi nationals accused Titan and CACI contractor personnel of beating them, depriving them of food and water, subjecting them to long periods of excessive noise, forcing them to be naked for prolonged periods, holding a pistol to the head of one of them and pulling the trigger, threatening to attack them with dogs, exposing them to cold, urinating on them, depriving them of sleep, making them listen to loud music, photographing them while naked, forcing them to witness the abuse of other prisoners, including rape, sexual abuse, beatings, electrocution, withholding food, forbidding prayer, ridiculing them for their religious beliefs, and other acts.⁷ The "Fay Report" (the Army investigation of the Abu Ghraib Detention Facility and the 205th Military Intelligence Brigade) concluded that contractors contributed to the problems at Abu Ghraib prison: "Several of the alleged perpetrators of the abuse of detainees were employees of government contractors."⁸

In 2009, two American contractors were involved in a shooting incident in Kabul, Afghanistan that left two Afghan nationals dead and a third Afghan national injured. At the time of the shooting, the two contractors were employed by Paravant, a subsidiary of Blackwater, to help the U.S. Army train Afghan troops. In 2010, the two men were arrested in the U.S. and charged with second-degree murder, attempted murder and various fire arms violations.⁹

More recently, in July 2010, four U.S. contract personnel were involved in a two-car accident near the airport in Kabul. Several Afghans were killed or injured, prompting Afghan locals to take to the streets in protest, chanting "death to America" and burning a SUV.¹⁰

Other allegations against PMCs and their contractor personnel involve conduct that could be considered mere negligence under U.S. domestic law. For example, several members of the military have been injured in vehicle accidents caused by contractors, or injured in equipment provided by PMCs. Other allegations have been brought by contractors themselves accusing the PMCs for which they were working of fraud and negligence, such as in the first Blackwater incident described above.

These allegations and others and the legal issues implicated will be addressed in more detail on Sections Three and Four.

I. The Nature of U.S. Privatized Military Contracting in Iraq and Afghanistan

The following section provides both a quantitative and qualitative paradigm through which to view and evaluate the increased presence, cost and roles of military contractors utilized by the United States during pre-conflict, actual conflict, and post-conflict situations.

⁷ See generally, *Saleh et al v. Titan et al*, Center for Constitutional Rights, "Current Cases," available at <http://ccrjustice.org/ourcases/current-cases/saleh-v-titan>.

⁸ *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, MG George R. Fay, Investigating Officer, at 47-52.

⁹ Press Release, Federal Bureau of Investigation, U.S. Department of Justice, *Two Individuals Charged with Murder and Other Offenses Related to Shooting Death of Two Afghan Nationals in Kabul, Afghanistan*, January 7, 2010.

¹⁰ Lama Hasan, *President Karzai Orders Foreign Security Out*, abcNEWS.com, Aug. 17, 2010.

Quantitatively, the breadth and scope in which contractors are used by the U.S. in the Afghanistan and Iraq conflicts is essential to understanding how fundamental and lasting the increased dependence and utilization of private military contractors will be in future conflicts. As a qualitative matter, the roles of contractors in U.S. foreign policy have changed through the performance of tasks once exclusively reserved to the public military. These evolving roles present new options and challenges for any nation states in conflict.

Though the Report attempts to include contractor data in both Iraq and Afghanistan, there is simply more available information on Iraq. Historically, the amount of money and contract personnel committed to operations in Afghanistan was statistically small in comparison with the money and contract personnel committed to Iraq.¹¹ This is evidenced by the number of earlier government reports, investigations and findings regarding government contracts and contract personnel, many of which note that the data does not include complete, if any, information on contractors in Afghanistan. Due to the increase in troop levels and corresponding increase in contractors in Afghanistan during the Obama Administration, government and private reporting has, in more recent years, begun to include information on Afghanistan.

A. Military Contractors by the Numbers

This section provides a breakdown of the number and nationalities of contractor personnel operating in Iraq and Afghanistan and the number of contractors killed and wounded in those countries.

At the outset, it is important to note two factors that affect the data provided herein. First, the Department of Defense (DoD), which has the majority of U.S. contracts overseas, did not begin gathering data on contractors until the second half of 2007. Second, as all government reports and private research agree, the data regarding the number of contractors operating in Iraq and Afghanistan, the actual amount of money that has been obligated through contracts, and how many private contractors have even been killed or wounded is highly unreliable as the tools for gathering the information continue to be developed and the data itself is not routinely checked for accuracy.

The most current data only covers contractors operating under DoD contracts. DoD, however, makes up approximately 95% of all U.S.-agency funded contracts overseas.¹² As of March 2010, there were 95,461 contractors in Iraq compared to 95,900 troops, a ratio of approximately 1:1.¹³ Third-country nationals made up more than half of all contractor personnel in Iraq (56%), while U.S. citizens comprised 26% and local nationals 18%.¹⁴ The number of contractors in Iraq has actually decreased substantially in the last couple years, as

¹¹ As will be discussed in the following section, the U.S. Congressional Budget Office (CBO) reports that the U.S. government obligated \$10 billion in contracts to Afghanistan between 2003 and 2007. Whereas, it committed \$85 billion in Iraq over the same time period.

¹² There were a total of 250,335 contractors operating in the entire CENTCOM AOR (Area of Responsibility) compared to approximately 272,000 uniformed personnel in the same region. USCENTCOM is responsible for operations in 20 countries in and around the Middle East including Afghanistan, Bahrain, Egypt, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Oman, Pakistan, Qatar, Saudi Arabia, Syria, Tajikistan, Turkmenistan, UAE, Uzbekistan, and Yemen. See Moshe Schwartz, *Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis*, at 4 Congressional Research Service, July 2, 2010.

¹³ DOD U.S. CENTCOM 2nd Quarter Contractor Census Report (as of March 2010); Joint Staff, Joint Chiefs of Staff, "Boots on the Ground" March 2010 report to Congress.

¹⁴ DOD U.S. CENTCOM 2nd Quarter Contractor Census Report (as of March 2010).

both the number of contractors and troops in Iraq have been steadily declining since December 2007. In an August 2008 report, the U.S. Congressional Budget Office (CBO) found that the total number of contractors operating under a U.S. government funded contract in Iraq was between 190,000 and 196,000.¹⁵ Though the contractor to soldier ratio was 1:1, at that time, there were more contractors working directly or indirectly for the U.S. government in Iraq than the sum total of all other coalition forces deployed to Iraq.¹⁶

As of March 2010, there were 112,092 contractors in Afghanistan compared to 79,100 troops, a ratio of approximately 1.42:1.¹⁷ Local nationals made up 70% of all contractor personnel, while third-country nationals comprised 16% and U.S. citizens 14%.¹⁸ The number of contractors Afghanistan has also been on the decline, but only recently. In December 2008, contractors made up 69% of DoD's workforce in Afghanistan, which was the highest recorded percentage of contractors used by DoD in any conflict in the history of the United States.¹⁹

The nature of the increase of contractors in the field goes far beyond the expansion of raw numbers. The U.S. deployment in World War I included a contractor to soldier ratio of 1:24, a ratio, which narrowed to 1:7 in World War II, and then to 1:5 in the Vietnam conflict. The current ratio of contractor to military personnel in the Iraq theater is 1:1, which is two times higher than the ratio during any other major U.S. conflict with the exception of the U.S. military action in the Balkans during the 1990s.²⁰ The 1.42:1 contractor to soldier ratio in Afghanistan represents an inverse for the first time in U.S. history.

Just as it is difficult to accurately estimate the number of contractors operating under U.S. government contracts in the Iraq and Afghanistan theaters, it is equally difficult to estimate the total number of contractors killed or injured. For example, contractor deaths are not included in the official Iraq Coalition Casualty Count. In June 2010, the Labor of Department published statistics, though with the disclaimer that they were neither complete nor official, indicating that from September 21, 2001 to March 2010, there were 1487 contractors deaths in Iraq and 521 such deaths in Afghanistan, with approximately 45,000 reported injuries.²¹ In comparison, it has been reported that 4423 troops have been killed in Iraq since 2003 and 1301 troops have been killed in Afghanistan since 2001.²² However, more recent news reports indicate that from January to September 2010 more U.S. funded contractors working in Iraq and Afghanistan have died than U.S. soldiers during that same time period.²³

¹⁵ U.S. Congressional Budget Office Report, *Contractors' Support of U.S. Operations in Iraq*, (CBO Report), at 8, Aug. 2008.

¹⁶ This estimate includes personnel who work directly for the US governments prime contractors, and to the extent possible, subcontractors who work for other contractors. *Id.*

¹⁷ DOD U.S. CENTCOM Quarterly Census Reports; *Troop Levels in the Afghan and Iraq Wars, FY2001-FY201*; Joint Staff, Joint Chief of Staff, "Boots on the Ground" monthly reports to Congress.

¹⁸ DOD U.S. CENTCOM 2nd Quarter Contractor Census Report (as of March 2010).

¹⁹ Moshe Schwartz, *Training the Military to Manage Contractors During Expeditionary Operations: Overview and Options for Congress*, Congressional Research Service, Dec. 17, 2008.

²⁰ While the U.S. operation in the Balkans in the 1990s is roughly comparable with the current ratio in Iraq, it is noteworthy that the Balkans conflict involved no more than 20,000 U.S. military personnel. *See* CBO Report, at 9.

²¹ Office of Workers' Compensation Program (OWCP) Defense Base Act Case Summary Report, *available at* <http://www.dol.gov/owcp/dlhwc/dbaallnation.htm>.

²² *See* [icasualties.org](http://www.icasualties.org) *available at* <http://www.icasualties.org/>.

²³ *See, e.g.,* Nick Wakeman, *Contractor death toll surpasses military's in Iraq, Afghanistan*, Washington Technology, Sept. 23, 2010.

When compared to U.S. losses, the number of contractors killed may seem low given the substantial number of contractors in the Iraq and Afghanistan theaters. However, statistically speaking, contractors have suffered the second most casualties in the Iraq conflict, for example. In other words, contractors in Iraq have suffered more losses total than all other coalition forces combined and more than any single U.S. Army division.²⁴ This reality is particularly significant when considering that the vast majority of contractors in the field are operating in functions in the rear (*i.e.* food service and weapons maintenance).

B. Government Spending on Private Military Contracts in Iraq

The three leading U.S. agencies that make the majority of contract awards for contingency operations are the Department of Defense (DoD), the U.S. Agency for International Development (USAID), and the Department of State (DoS). DoD is responsible for obligating 90-95% of the total contracts.

Looking at a recent and relatively short time period for DoD contracts only, during fiscal year 2007 and the first half of fiscal year 2008, the agency reported approximately \$30.3 billion in obligations on 55,603 contracts active in Iraq or Afghanistan.²⁵ Included in that figure are obligations on contracts with performance in Iraq and Afghanistan but which also include work outside those two countries. DoD's contracts were for a variety of goods and services including maintenance of DoD facilities, reconstruction, security and supplies.

Viewing a longer time period and with respect to Iraq only, from 2003 through 2007, U.S. government agencies awarded \$85 billion in contracts for work to be principally performed in the Iraq theater. This amount accounts for almost 20% of the \$144 billion in funding for *all* U.S. government activities in Iraq from 2003 to 2007. Of the \$85 billion awarded in U.S. contracts, 70 percent of those awards were for contracts performed in Iraq itself.²⁶ DoD awarded the majority of contracts totaling \$76 billion, while USAID and DoS obligated \$5 billion and \$4 billion, respectively, over the same period.²⁷

Given that DoD's contract obligations represented almost 90% of all U.S. agency contract dollars awarded in the Iraq theater from 2003 through 2007, it is important to understand where those contracts are actually fulfilled geographically. Of the \$76 billion U.S. Department of Defense contract awards, \$54 billion was for contracts performed in Iraq.²⁸ \$14 billion was for contracts performed in Kuwait and \$8 billion was for contracts performed in other nearby countries.²⁹ Regarding the U.S. Department of Defense entities that are obligating these contracts, the U.S. Department of the Army is the largest contractor in the Iraq theater by funds obligated. From 2003 to 2007, the U.S. Army awarded \$57 billion for contracts or 75 percent of the total money obligated by the U.S. Department of Defense on contracts in the Iraq theater.³⁰ The Departments of the Air Force, the Navy (which includes the Marine Corps) and the Defense Logistics Agency awarded the remaining \$19 billion in

²⁴ Singer (CORPORATE WARRIORS) at 246.

²⁵ *Report to Congressional Committees, CONTINGENCY CONTRACTING*, "DOD, State and USAID Contracts and Contractor Personnel in Iraq and Afghanistan," at 20-21, Government Accountability Office (GAO), Oct. 2008.

²⁶ CBO Report at 1.

²⁷ *Id.* at 3.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

U.S. Department of Defense contract obligations at \$6 billion, \$1 billion, and \$12 billion respectively.³¹

Looking at the numbers alone, it is not easy to understand how significant the amount obligated by the U.S. government to military contractors. However, taking the largest Iraq-war related contract which was awarded to Kellogg Brown and Root (KBR) as an example, this approximately \$22 billion contract, which requires KBR to provide for military mission logistics and assist in the restoration of Iraqi oil production is “...roughly three times what the U.S. Government paid to fight the entire 1991 Persian Gulf War. When putting other wars into current dollar amounts, the U.S. government paid KBR about \$7 billion more than it cost the U.S. to fight the American Revolution, the War of 1812, the Mexican-American War, and the Spanish American War combined.”³²

C. Private Military Contractors and Their Expanded Role

While the number, ratio and amount of money obligated to military contractors in Iraq and Afghanistan is an enormous jump from previous conflicts, the evolving role of contractors in pre-conflict, conflict and post-conflict operations has also caused many observers pause. Contractor personnel roles are at the heart of the political and legal challenges facing not only the U.S., but the international community as well. The current expansive roles of contractors by the current world hegemon, will, without doubt, affect the planning and judgment of international legality of using contractors by other states in the future. As a result, examining the nature of the displacement of public soldiers through private means is of great importance. Nowhere is this displacement exposed more in harsh relief than the movement of PMCs beyond their traditional role of logistical support into the realms of security and intelligence.

1. Logistics/Base Support

The historical role of contractors has largely been through the provision of logistical support. The U.S. conflict in Iraq is no exception with over 70% of the contractor personnel contracted through the DoD in Iraq performing traditional support activities such as maintenance, transportation of supplies, food preparation, laundry service and construction of living, dining and bathing facilities for military personnel, and communication.³³ The role of logistical support cannot be dismissed. As U.S. General Omar Bradley said, “Amateurs talk about strategy. Professionals talk about logistics.” This adage still rings true today. Though the roles of military contractors are evolving, the industry’s core base will remain in logistical support. It is the area that the government is least capable of delivering and the area most likely to return the greatest value when subjected to market forces.

³¹ *Id.* U.S. agencies other than the U.S. Department of Defense, the U.S. Agency for International Development and the Department of State obligated a total of less than \$300 million. This category includes the Departments of Agriculture, Commerce, Health and Human Services, the Interior, Justice, Transportation, and the Treasury, as well as the Broadcasting Board of Governors and the General Services Administration. CBO Report at 3.

³² Singer (CORPORATE WARRIORS) at 247.

³³ DOD U.S. CENTCOM 2nd Quarter Contractor Census Report (as of March 2010). Despite, past statements that it would do so, DoD does not report the breakdown of services contractors provide in Afghanistan. Typically, the services performed in Afghanistan are similar to those performed in Iraq.

2. Security

Similar to the PMCs exponential growth in numbers caused by the provision of logistical support during the build-up and pre-invasion of Iraq, it was the “ensuing occupation period where the companies’ roles expanded.”³⁴ As the occupation period extended into years, violence in Iraq escalated and the U.S. mission grew more challenging. It was during this post-invasion rise in violence where private security contractors (PSCs) “began to be used as a stopgap, in lieu of sending more U.S. troops to fill the lack of significant allied support.”³⁵ Indeed, as reconstruction in Iraq began, the percentage of contractors performing base support remained relatively constant, the percentage working in construction decreased, and the percentage performing security increased. Private military contractors began training the Iraqi police force and army, but more importantly, they provided on the ground physical protection—a great source of controversy. Quickly, military contractors found themselves providing armed convoy escorts, physical protection of military bases and, most notably, personal security to top U.S. and Iraq officials, such as Coalition Provisional Authority leader, L. Paul Bremer.

What constitutes a private security contractor continues to be a subject of debate. Some define private security as protecting a person, place or thing, while others use a broader definition to include such activities as providing intelligence analysis and the training of military or law enforcement personnel. The National Defense Authorization Act for Fiscal Year 2008 (NDAA FY2008) defines a private security function in the more limited manner: guarding of personnel, facilities or properties and other activity for which contractors are required to be armed.³⁶ In general terms, a private security contractor can be armed or unarmed, and provide services such as site security, convoy security, security escort, operational coordination, intelligence analysis, hostage negotiations, and security training.³⁷

A January 2010 Congressional Research Service report estimated there were over 30,000 armed employees working for a variety of government and private sector clients in Iraq, and approximately 25,000 security contractors registered in Afghanistan.³⁸ Due to the restrictions placed on security companies in Afghanistan, it is no surprise that many security contractors are not registered or operate without the required license, many of them for NATO and the U.S. government. U.S. government funded security contractors account for approximately 30% (Iraq) and 40% (Afghanistan) of total security contractors in those theaters. In real numbers, there were 12,684 (of which 88% were armed) security contractors operating in Iraq under U.S. government contracts; over three-quarters (77%) of armed security contractors were made up of third-country nationals.³⁹ There were 11,423 (of which 94% were armed) security contractors operating in Afghanistan under U.S. government contracts; almost 90% of the armed security contractors were local nationals.⁴⁰ With respect

³⁴ Singer (CORPORATE WARRIORS) at 247.

³⁵ *Id.*

³⁶ NDAA FY2008, sec. 864.

³⁷ Moshe Schwartz, *The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress*, at 2, Congressional Research Service, Jan. 19, 2010.

³⁸ *Id.* at 3.

³⁹ DOD U.S. CENTCOM 4th Quarter Contractor Census Report (as of September 30, 2009).

⁴⁰ *Id.*

to the percentage of total number of U.S. government contractors, DoD reported that just over 12% of contractors in Iraq perform security services.⁴¹

The trend in Iraq and Afghanistan has followed an unsurprising pattern given the nature and intensity of the involvement of the U.S. in both conflicts at certain points in time and the desire to eventually decrease troop levels. In Iraq, the number of armed security contractors went from 5,481 in September 2007 to a high of 13,232 in June 2009, and in the fourth quarter of 2009 began to decline—a trend DoD anticipates will continue as the number of troops decrease.⁴² In Afghanistan, the number of armed security contractors went from 2,401 in September 2007 to 3,184 in December 2008. From December 2008 to September 2009, the number increased to 10,712 armed contractors, an increase of 236%.⁴³

Other issues to consider as contractors increasingly play a security role are (1) the amount of monetary compensation private security contractor personnel receive for their work; (2) whether the increased use of private security contractor personnel weakens military readiness by luring away highly trained military personnel like special operations forces; and (3) the attrition rate of private security contractors.

First, the amount of compensation. Are private security contractor personnel paid unnecessarily exorbitant salaries? The answer is not clear. Looking strictly at the amount of money paid per day, the amount of compensation paid to a PSC personnel compared to U.S. Army infantryman performing the same or similar function is grossly high. For example, “In 2007, private security guards working for companies such as Blackwater and DynCorp were earning up to \$1,222 a day or \$445,000 a year. By contrast, an Army sergeant was earning \$140 to \$190 a day in pay and benefits, a total of \$51,100 to \$69,350 a year.”⁴⁴ However, according to the August 2008 Congressional Budget Report the answer is no. The CBO report found that the costs of a private security contract are comparable with those of a U.S. military unit performing similar functions, particularly when peacetime is factored into the equation.⁴⁵ During peacetime, the private security contract would not have to be renewed, whereas the military unit would remain in its force structure.⁴⁶ An excerpt from the CBO Report explains:

“The figure of \$1,222 a day represents the contractor’s billing rate, not the amount paid to the contractor’s employees. The billing rate is greater than an employee’s pay because it includes the contractor’s indirect costs, overhead, and profit.”⁴⁷

A better comparison would involve estimating a soldier’s “billing rate”—the total cost to the government of having a soldier fill a deployed security position for one year. Further, contractors generally bid various numbers of personnel in different labor categories, so focusing on a single labor category—such as the security guards—gives an incomplete picture of the total cost of providing security.

⁴¹ DOD U.S. CENTCOM 2nd Quarter Contractor Census Report (as of March 2010). Despite, past statements that it would do so, DoD does not report the breakdown of services contractors provide in Afghanistan.

⁴² Schwartz, DOD’s Use of PSCs, at 6.

⁴³ DOD U.S. CENTCOM Quarter Contractor Census Reports, FY2008-FY2009.

⁴⁴ CBO Report at 14.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

A better comparison would also reflect all types of personnel as well as non-labor costs (such as vehicles and other equipment) that a security contractor includes in its bid.”⁴⁸

The second issue of debate is whether the use of private security contractors depletes the U.S. military by recruiting military personnel with certain skills away from reenlisting in the military. Though a concern, all government and official reports indicate the use of private security contractors in both the Iraq and Afghanistan theaters does not appear to be increasing attrition among military personnel.”⁴⁹ DoD officials have stated that the hiring of experienced military and civilian government personnel by private firms is not causing significant shortages of certain categories of military personnel at this time.⁵⁰

The third issue concerns the rate of attrition among contractors, particularly security contractor personnel whose role is physical protection. Again, due to several years of inefficient tracking, there are no conclusive numbers on the attrition rate. However, consider what would happen if several members of the Blackwater security detail assigned to Coalition Provisional Authority head, L. Paul Bremer, arbitrarily decided to return to the United States, or if civilian contractor escorts to munitions convoys failed to show up to work and walked out on the job. Unlike military personnel who have no legal discretion as to whether they stay or leave Iraq, private military contractor personnel have complete freedom to leave whenever they choose, likely risking only a breach of contract under civil law.

This information is telling for several reasons. First, at roughly 25,000 in number, private security contractor personnel comprise just over 12% of the 207,500 estimated contractor personnel working in Iraq and Afghanistan on a U.S. contract, but they absorb most, if not all, of the media coverage and legal discussion regarding private military contractors in Iraq and Afghanistan. Second, while the actual cost may be comparable to a similar military unit, the ability to easily leave their assigned mission raises serious military operational concerns.

3. Intelligence

The realm of the intelligence community—commonly referred to as IC⁵¹ in the industry—is by nature secretive and, therefore, complete and precise information on the number of private contractors engaged or dollar amounts spent on private contractors in U.S. intelligence operations is not readily available. According to a report by the Office of the Director of National Intelligence (ODNI), approximately 25-27% of “core” intelligence personnel are contractors.⁵² This makes for approximately 37,000 private contractors working alongside the 100,000 government employees in the collection and analysis of intelligence, technology, and mission management.⁵³ One source indicates that approximately 40% of contract intelligence officers were hired to collect or analyze information, a task traditionally the province of government employees of the CIA or NSA.⁵⁴ However, Ronald Sanders, head

⁴⁸ CBO Report at 14.

⁴⁹ *Id.* at 11 (citing United States Government Accountability Office (GAO) Report 2005, at 35).

⁵⁰ *Id.*

⁵¹ Sixteen civilian and military government agencies make up the U.S. IC.

⁵² Robert O’Harrow, Jr., *Contractors Augment Intelligence Agencies*, Wash. Post, Aug. 28, 2008, at D01. This figure does not include workers at companies that build spy satellites and computer equipment, cafeteria staffers or security guards (“non-core” functions), which if counted, contractors would comprise about 70% of the U.S. intelligence workforce. Greg Miller, *Contractors Account for a quarter of US spy operations*, L.A. Times, Aug. 28, 2008.

⁵³ *Id.*

⁵⁴ Richard Willing, *Contractors Playing Major Role in U.S. Intelligence*, USA Today.com, Apr. 25, 2007.

of personnel for the ODNI, gives a higher percentage to that category. Of contractors working in intelligence, Sanders has stated that 27% are involved in intelligence collection and operations and 19% work in analysis job (totaling more than 45%), while 22% manage computer networks or perform other information technology functions.⁵⁵

With respect to dollar amounts, several sources indicate that roughly 70% of the \$60 billion spent annually on intelligence (or \$45 billion) goes to private contractors.⁵⁶ A contractor costs on average \$250,000 a year, nearly twice what a government employee costs.⁵⁷

The more significant concern is not necessarily how many contractors work in the IC or how much they cost, though certainly the high numbers could indicate the need for review, but rather what are the qualitative tasks being performed by private employees whose employment is dictated by a profit-seeking firm. As already mentioned, a substantial number of intelligence collection and analysis is being performed by private contractors. In testimony before Congress, CIA Director Mike Hayden admitted that contractors for the CIA were used to perform “enhanced interrogation,” such as waterboarding, on detainees held at CIA blacksites⁵⁸ and the Fay Report makes clear that contractors were involved in the abuse and torture of prisoners at Abu Ghraib prison in Iraq.⁵⁹ Private contractors are also substantially involved in the analysis of the intelligence collected. Employees of Lockheed Martin, Booz Allen, and SAIC are thoroughly integrated in analytical divisions throughout the IC, including the ODNI, which produces the President’s Daily Brief.⁶⁰

The increase of publicly available information about the degree of involvement by contractors in the IC, scandals such as those involving Blackwater, CACI and Titan (the Abu Ghraib contractors), and a growing concern by certain members of Congress ultimately led to legislation prohibiting the use of contractors in traditional or inherently governmental functions, such as interrogation.⁶¹

II. The Process of Military Contracting in the United States

The contracting process for the spectrum of PMCs and contractor personnel spans several agencies and officials. The most prominent actors in military contracting in the United States, however, fall under the guidance of the Office of Management and Budget (OMB) and procedures outlined under relevant military regulations.

The Office of Management and Budget, primarily through the promulgation and interpretation of OMB Circular A-76, generally sets out the type of governmental functions

⁵⁵ Greg Miller, *Contractors Account for a quarter of US spy operations*, L.A. Times, Aug. 28, 2008.

⁵⁶ Shaun Waterman, *US Intel Budget May Reach 60 Billion Dollars*, Washington (UPI), June 11, 2007; *see also* Simon Chesterman, *We Can’t Spy if We Can’t Buy*, 19 EJIL 5 (2008); *see generally* Tim Shorrock, SPIES FOR HIRE: THE SECRET WORLD OF INTELLIGENCE OUTSOURCING (2008).

⁵⁷ Chesterman, 19 EJIL 5.

⁵⁸ Richard Esposito and Jason Ryan, *CIA Chief: We Waterboarded*, abcNEWS.com, Feb. 5, 2008.

⁵⁹ *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, MG George R. Fay, Investigating Officer, at 47-52.

⁶⁰ R.J. Hillhouse, *Outsourcing Intelligence*, The Nation, July 30, 2007. The President's Daily Brief is an aggregate of the most critical analyses from the sixteen agencies that make up the intelligence community. Staff at the ODNI sift through reports to complete the PDB, which is presented to the President every day as the US government's most accurate and most current assessment of priority national security issues. *Id.*

⁶¹ *See* Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA FY2009), sec. 1036, P.L. 110-417, Oct. 14, 2008.

that may be contracted out by government agencies.⁶² Once identified as appropriate for contracting, each relevant agency carries out specific processes to hire a contractor for the specific task to be fulfilled.

Military regulations exist to effectuate, control, and provide guidance to the hiring and use of private military firms and the individual contractors they employ and provide substance to the military contracting surge discussed above. Of these regulations, the program responsible for managing contractors acting in theater is Army Regulation (AR) 700–137, specifically the Logistics Civil Augmentation Program (LOGCAP) found therein,⁶³ which establishes the basic military practice in processing the augmentation of military forces through civilian contractors during wartime.

A. Process and Parameters of Military Contracting

The procedural requirements of PMCs operating in theater are governed by U.S. policy prohibiting the outsourcing of “inherently governmental” functions and executed by U.S. military regulations setting forth the process by which contractors enter the field.

1. “Inherently Governmental” Functions

Congress has defined “inherently governmental function” to mean a function that is “so intimately related to the public interest as to require performance by Federal Government employees.”⁶⁴ It involves functions that can “determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal justice proceedings,” and functions that can “significantly affect the life, liberty, or property of private persons. . . .”⁶⁵

The Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA FY2009), passed at the end of 2008, required the OMB to review the many different definitions of “inherently governmental function” and to determine whether the various definitions have sufficient clarity to ensure that only officers or employees of the federal government or members of the armed forces perform inherently governmental functions and other critical functions necessary for the mission success of a federal agency.⁶⁶ It has yet to be seen whether the objective—to develop a single consistent definition of the term—has been met.

The Office of Management and Budget Circular A-76 sets forth the U.S. government’s policy proscribing the outsourcing of activities that are “inherently governmental” in nature. But, neither the OMB Circular nor accompanying interpretation provides governing principles useful in illuminating *how* and *why* certain functions obtain “inherently governmental” status. In 2003, Circular A-76 was revised and now states that using contractors to provide certain types of protective services, such as guard services, convoy protection services, and the operation of prison or detention facilities, whether performed by unarmed or armed personnel, is *not* prohibited. The revised Circular also advises that executive agencies should take into

⁶² OMB Circular No. A-76: Performance of Commercial Activities, Revised 2003 (Circular A-76) (White House Office of Management and Budget, Washington, DC, May 29, 2003), *available at* http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction.

⁶³ Army Regulation (AR) 700-137 LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP).

⁶⁴ See 31 U.S.C. § 5(2)(A), “The Federal Activities Inventory Reform Act of 1998,” P.L. 105-270, codified at 31 U.S.C. § 501.

⁶⁵ *Id.* § 5(2)(B)(i),(ii), and (iii).

⁶⁶ NDAA FY2009, sec. 321, P.L. 110-417, Oct. 14, 2008.

account whether circumstances exist where the provider's authority to take action will significantly and directly affect the life, liberty or property of individual members of the public.⁶⁷

The U.S. General Accountability Office (GAO) has provided little guidance to understanding the “inherently governmental” function test in national security, only that it is, clear that government workers need to perform certain “warfighting, judicial, enforcement, regulatory, and policy-making functions ... Certain other capabilities, ... such as those directly linked to national security, also must be retained in-house to help ensure effective mission execution.”⁶⁸ This guidance offers very little in the way of specific or concrete rules where national security privatization is concerned. No one doubts that the U.S. government must retain “certain warfighting” functions. Similarly, according to the GAO, capabilities “directly linked to national security” must only be retained if demonstrable that in-house assistance helps “ensure effective mission execution.”⁶⁹ The conceptual ease of such abstract judgments, however, has been offset by the difficulty in assigning detailed meaning to each relevant term.

Perhaps in response to notorious incidents involving security contractors as well as the large number of contractors in contingency operations and the increased scrutiny of their roles, the NDAA FY2009 also mandates that private security contractors are not authorized to perform “inherently governmental” functions in an area of combat operations.⁷⁰ This mandate, however, simply reiterates the OMB Circular policy and provides no more substance to the restriction with respect to security contractors. Of more significance to PSCs, the NDAA FY2009 specifically states that interrogation is an inherently governmental function and cannot be appropriately transferred to the private sector.⁷¹

In a world where privatization has prevailed as a matter of practice, concerns of national security are described as “uniquely ill-suited to privatization.” And, based on the above definitions and guidelines, it would seem that national security functions, including those of guarding government officials and military installations, would have remained one of the last areas of government perceived as “inherently governmental” and thus unsuitable for privatization or outsourcing. Additionally, given the pervasive mistrust toward privatizing national security functions, one would expect that the privatization in defense by the United States would be the exception rather than the rule. However, none of these assumptions have been brought to bear the truth.

While the sheer number and ratio of contractors to troops has risen dramatically over recent years, and despite the need for a well-defined term with clear parameters, particularly in the area of national security, determining the contours of the “inherently governmental” function test has been and remains a constant challenge.

2. Logistics Civil Augmentation Program (LOGCAP)

In the context of most defense contracting, the contracting process is either guided by Pentagon officials (dependent on the underlying function undertaken by contract) or through LOGCAP, for the purpose of supporting military operations undertaken by U.S. troops.

⁶⁷ Circular A-76.

⁶⁸ See Commercial Activities Panel: Improving the Sourcing Decisions of the Federal Government (U.S. General Accounting Office (GAO), GAO-02-847T, Washington, DC, 27 September 2002), available at <<http://www.gao.gov/new.items/d02847t.pdf>, 21.

⁶⁹ *Id.*

⁷⁰ NDAA FY2009, sec. 841.

⁷¹ NDAA FY2009, sec. 1036.

Under the regulation, the four primary objectives of LOGCAP include:

- (1) Resolve the combat support and combat service support unit shortfalls represented in operation plans.
- (2) Consider conversion of existing support units based on availability of contract support in wartime.
- (3) Provide rapid contracting capability for contingencies not covered by global operation plans.
- (4) Provide for contract augmentation in the continental United States during mobilization.⁷²

Although LOGCAP is an Army program, it is also empowered to support the other branches of the U.S. armed forces and support other services in joint operations, as well as federal, and military coalition partners (following the consummation of bilateral agreements).⁷³

B. Governmental Oversight and Review of Military Contractors

The section below briefly outlines the statutory and military regulatory framework designed to manage the work and behavior of contractors acting under contracts that require deployment in zones of armed conflict.

1. General Substantive Statutory and Regulatory Framework

U.S. government regulation of contractor activity has posed difficulties of basic set standards and disclosures among governmental agencies as well as imposing criminal liability when individual contractors act outside the scope of the law. One of the most common critiques faced by the government is that not only did different agencies with projects in the same theater (*i.e.*, DoD and DoS) not know of the activities of the other, but each individual department did not possess the requisite manpower or regulatory regime to possess a clean view of the activities of contractors for which they are directly responsible.

The first attempt to standardize U.S. government action in relationship to contractors came through a December 5, 2007 Memorandum of Agreement (MOA) between the Department of Defense and the Department of State.⁷⁴ The agreement, however, applies only in Iraq and focuses on security contractors. Under the MOA, the DoD and DoS agreed to jointly develop and implement certain “core standards” including: (1) the management of PSC personnel; (2) the coordination of PSC operations outside secure base and U.S. diplomatic property; (3) a clear legal basis for holding private security contractor employees accountable under U.S. law; and (4) recognition of investigative jurisdictions and coordination of joint investigations where conduct of PSC personnel are to be investigated.⁷⁵ Annexed to the MOA is a detailed document setting forth rules governing private security contractors with the intention of “improv[ing] the coordination and accountability” of PSCs of both

⁷² Army Regulation (AR) 700-137; Colonel Karen E. LeDoux, LOGCAP 101: An Operational Planner’s Guide, Army Logistician, May-June 2005.

⁷³ OWNER’S MANUAL FOR THE LOGCAP III CONTRACT: LOGCAP 101: WORKING WITH LOGCAP IN IRAQ, Report Issued by the Joint Munitions Command (2006).

⁷⁴ Memorandum of Agreement (MOA) Between the Department of Defense and the Department of State on USG Private Security Contractors, Washington, D.C. December 5, 2007, available at <http://www.defense.gov/pubs/pdfs/Signed%20MOA%20Dec%205%202007.pdf>. (The DoS Archive for documents is at <http://2002-2009-fpc.state.gov/c20470.htm>).

⁷⁵ *Id.*

Departments.⁷⁶ Thus, under the authority of the MOA, DoD and DoS began, in earnest, to develop policies for vetting, background investigations, training, weapons authorizations, movement coordination, and incident and response procedures and investigations for contractors directly tied to each institution.

Passed at the end of 2007, the National Defense Authorization Act for Fiscal Year 2008 (NDAA FY2008), section 861 obligated DoD, DoS, and USAID to enter into a Memorandum of Understanding (MOU) relating to contracting in both Iraq and Afghanistan.⁷⁷ NDAA FY2008 also specified a number of issues to be covered in the MOU, including delineating responsibility for investigating possible violations of the UCMJ and MEJA, and the identification of common databases to serve as repositories of information on all contracts and contractor personnel.⁷⁸ Specifically, section 862, also required the Secretary of Defense, in coordination with the Secretary of State, to prescribe regulations and guidance relating to screening, equipping and managing private security personnel in areas of combat operations. The regulations were to include tracking private security personnel, authorizing and accounting for weapons used by PSCs and reporting requirements whenever a security contractor discharges a weapon, kills or injures another person.⁷⁹ In July 2008, DoD, DoS and USAID signed an MOU in which they agreed the Synchronized Predeployment and Operational Tracker (SPOT) would be the system of record for the statutorily-required contract and personnel information.⁸⁰ SPOT is essentially a web-based system originally developed by DoD to provide greater visibility over contractors but under the MOU, each agency is responsible for accurately inputting data elements related to contractor personnel, such as the number of personnel employed. Though the agencies have made progress in implementing SPOT, numerous GAO reports have repeatedly indicated that SPOT falls short of providing information that would help facilitate oversight and inform decision making as well as fulfill statutory requirements.⁸¹

Section 854 of the NDAA FY2009 expands the MOU to include reporting requirements for contractors of allegations of offenses in violation of the UCMJ or MEJA committed by or against contractor personnel, delineates responsibility for victim and witness protection and other assistance to contractor personnel in connection with such crimes, and

⁷⁶ *Id.*, ANNEX A: DELIVERABLES. See, e.g., section IV setting forth “Rules for the use of Force” for PSCs of both DoD and DoS.

⁷⁷ National Defense Authorization Act for Fiscal Year 2008 (NDAA FY2008), (P.L. 110-181; 122 Stat. 253) codified at 10 U.S.C. §2302 (2007), sec. 861. As a practical matter, some of the MOU would likely supersede the MOA, but because the MOA was not Congressionally mandated, it is not clear what legal effect the MOU has on the MOA.

⁷⁸ *Id.*, sec. 861-862.

⁷⁹ *Id.*

⁸⁰ See *Testimony Before the Subcommittee on Oversight and Investigations, Committee on Armed Services, House of Representatives, IRAQ AND AFGHANISTAN, “Agencies Face Challenges in Tracking Contracts, Grants, Cooperative Agreements, and Associated Personnel,”* Government Accountability Office (GAO), at 2-3, March 23, 2010.

⁸¹ See, e.g., *id.*; *Statement Before the Commission on Wartime Contracting in Iraq and Afghanistan, CONTINGENCY CONTRACTING, “Further Improvements Needed in Agency Tracking of Contractor Personnel and Contracts in Iraq and Afghanistan,* GAO, November 2, 2009; *Testimony Before the Subcommittee on Oversight and Investigations, Committee on Armed Services, House of Representatives, CONTINGENCY CONTRACTING, “DOD, State, and USAID Are Taking Actions to Track Contracts and Contractor Personnel in Iraq and Afghanistan,* GAO April 1, 2009.

includes provisions for ensuring that contractor personnel are aware of their responsibility to report such crimes.⁸²

The NDAA FY2008 also established the Commission on Wartime Contracting (CWC), an independent, bipartisan legislative commission created to study wartime contracting in Iraq and Afghanistan.⁸³ Section 841 requires the Commission to study federal agency contracting for the reconstruction, logistical support of coalition forces, and the performance of security functions, in Iraq and Afghanistan, including assessing waste, fraud, abuse and mismanagement. The CWC has the authority to hold hearings and refer to the Attorney General any violation it identifies in carrying out its duties and is required to issue two reports during its tenure, which lasts until 2011.⁸⁴ It issued an interim report in June 2009 and has issued three special reports.⁸⁵

2. Operational Military Regulations of Contractors in Theater

U.S. military regulations move the substantive restrictions of state contracting from the abstract realm of “inherently governmental” functions to the “on the ground” issues that surround the regulation of contractors operating in the theater of armed conflict. According to DoD formal instructions, contractors operating in a conflict zone are considered either “external support” or “theater support” dependent on the area in which they were contracted.⁸⁶ This section briefly sets out the major regulatory procedures and restrictions imposed upon PMCs and contractors.

a. Logistics / Security Status

Under current regulations, contractors operating in logistics support are authorized to engage in indirect participation (including managing communications, support, transporting supplies) in the theater of armed conflict.⁸⁷ Such personnel are authorized by a military commander to carry a weapon for individual self-defense to be determined on a case-by-case basis.⁸⁸ The carrying of such weapons must also be authorized under the contract between the government and the PMC in question as well as the employment agreement between the PMC and individual contractor.⁸⁹

In contrast, armed contractor personnel are available to support U.S. troops for security purposes when the purpose of the contract is clearly non-combat (and thus not considered an inherently governmental function).⁹⁰

b. Command and Control

⁸² Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA FY2009), P.L. 110-417, sec. 854, Oct. 14, 2008. Note these provisions do not apply to contracts with the CIA.

⁸³ NDAA FY2008, sec. 841.

⁸⁴ See generally, website for the Commission on Wartime Contracting in Iraq and Afghanistan, <http://www.wartimecontracting.gov/index.php>.

⁸⁵ See *id.*; *At What Cost? Contingency Contracting in Iraq and Afghanistan*, Interim Report, Commission on Wartime Contracting in Iraq and Afghanistan, June 2009, available at http://www.wartimecontracting.gov/docs/CWC_Interim_Report_At_What_Cost_06-10-09.pdf.

⁸⁶ See Department of Defense Instruction (DODI), Number 3020.41, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces,” paragraph E2.1.8 (external support); DODI 3020.41, paragraph E2.1.18. (theater support).

⁸⁷ Army Regulation (AR) 715-9, “Contractors Accompany the Force,” para. 3-3(d).

⁸⁸ DODI 3020.41, paragraphs 6.3.4.1, 6.3.4.2.

⁸⁹ *Id.*

⁹⁰ DODI 3020.41, paragraph 6.3.5.7040(c).

When contractors accompany the force in theater, they do not serve directly under the military commander charged with their region of operation. Rather, an Army Procurement Contracting Officer oversees the performance of the contract as well as any amendments to the underlying contract that may be necessary as the contractor's work unfolds.⁹¹ As such, the command and control structure of contractors is fundamentally different than that of the regular military.⁹² Basic questions of command and control are not resolved ad hoc by the commander in theater but through the terms and conditions of the government contract under which each PMC is operating.⁹³ This differentiation of command and control is manifest through the regulatory dictate that only the contracting officer communicates the military's requirements and prioritizes PMC responsibilities.⁹⁴ However, during the course of performing their contract, contractors operating in theater are required by law to adhere to all guidance and obey all instructions and general orders that are issued by the theater commander relating to force protection, security, health, safety and relations and interaction with local nationals.⁹⁵ Contractors are also required by law to comply with U.S., host country and local laws, treaties and international agreements and all applicable Uniform Code of Military Justice provisions.⁹⁶ Moreover, contractors are required to adhere to all guidance and obey all instructions and general orders issued by the combatant commander.⁹⁷ Failure to obey lawful orders of the theater commander may result in both individual and company contractor removal from the theater.⁹⁸ Short of removal, commanders can affect individual contractor's status through revocation of clearances and restricting contractors from installations or facilities under their control.⁹⁹

c. Licensing Requirements for Armed Contractors

Under the U.S. 2007 Operational Law Handbook, PMCs contracted to act in a security context, where the use of force is contemplated, are allowed to carry arms only following explicit approval. The application to carry arms must include: (1) a description of where such contract security personnel will operate, the anticipated threat, and what non-military property, or non-military personnel such contractor personnel are intended to protect, if any; (2) a description of how the movement of contractor security personnel will be coordinated through areas of increased risk or planned or ongoing military operations including how the contractor security personnel will be rapidly identified by members of the Armed Forces; (3) a communication plan to include a description of how relevant threat information will be shared between contractor security personnel and U.S. military forces, including how appropriate assistance will be provided to contractor security personnel who become engaged

⁹¹ AR 715-9, Ch. 3-2, paragraphs *e* and *f*; Field Manual (FM) 3-100.21 (100-21), "Contractors on the Battlefield," Ch. 4; *see also, e.g.*, MEMORANDUM FOR COMMANDER, U.S. ARMY MATERIEL COMMAND DEPUTY ASST SECRETARY OF THE ARMY FOR POLICY AND PROCUREMENT, Special Inspector General for Iraq Reconstruction, November 23, 2004 (audit prepared by IG office regarding procurement practice in Iraq).

⁹² AR 715-9, Ch. 4; FM 3-100.21, Ch. 4; AR 700-137, "Logistics Civil Augmentation Program (LOGCAP)."

⁹³ AR 715-9, Ch. 2; FM 3-100.21, Ch. 2.

⁹⁴ *See generally*, AR 715-9; FM 3-100.21.

⁹⁵ *See* Defense Federal Acquisition Regulation Supplement (DFARS) 252.225-7040, "Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States (July 2009)," paragraph (d); Army Federal Acquisition Regulation Supplement (AFARS) 5152.225-74-9000(a)(3).

⁹⁶ *Id.*; FM 3-100.21, Ch. 4.

⁹⁷ *See id.*

⁹⁸ *Id.*

⁹⁹ *See* AR 715-9, Ch. 4, Discipline and Commander's Authority.

in hostile situations; (4) documentation of individual training covering weapons familiarization, rules for the use of deadly force, limits on the use of force including whether defense of others is consistent with law, the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of deadly force that control the use of weapons by civilians, and the Law of Armed Conflict; (5) certification that the individual is not prohibited under U.S. law from possessing a weapon or ammunition due to conviction in any court of a crime of domestic violence whether a felony or misdemeanor; (6) written acknowledgement by the defense contractor firm and individual contractor security personnel, after investigation of background and qualifications of contractor security personnel and organizations, certifying such personnel are not prohibited under U.S. law to possess firearms; (7) written acknowledgement by the defense contractor firm and individual contractor security personnel that: (a) potential civil and criminal liability exists under U.S. and HN (host nation) law for the use of weapons, (b) proof of authorization to be armed must be carried; (c) contractor may possess only U.S. Government-issued and/or approved weapons and ammunition for which they have been qualified; (d) contract security personnel were briefed and understand limitations on the use of force; and (e) authorization to possess weapons and ammunition may be revoked for non-compliance with established rules for the use of force.¹⁰⁰

d. Contractor Reporting Requirements in Theater

As mentioned, pursuant to legislation (NDAA FY2008), DoD, DoS and USAID signed an MOU in which they agreed the Synchronized Predeployment and Operational Tracker (SPOT) would be the system of record for the statutorily-required contract and personnel information. Although the law only requires each agency to track aggregate data on contracts and contractor personnel, DoD configured SPOT in a manner that requires users to manually enter detailed information, such as deployment dates, next of kin, and whether an individual has been injured or killed, for each person working in Iraq or Afghanistan.¹⁰¹ At the ground level, DoD Instructions require a database be maintained, with the purpose of informing Combatant Commanders in the theater, and contain the following information: (1) by-name accountability of all contractors deployed with forces, and (2) “minimum contract information,” including a summary of services or capability to be provided under the contract, and sponsoring military unit contact information.¹⁰² Further, DoD Instructions require that use and maintenance of the database is required throughout all levels of command where contractors may support contingency operations or other military operations.¹⁰³

III. Criminal Liability for Contractors

The United States government has yet to demonstrate a comprehensive capability to hold either private military firms or individual contractors criminally liable for unlawful acts perpetrated abroad. Contractor immunity provisions that had previously been implemented in both Iraq and Afghanistan highlighted the need for more expansive and developed statutory regimes that enable federal or military prosecution of contractors. Yet, even with the closing

¹⁰⁰ See 2007 Operational Law Handbook, Judge Advocate General, Ch. 7; see also DODI 3020.41, paragraphs 6.3.4, 6.3.4.1., and 6.3.4.2.

¹⁰¹ See *Testimony Before the Subcommittee on Oversight and Investigations, Committee on Armed Services, House of Representatives, IRAQ AND AFGHANISTAN*, “Agencies Face Challenges in Tracking Contracts, Grants, Cooperative Agreements, and Associated Personnel,” Government Accountability Office (GAO), at 2-3, March 23, 2010.

¹⁰² DODI 3020.41, 6.2.6.

¹⁰³ See *id.*

of this immunity gap and the great potential for prosecution under federal and military statutes, holding contractors accountable continues to elude the entity primarily responsible for sending them abroad in the first place. This section briefly examines the provisions of U.S. law relevant for creating criminal liability for contractors acting in Iraq and Afghanistan.

A. Contractor Immunity Provisions

Previously, contractors operating in both Iraq and Afghanistan had been granted immunity under local laws for actions in the scope of their employment relative to their contract with the United States. These immunity provisions caused substantial criticism by the public and academic commentators and engendered debate within the domestic political environment of each of the three nations. The contours of each immunity grant also created confusion as to what acts were covered and, as a result, put in to question where the ultimate responsibility for prosecution rested. For numerous reasons, including the international outrage over the Blackwater/Nisoor Square incident, as of January 1, 2009, immunity for contractors operating in Iraq came to an end with the approval of a new agreement between Iraq and the U.S. Currently, immunity for contractors in Afghanistan continues, however, such immunity for *security* contractors will essentially become a non-issue by January 2011 if a recent decree by the Afghanistan President, Hamid Karzai, is implemented.

1. Iraq

a. CPA 17

In the United States conflict in Iraq, contractor immunity was initially established in June 2003 by Coalition Provisional Authority Order No. 17 (CPA 17).¹⁰⁴ CPA 17 had provided a general grant of immunity to contractors and outlined the basic parameters in which such immunity would not attach or otherwise be made inapplicable. The general grant of immunity provided that:

“Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”¹⁰⁵

While the language of this immunity grant was broad, it also included limiting language, presumably designed to preclude immunity in certain circumstances. Under the terms of the immunity grant, immunity was not afforded to contractors for acts which were not performed “pursuant to the terms and conditions” of the contract by which the contractor was acting.¹⁰⁶ In other words, to the extent contractors engaged in behavior not seen to further the terms and conditions of an underlying conduct, immunity would not attach. U.S. court precedent indicates that there is a presumption that contractual provisions should not be read to authorize criminal acts by a contracting party. This presumption is stronger when the criminal acts in question are violent in nature. As such, the “pursuant to the terms and conditions” provision of CPA 17 may, in fact, have excluded immunity from prosecution of violent crimes by contractor personnel.

¹⁰⁴ See Coalition Provisional Order 17, §4, as amended June 17, 2004, available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev__with_Annex_A.pdf.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

CPA 17 also established a waiver provision, which provided that a grant of general contractor immunity “is not for the individuals concerned” and “may be waived” by the United States, and thus, opened the possibility of a local trial for contractors accused of unlawful activity.¹⁰⁷

CPA 17 expired in conjunction with the expiration of the UN mandate established under Security Council Resolution 1511, December 31, 2008 and was replaced by a new agreement negotiated between the United States and Iraq.

b. The Withdrawal Agreement

On November 27, 2008, the Iraqi Parliament ratified a new agreement with the U.S., (commonly referred to as the “Withdrawal Agreement”), that calls for the withdrawal of U.S. troops over a three-year period and essentially revokes the blanket immunity for military contractors that CPA 17 had provided.¹⁰⁸ Sources indicate that the U.S. had originally wanted the continued immunity from Iraqi law for both troops and contractors, however, Iraq stood firm with regard to contractors, a position taken, no doubt, on account of the Nisoor Square incident involving contractors of the Blackwater company. A compromise was eventually reached and immunity was retained for U.S. troops *only* for acts performed while on duty. The Agreement became effective on January 1, 2009.

Article 12 of the Withdrawal Agreement states, “Iraq shall have primary right to exercise jurisdiction over United States contractors and United States contractor employees,” which are defined as “non-Iraqi persons or legal entities, and their employees, who are citizens of the United States or a third country and who are in Iraq to supply goods, services, and security in Iraq to or on behalf of the United States Forces under a contract or subcontract with or for the United States Forces.”¹⁰⁹ Excluded are persons or legal entities normally resident in the territory of Iraq. Iraq is under no obligation to inform U.S. officials if a contractor has been arrested. Presumably, the U.S. could continue to exercise jurisdiction over U.S. contractors in cases over which U.S. courts have jurisdiction, though the Agreement does not authorize the U.S. to arrest or detain a contractor without a warrant issued by an Iraqi court, unless perhaps such persons are caught in the act of committing a serious crime or if the arrest takes place on base.¹¹⁰ However, such arrests must be reported and the detainee-contractor turned over to Iraqi authorities within 24 hours.¹¹¹

The author knows of no case against U.S. contractors brought in Iraqi courts, to date. However, though the application of Iraqi jurisdiction over contractors did not begin until January 1, 2009, there has been debate as to whether the Iraqi government could prosecute Blackwater contractors (or any other contractor for that matter) for acts committed during the period of past immunity.

2. Afghanistan

Despite the current state of immunity for U.S. military, civilian personnel and contractors operating in Afghanistan, there is no direct corollary to CPA 17 that so publicly and specifically provides such immunity. As an initial matter, the U.S. is participating in two

¹⁰⁷ *Id.*

¹⁰⁸ Agreement Between the United States of American and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, November 17, 2008 (Withdrawal Agreement), *available at* http://graphics8.nytimes.com/packages/pdf/world/20081119_SOFA_FINAL_AGREED_TEXT.pdf.

¹⁰⁹ *Id.* Art. 12, Art. 2.

¹¹⁰ *Id.* Art 22, Art. 6.

¹¹¹ *Id.* Art. 22.

military operations in Afghanistan, which have separate mandates and different status of forces arrangements. Operation Enduring Freedom (OEF) refers to the U.S.-led coalition that initiated military action in Afghanistan in 2001, while the International Security Assistance Force (ISAF) is a NATO-led coalition deployed to Afghanistan under a United Nations mandate after the fall of the Taliban government in December 2001.¹¹²

With respect to contractors supporting the OEF mission, the operative document (essentially acting as a SOFA) outlining the relationship between the U.S. and Afghanistan, does not break out the jurisdictional question of contractors separate from that of the regular military.¹¹³ Instead, the agreement asserts the establishment of an accord “regarding issues related to United States military and civilian personnel of the Department of Defense.”¹¹⁴ Such personnel are to be accorded “a status equivalent to that accorded to the administrative and technical staff” of the U.S. Embassy under the Vienna Convention on Diplomatic Relations of 1961. Accordingly, covered U.S. personnel are immune from criminal prosecution by Afghan authorities. In this regard, however, contractors may not be specifically provided immunity as, at least under most U.S. government guidelines and regulations “civilian personnel” are distinguished from “contractor personnel.”

On the other hand, the agreement does provide that:

The Government of Afghanistan recognizes the particular importance of disciplinary control by United States military authorities over United States personnel and, therefore, Afghanistan authorizes the United States Government to exercise criminal jurisdiction over United States personnel. The Government of Afghanistan and the Government of the United States of America confirm that such personnel may not be surrendered to, or otherwise transferred to, the custody of an international tribunal or any other entity or state without the express consent of the Government of the United States.¹¹⁵

Thus, the agreement encourages the exercise of U.S. jurisdiction over its own personnel, from which contractors are not specifically excluded, but it does *not* prohibit Afghanistan from exercising jurisdiction over contractor personnel. Moreover, the agreement appears, in large part, to concern the transfer of U.S. personnel to international tribunals or other states. To date, Afghanistan has not attempted to exercise jurisdiction over any contractors supporting the OEF mission in Afghanistan.

Regarding the ISAF mission, the operative document is the Military Technical Agreement between ISAF and the Afghan Interim Authority. This agreement is much more straightforward and provides that all ISAF and supporting personnel are subject to the exclusive jurisdiction of their own governments.¹¹⁶ However, there is no clear data on what portion, if any, of U.S. personnel involved in supporting the ISAF mission include contractors.

¹¹² In both cases, the agreements were signed with the transitional or interim government, which has since been replaced by the fully elected Government of the Islamic Republic of Afghanistan. Neither agreement has been directly affected by the change in government.

¹¹³ Agreement regarding the status of United States military and civilian personnel of the U.S. Department of Defense present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities, Exchange of notes September 26 and December 12, 2002, and May 28, 2003. Entered into force May 28, 2003. TIAS (Treaties and Other International Acts Series).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ The Military Technical Agreement is available at <http://www.operations.mod.uk/isafmta.pdf>.

In Afghanistan, the concern and debate over immunity provided to private *security* companies and individual security contractors may be completely moot by January 2011. As mentioned earlier in this Report, on August 17, 2010, President Hamid Karzai issued a decree calling for a phase-out and banishment of all private security companies in Afghanistan, both domestic and foreign, which employ approximately 40,000 individuals there.¹¹⁷ The decision aims “to better provide security for the lives and property of citizens, fight corruption, prevent irregularities and the misuse of arms, military uniforms and equipment by private security companies,” the decree said.¹¹⁸ Increasing concerns by the Afghan government that the private security companies were becoming like private militias led to the decree, which is designed to facilitate the complete handover of security to Afghan government control. The sole exception to the order allows private guards to continue to operate within compounds of embassies, consulates, nongovernmental organizations and economic organizations.¹¹⁹ Thus, these individuals continue to enjoy immunity to the extent it exists as explicated above, but based on the tenor of the decree, it may not be long before immunity, to the degree it exists, for these remaining contractors is similarly banished.

B. Prosecution in Federal Court

To the extent immunity shields contractors from prosecution in Iraq and Afghanistan, two other forums have served as the focal points for the exercise of U.S. jurisdiction over contractor crimes – U.S. federal civilian court and court-martial jurisdiction. The question of the reach and role, of federal and military courts has led to great confusion between the civilian government and military service. Further, jurisdictional holes in both systems, exposed over the course of both of the respective conflicts in Iraq and Afghanistan have led to legal reform through congressional legislation.

The basic jurisdictional threshold questions are simple for both federal and military courts. U.S. federal courts, as a general rule, do not possess jurisdiction over acts occurring beyond national borders absent an explicit statutory provision to the contrary.

1. Special Maritime Territorial Jurisdiction (SMTJ)

Federal statutes grant U.S. courts “special maritime and territorial jurisdiction” (SMTJ) which enables federal courts to exercise their jurisdiction for acts perpetrated on U.S. military bases.¹²⁰ SMTJ extends jurisdiction over crimes where no other government is able to effectively safeguard American interests. Originally, the SMTJ statutory regime was limited to areas of “special jurisdiction” including the high seas, U.S. vessels on international seas, U.S. aircraft, and certain land utilized by the U.S government personnel as military bases and embassies.

This jurisdiction was expanded by the U.S.A. PATRIOT Act to explicitly include military bases located abroad “with respect to offenses committed by or against a national of the United States.”¹²¹ The Act also expanded SMTJ jurisdiction over any place used by

¹¹⁷ Lama Hasan, *President Karzai Orders Foreign Security Out*, abcNEWS.com, Aug. 17, 2010.

¹¹⁸ *Karzai formally orders security firms to disband*, Associated Press, Aug. 18, 2010.

¹¹⁹ Alissa Rubin, *Karzai Orders Guard Firms to Disband*, The New York Times, Aug. 17, 2010.

¹²⁰ See 18 U.S.C. §7.

¹²¹ See *id.*; 8 U.S.C. §1101(22) defines a U.S. national as a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States. U.S. servicemembers who are foreign nationals are generally considered U.S. nationals, but foreign nationals employed by the U.S. government abroad are not. Thus, the Act would exclude foreign contractors working for U.S. PMCs.

entities of the United States government, which includes property owned by other states but used for governmental purposes by the United States.¹²²

In 2007, a CIA contractor was convicted for assault of a detainee in Afghanistan by way of SMTJ.¹²³ He appealed his conviction based on part that the temporary base in Afghanistan did not constitute a “premises” of a “military mission” within the meaning of the statute, but the Fourth Circuit disagreed and upheld the conviction.¹²⁴ The court looked to factors, such as size, length of U.S. control, improvements, use, occupation by U.S. personnel, to determine whether is a premises is a “mission.”¹²⁵

2. Military Extraterritorial Jurisdiction Act (MEJA)

The primary alternative to SMTJ jurisdiction is the Military Extraterritorial Jurisdiction Act (MEJA).¹²⁶ The purpose of MEJA was to extend federal court jurisdiction over civilians overseas who commit criminal offenses where domestic prosecution in that foreign nation was not feasible. Initially passed in 2000, it provides for the punishment of conduct that would be punishable by imprisonment for more than one year (a felony offense) if committed within the SMTJ jurisdiction of the United States. This includes aggravated assault, theft, unlawful killing, sexual abuse and other serious crimes. MEJA also provides jurisdiction to cover former members of the service whose crimes are not discovered until their separation from service.¹²⁷

MEJA was amended in 2004 through the National Defense Authorization Act for Fiscal Year 2005 passed by Congress. The amendments stemmed from the fact that the original MEJA failed to cover contractors beyond those working for the Department of Defense. Accordingly, the current MEJA provides jurisdiction for individuals “employed by or accompanying the Armed Forces outside the United States,” which encompasses civilian employees, contractors and subcontractors (at any tier) (and their respective employees) of the Department of Defense *and* “other Federal agencies” and “any provisional authority.”¹²⁸ However, in the case of employees and contractors of “other Federal agencies” and “any provisional authority,” the law limits jurisdictional coverage only “to the extent such employment relates to supporting the mission of the Department of Defense.”¹²⁹

MEJA does not create jurisdiction over individuals employed by or accompanying the military who are citizens of the state in which they are operating (who are presumably subject to domestic prosecution).¹³⁰ Further, MEJA offers extensive guidance for pre-trial procedures covering arrest and detention, extradition, and the right to counsel, designed to alleviate practical problems of the substantial distance separating the criminal act being prosecuted and

¹²² 18 U.S.C. §7(9). Specifically, the Act reaches the premises of U.S. diplomatic, consular, military or other United States Government missions or entities in foreign states, including buildings, parts of buildings, residences, etc. used for U.S. missions, regardless of ownership.

¹²³ Press Release, Department of Justice, *David Passaro Sentenced to 100 Months Imprisonment: First American Civilian Convicted of Detainee Abuse During the Wars in Iraq and Afghanistan*, Feb. 13, 2007, available at <http://charlotte.fbi.gov/dojpressrel/2007/ce021307.htm>.

¹²⁴ *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009).

¹²⁵ *Id.* at 214.

¹²⁶ 18 U.S.C. §3261-67, “Military Extraterritorial Jurisdiction Act of 2000,” (MEJA), as amended by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

¹²⁷ *Id.*

¹²⁸ 18 U.S.C. §3261, §3267. Those “accompanying” the military include military and civilian personnel dependents. 18 U.S.C. §3267.

¹²⁹ *Id.* at §3267.

¹³⁰ *Id.*

the court in which the prosecution will take place.¹³¹ In 2005, DoD issued regulations for implementing MEJA: DoD Instruction 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompany the Armed Forces Outside the United States, Certain Service Members, and Former Service Members*, March 3, 2005.¹³² Under the Instruction, the DoD Inspector General (IG) has the responsibility to inform the Attorney General when he or she has reasonable suspicion that a federal crime has been committed, and is further responsible for implementing investigative policies to make MEJA effective.¹³³

MEJA, as it was originally enacted and in its current form, has been criticized for two primary reasons (1) it only extended to Department of Defense employees and contractors; and (2) while granting U.S. courts jurisdiction over extraterritorial acts, and despite the DoD Instruction, the Act was not accompanied by the necessary grant of resources to enable Department of Justice (DoJ) officials to engage in a meaningful investigation of acts occurring so far from their traditional realm of power and to have whatever evidence is accumulated in such cases be thoroughly investigated and presented in court. Critiques of the first sort have largely been addressed by the amendment to include contractors of any federal agency “to the extent such employment relates to supporting the mission of the Department of Defense overseas.” Note that this revision to the law may not necessarily cover a significant portion of contractors who engage in personal security of employees (or companies) that are not associated with the Department of Defense (*i.e.*, State Department or USAID employees or private reconstruction firms) and, arguably as such, are not “supporting the mission of the Department of Defense overseas.”

Other potential loopholes in MEJA’s jurisdictional grant have also sparked concern. Specifically, only crimes that carry a punishment over one year fall within MEJA jurisdiction. This penalty calculation would exclude simple assault charges, which would include unlawful acts such as physically assaulting a detainee during an interrogation through striking or slapping as well as other means of mental abuse otherwise prohibited by law and regulation.

In April 2008, DoJ reported that 12 individuals had been charged under MEJA with several investigations underway.¹³⁴ Since then, DoJ has made additional indictments under MEJA, including those against three contractors employed by Special Operations Consulting Security Management Group, Inc., a DoD PMC, for kidnapping a foreign national at gunpoint while working at Camp Al-Asad Air Base, Iraq,¹³⁵ and Blackwater contractors, which will be discussed in detail below. A more recent case, which has been cited for leading to the Karzai decree in August that banishes private security firms from Afghanistan, involves Paravant LLC, a subsidiary of Blackwater (or Xe Services, as it is now known). The two individuals were working as contractors for the DoD, providing training to the Afghan National Army in the use and maintenance of weapons and weapons systems. The men were charged under MEJA with second-degree murder, attempted murder, and firearms offenses for a shooting

¹³¹ *Id.* at §3262-3266.

¹³² 71 Fed. Reg. 8,946, Feb. 22, 2006.

¹³³ DoD Instruction 5525.11 §5.

¹³⁴ *Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment, Hearing Before the Senate Committee on Foreign Relations, 110th Congress.* (Apr. 9, 2008) (Statement of Sigal P. Mandelker, Deputy Assistant Attorney General, Criminal Division, DoJ).

¹³⁵ Press Release, U.S. Attorney for the Western District of Louisiana, *Military Contractors Indicted by Federal Grand Jury*, Dec. 15, 2008, available at <http://www.usdoj.gov/usao/law/news/wdl20081215.pdf>.

incident that resulted in the deaths of two Afghan nationals and injured a third.¹³⁶ The trial is set to begin September 12, 2010 in the U.S. District Court for the Eastern District of Virginia.¹³⁷

Blackwater¹³⁸ and the Nisoor Square Incident

The “Nisoor Square incident” is a well-known tragedy that helped incite policy-makers and the public to intensely focus on the issue of regulating PMCs and PSCs specifically. The event occurred on September 16, 2007 at the Nisoor Square traffic circle in Baghdad, Iraq. As noted above, employees and subcontractors of the Blackwater company, which had a contract with the State Department to provide personal security services, were assigned to a convoy of heavily-armored trucks and were armed with, among other weapons, a sniper rifle, machine guns, and grenades. The Blackwater personnel became involved in a firefight in the public square and as a result, 17 people were killed and over 24 others injured, most of which were allegedly unarmed civilians, including women and children.

Until December 2008, the DoJ had not indicated any inclination toward prosecuting the individuals responsible despite the fact that several official reports indicate that the Blackwater personnel had very little, if any at, justification for the deaths and injury of civilians. Immediately after the incident, Iraq revoked the company’s license to operate in Iraq. Whether in response to continued pressure from the public, clear dissatisfaction by Congress on the issue of accountability of PMCs, or the newly-elected President Obama, who had run his campaign on change, transparency and accountability, five former Blackwater personnel were indicted under MEJA on December 4, 2008. They were charged with the deaths of 14 unarmed civilians and the injury of at least 20 civilians (most, if not all, victims were Iraqi citizens), with the specific charges of voluntary manslaughter, attempt to commit manslaughter, using and discharging a firearm during and in relation to a crime of violence, and aiding and abetting the manslaughter. Two weeks earlier, another former Blackwater security guard, Jeremy Ridgeway, had signed a plea agreement, pleading guilty to voluntary manslaughter, attempt to commit manslaughter and aiding and abetting, in exchange for his testimony against his colleagues.

On January 13, 2009, the defendants filed a motion to dismiss all counts for lack of jurisdiction under MEJA and briefing by both parties on the issue concluded in February 2009. The defendants claimed that the federal court had no jurisdiction to try them for crimes committed in Iraq because MEJA only covers employees or contractors of any federal agency whose employment “relates to supporting the mission of the Department of Defense overseas.”¹³⁹ The defendants pointed out that their company’s contract was to provide armed protection to civilian personnel of the State Department whose mission is to “create a more secure, democratic, and prosperous world for the benefit of the American people and the international community,” while the mission of DoD is to “provide the military forces needed to deter war and to protect the security of our country.”¹⁴⁰ On February 17, 2009, Judge

¹³⁶ Press Release, Federal Bureau of Investigation, U.S. Department of Justice, *Two Individuals Charged with Murder and Other Offenses Related to Shooting Death of Two Afghan Nationals in Kabul, Afghanistan*, Jan. 7, 2010.

¹³⁷ *United States v. Drotleff et al.*, 2:10-cr-00001 (E.D. Va.), Minute Order, Aug. 17, 2010.

¹³⁸ As mentioned earlier, the Blackwater company changed its name in February 2009 to Xe Services. This Report, however, will continue to use the well-known “Blackwater” name.

¹³⁹ Defendants’ Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss for Lack of Jurisdiction, (January 13, 2009), *United States of America v. Slough et al.*, 1:08:cr-00360 (2009 WL 192243 (D.D.C.)).

¹⁴⁰ *Id.*

Urbina of the District Court of the District of Columbia declined to dismiss the charges, stating that the claims regarding the nature of Blackwater's work and whether the contractors' employment supported DoD's mission should be heard by a judge or a jury after the prosecution presents its case, though noting that defendants points were strong on the issue.¹⁴¹ Before the case reached the trial stage, however, Judge Urbina dismissed all of the indictments because the prosecution had built its case on compelled statements that are entitled to immunity under the Fifth Amendment.¹⁴² The dismissal sparked outrage in Iraq and the international community, causing Vice President Joe Biden to publicly assure Iraq that the U.S. government would appeal the decision.¹⁴³ The DoJ promptly filed an appeal on January 29, 2010 in the U.S. Court of Appeals for the District of Columbia.¹⁴⁴ Currently, briefing on the appeal will be completed by October 15, 2010, though oral argument has not yet been set.¹⁴⁵

* * *

Despite the perceived travesty with Blackwater and the Nisoor Square incident, (though certainly the failure to result in any convictions was not due to any determined insufficiencies of MEJA), there have been a few successful prosecutions involving DoD contractors in Iraq and Afghanistan under MEJA. Contractors have been convicted for (1) possessing child pornography (Baghdad);¹⁴⁶ (2) downloading child pornography (Afghanistan);¹⁴⁷ (3) engaging in abusive sexual contact involving a female soldier (Iraq);¹⁴⁸ (4) assaulting another contractor with a knife (xx);¹⁴⁹ and (5) shooting an Afghan civilian detainee who was accused of setting fire to another U.S. employee.¹⁵⁰ Additionally, in a well-known case, a former soldier was convicted for the rape and murder of an Iraqi girl and the murder of her family while on active duty in Iraq.¹⁵¹ The defendant had challenged the court's jurisdiction under MEJA on the basis that he was never properly discharged from the military and should instead have been subject to a court martial, but the court refused to dismiss the case.¹⁵²

¹⁴¹ See *United States v. Slough, et al.*, No. 1:08-cr-00360-RMU (D.D.C.), Minute Order filed February 17, 2009; Del Quentin Weber, *Judge Refuses to Dismiss Charges Against Blackwater Guards*, Wash. Post, Feb. 18, 2009, A05.

¹⁴² *United States v. Slough, et al.*, No. 1:08-cr-00360-RMU, slip op. (D.D.C. Dec. 31, 2009).

¹⁴³ Ernesto Londono, *Justice Department to appeal dismissal of Blackwater, Biden says*, Wash. Post, Jan. 24, 2010, A14.

¹⁴⁴ *United States v. Slough, et al.*, No. 10-3006 (C.A.D.C.), Notice of Appeal filed Jan. 29, 2010.

¹⁴⁵ *Id.*, Docket Rpt.

¹⁴⁶ Press Release, Department of Justice for the Eastern District of Virginia, *Military Contractor Sentenced for Possessing Child Pornography in Baghdad*, May 27, 2007, available at <http://www.usdoj.gov/usao/vae/Pressreleases/05-MayPDFArchive/07/20070525khanr.html>.

¹⁴⁷ Press Release, U.S. Attorney for the Western District of Texas, *Former Military Contractor from Andrews, Texas Pleads Guilty to Possessing Child Pornography While in Afghanistan*, Jan. 20, 2009, available at http://www.usdoj.gov/usao/txw/press_releases/2009/thames_plea.pdf.

¹⁴⁸ *United States v. Maldonado*, 215 Fed. Appx. 938 (11th Cir. 2007) (unpublished).

¹⁴⁹ Press Release, U.S. Attorney for the District of Arizona, *Military Man Charged with Assaulting Woman on U.S. Military Base in Iraq*, March 1, 2007.

¹⁵⁰ Press Release, U.S. Attorney for the Eastern District of Virginia, *Civilian Contractor Pleads Guilty to Voluntary Manslaughter of Afghan Detainee*, Feb. 3, 2009.

¹⁵¹ Press Release, Department of Justice, *Former Ft. Campbell Soldier Sentenced to Life in Prison After Conviction on Charges Related to Deaths of Iraqi Civilians*, Sept. 4, 2009, available at <http://louisville.fbi.gov/dojpressrel/pressrel09/lo090409.htm>.

¹⁵² *United States v. Green*, No. 5:06CR-19-R (W.D. Ken.2008) (not reported). The case is on appeal.

3. War Crimes Act

Contractors could also be charged under the United States War Crimes Act which implements U.S. obligations under the Geneva Conventions. The War Crimes Act criminalizes unlawful killing and other violent crimes that some military contractors (most notably the Blackwater contractors involved in the September 16 killings) have been accused of perpetrating against Iraqi civilians.¹⁵³ However, the Act only applies to these type of crimes when committed by or against U.S. nationals or U.S. servicemembers.¹⁵⁴ Therefore, foreign contractors who commit war crimes in connection with U.S. contingency operations overseas, even if employed by the U.S. government or U.S. PMCs are not amenable to prosecution under the Act. The use of the War Crimes Act to prosecute military contractors who are U.S. nationals has apparently been ignored for two major reasons. First, the War Crimes Act, while appropriate for the prosecution of war crimes, represents a small percentage (albeit significant in severity if nothing else) of crimes perpetrated by contractors and thus cannot act as a comprehensive regime of accountability for controlling contractors in the field. Second, the prosecution of someone under the War Crimes Act strongly infers that the defendant actually engaged in a war crime. The taint that would thereafter attach would not be limited to the individual contractor or the military contracting firm, but would officially associate the U.S. military with individuals the U.S. government itself believes to be war criminals.

4. Corporate Criminal Liability

Corporate criminal liability is a criminal law regime designed to hold the corporate entity liable for the actions of its agents.¹⁵⁵ In most cases, the link between agent and business entity are severed when the agent engages in a criminal act, even if that act was in furtherance of corporate gain. However, under U.S. law, corporate criminal liability may attach in the United States when the alleged unlawful acts of an employee appear to be part and parcel of the overall mission of the larger corporate actor. In other words, when unlawful acts do appear to be part of the contemplated employment, the corporate entity may face criminal liability even though there is not a direct nexus with the underlying crimes at issue.

The case for corporate criminal liability may also be bolstered through a showing that the corporate entity displayed gross negligence or recklessness in its business practices that might lead to criminal acts. In the context of the private military industry, the rehiring of individuals believed to have engaged in criminal acts in similar circumstances or a systematic lack of training provided to individuals not believed to have received appropriate training through other mechanism might satisfy corporate criminal liability standards.

C. Prosecution in Military Court - Uniform Code of Military Justice (UCMJ)

The Uniform Code of Military Justice represents the statutory regime used to hold criminal trials for members of the U.S. armed forces accused of crimes. The UCMJ is not typically used to prosecute civilians, even civilians performing traditionally military oriented tasks. Jurisdictional holes in using U.S. federal courts outlined above have prompted a recent amendment to U.S. law creating UCMJ jurisdiction over contractor conduct.

¹⁵³ 18 U.S.C. §2441 (2006).

¹⁵⁴ *Id.*

¹⁵⁵ See generally, Rex Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity*, 56 A.F.L. 167 (2005).

1. Constitutional Limitations on Military Jurisdiction

When MEJA was proposed, it was originally accompanied by legislative language that would have extended UCMJ jurisdiction over civilians engaged in contingency operations. It was passed over in part due to concerns over its constitutionality.

The ability of the federal government to expose civilians to criminal jurisdiction within military courts has proven controversial and uncertain. Current U.S. court precedent seems to favor the argument that exposing civilians to court-martial proceedings may intrinsically violate a civilian defendant's constitutional rights, specifically those of the Fifth and Sixth Amendment of the U.S. Constitution guaranteeing due process and the right to a jury trial respectively. The Supreme Court established the presumption against applying military jurisdiction over civilians in peacetime (defined as a time with no declared war) in *Reid v. Covert*.¹⁵⁶ This precedent has been reinforced in other cases including the Supreme Court's decision of *Solorio v. United States*¹⁵⁷ in 1987 that ruled that UCMJ jurisdiction was limited to individuals possessing an official military status.

The specific rule underlying such claims is that the procedural rules and composition of court-martial jury would compromise a fair trial of a U.S. civilian.¹⁵⁸ For example, unlike in civilian criminal trials, a U.S. court-martial requires only a majority vote to convict rather than the unanimous verdict generally considered necessary in U.S. civilian court. The more general concern is that the make-up of and practices of a UCMJ trial are specifically designed to ensure justice in the hierarchical and particularities of military life, an aspect to which it is generally considered inappropriate to expose civilians.¹⁵⁹

The facts that created this precedent, largely encompassed within the case of *Reid v. Covert*, are much different than that which surrounds the reality of civilian military contractors. The civilian convicted in *Reid* was the wife of a serviceman accused of murdering her husband abroad. While an international agreement conferred jurisdiction of such cases to military tribunals, the Court concluded that the defendant's civilian status precluded prosecution under the processes of military courts.

Further, the question of UCMJ jurisdiction over civilians has more modern analogues within the context of civilians detained at the U.S. Naval Station at Guantanamo Bay, Cuba. In *Hamdan v. Rumsfeld*, the Supreme Court rejected military tribunal jurisdiction over the Guantanamo civilian due to the unilateral nature of the President's tribunal order and the fact that the tribunals in question did not satisfy the "regularly constituted court" requirement set out in Common Article 3 of the Geneva Conventions and incorporated in the Uniform Code of Military Justice.¹⁶⁰

Several distinctions, of course, arise between the exposure of contractors to military jurisdiction and that of *Reid* and *Hamdan*. Unlike in *Reid*, contractors are often engaged in the same variety of military acts and responsibilities that are undertaken by regular soldiers. As such, the cultural divide between a serviceman's wife and a security contractor are not as

¹⁵⁶ *Reid v. Covert*, 354 U.S. 1 (1957).

¹⁵⁷ *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 365 (1987).

¹⁵⁸ See *Reid*, 354 U.S. at 3 (plurality opinion) (noting that the case involved "the power of Congress" - rather than the power of the President and Senate by treaty - "to expose civilians to trial by military tribunals, under military regulations and procedures, for offenses against the United States thereby depriving them of trial in civilian courts, under civilian laws and procedures and with all the safeguards of the Bill of Rights").

¹⁵⁹ See, e.g., *Toth v. Quarles*, 350 U.S. 11 (1955). (noting "there are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution.").

¹⁶⁰ 548 U.S. 557, 562 (2006).

stark. Unlike in *Hamdan*, a criminal prosecution under the UCMJ would appear to satisfy the “regularly constituted court” provision of the Geneva Conventions and even the more rigorous procedural protections encompassed in the Third and Fourth Geneva Conventions proper. Similarly, the extension of jurisdiction to contractors was passed through the Congress and, as a result, unilateral executive action is not a concern.

2. *The Expansion of UCMJ Jurisdiction to Cover Contractors*

In October 2006 the National Defense Authorization Act for Fiscal Year 2007¹⁶¹ expanded UCMJ jurisdiction to cover civilians “accompanying an armed force in the field” in the context of “contingency operations,” moving away from the requirement of declared war previously enshrined in the statutory regime. This new power has not been challenged yet, and thus has not yet proved its constitutional mettle. Further, the amendment is likely to exclude contractors not directly employed by the Department of Defense, thus excluding a number of contractors currently employed in the Iraqi and Afghanistan theaters.

In addition to getting past the constitutional hurdles, the statutory requirements still present uncertainties in the prosecution of a contractor under the UCMJ. First, “serving with or accompanying” the forces has been historically interpreted to require that the civilian’s presence be not merely incidental to, but “directly connected with or dependent upon, the activities of the armed forces or their personnel.”¹⁶² Moreover, courts have found that military jurisdiction over a civilian “cannot be claimed merely on the basis of convenience, necessity, or the non-availability of civil courts.”¹⁶³ Second, “in the field” means serving in a area of “actual fighting” at or near the “battlefront” where “actual hostilities are under way.”¹⁶⁴ Thus, contractors are not amenable to prosecution under the UCMJ merely on account of their employment in Iraq or Afghanistan—the two most obvious “battlefields” for the armed forces today. There must be sufficient connection to military operations ongoing there. This leaves open the question of whether contractors working for DoD but operating in not-so-traditional battlefields would be subject to jurisdiction under the UCMJ. Given that Obama Administration is continuing the claim of necessity for a military paradigm in a post-9/11 “global war on terrorism,” such as the right detain under the laws of war any individual captured anywhere in the world, it remains to be seen whether the meaning of “the battlefront” and “actual hostilities” will be stretched to cover the globe.

Implementing regulations of the expanded UCMJ jurisdiction over civilians were promulgated by Secretary of Defense Robert Gates and the Department of Defense on March 10, 2008 thus providing insight into how the new jurisdictional grant will be executed in practice.¹⁶⁵ The new regulations provide military commanders with the authority to “respond to an incident, restore safety and order, investigate, apprehend suspected offenders” in circumstances where a criminal act falling under the expanded UCMJ jurisdiction is suspected.¹⁶⁶

¹⁶¹ National Defense Authorization Act for Fiscal Year 2007 (NDAA FY2007) (Pub. L. 109-364).

¹⁶² *United States v. Barney*, 21 C.M.R. 98 (1956).

¹⁶³ *In re di Bartolo*, 50 F.Supp. 929, 930 (S.D.N.Y. 1943).

¹⁶⁴ *Reid*, 354 U.S. at 35.

¹⁶⁵ MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS CHAIRMAN OF THE JOINT CHIEFS OF STAFF UNDER SECRETARIES OF DEFENSE COMMANDERS OF THE COMBATANT COMMANDS SUBJECT: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations, Washington, DC, March 10, 2008 (DoD March 10 Memo).

¹⁶⁶ *Id.* at 1.

A coordinated response by military commanders with the Department of Justice is also explicitly addressed. The regulations require military officers to “notify responsible Department of Justice authorities, and afford DoJ the opportunity to pursue its prosecution of the case in federal district court.”¹⁶⁷ This coordination process is not intended to delay justice as, “[w]hile the DoJ notification and decision process is pending, commanders and military criminal investigators should continue to address the alleged crime” and that “military justice procedures that would be required in support of the exercise of UCMJ jurisdiction over civilians [should] continue to be accomplished during the concurrent DoJ notification process.”¹⁶⁸

Perhaps as a nod to the constitutional concerns enshrined in *Reid* and its progeny, the regulations indicate that “[b]ecause of the unique nature of [UCMJ] jurisdiction over civilians be based on military necessity to support an effective fighting force and be called for by circumstances that meet the interests of justice.”¹⁶⁹ These circumstances include, “when U.S. federal criminal jurisdiction does not apply or federal prosecution is not pursued, and/or when the person’s conduct is adverse to a significant military interest of the United States.”¹⁷⁰

This dual consideration, explicitly considering the unwillingness of the Department of Justice to act as a force counseling UCMJ action is double-edged. On the one hand it indicates a limitation on military discretion, but also exposes a civilian to dueling prosecutorial interests that are not typically present for the civilian criminal defendant.

As for whether the UCMJ has been used successfully to hold contractors accountable, there is one reported use of the amended UCMJ to cover a contractor: an interpreter with dual Canadian-Iraqi citizenship pleaded guilty in connection with the stabbing of another contractor.¹⁷¹ Additionally, several contractors have been detained for possible UCMJ charges that were never referred for trial.¹⁷²

D. The Problem of the Law in Action

The execution of national regulations designed to provide punitive accountability for misdeeds by PMCs and their personnel has been undercut by a deep institutional ambivalence as to which legal regime, civilian or military, is appropriate and required to ensure such accountability. The current ambivalence between these systems is fed by a belief that the civilian system is not properly incentivized nor specialized to ensure PMC accountability while the military system is excessively harsh and prejudiced in its judging of civilians straddling the military/private divide.

Civilian prosecutors and civilian judges have routinely demonstrated hesitancy in engaging in actions that could potentially invoke questions of foreign affairs, or worse, military affairs. Several commentators have remarked of this hesitancy in the context of the justiciability questions such as the political question doctrine. The root of the concern is not

¹⁶⁷ DoD March 10 Memo at 2.

¹⁶⁸ *Id.*

¹⁶⁹ DoD March 10 Memo, Attachment 3.

¹⁷⁰ *Id.*

¹⁷¹ In June 2008, Alaa Mohammad Ali, a Canadian-Iraqi translator became the first contractor convicted through a UCMJ prosecution. See *First contractor convicted under US military law in Iraq*, WASH. POST, June 24, 2008; Press Release, Multi-National Corps—Iraq PAO, *Civilian contractor convicted at a court-martial*, June 23, 2008, available at http://www.mnf-iraqcom/index.php?option=com_content&task=view&id=20671&Itemid=128.

¹⁷² <http://www.caaflog.com/category/art-2a10/>.

based in law as much as a deeply held sense that questions invoking foreign affairs lie outside the domain of civilian prosecution. The expansion in the number and roles of military contractors in the Iraq and Afghanistan conflicts corresponds with an initiative by the executive branch to lower the size of the active military and part of a larger preference for privatized actors within government. The reliance on contractors plays a significant role in the public's perception of the progress of the war in ways that are not necessarily obvious. The most watched statistics of the war are the number of American troops killed and wounded. Those numbers do not include contractors. Improprieties by military contractors can also largely be quarantined as a concern appropriately targeting the PMC in question rather than of military ethics of capabilities.

Military legal officers do possess a compelling incentive to charge and secure convictions of private contractors who engage in violations of law in theater. The most compelling incentive is that their government brethren bear the burden of the bitter feelings that trigger-happy contractors can engender. The civilian population in a war zone largely fails to differentiate U.S. troops and U.S. contractors.

IV. Civil Liability for Contractors

Civil law provides another avenue for holding PMCs and their personnel (and PMC subcontractors and their personnel) accountable for their conduct overseas. The following section primarily addresses the numerous potential civil law claims for monetary compensation that can be brought against PMCs and their personnel, followed by a discussion of the potential defenses that can be raised in response to such claims.

This section covers cases where the focus of the law suit addresses the “bad” behavior, conduct, or action, or inaction of PMCs and their personnel overseas in areas of armed conflict or overseas in circumstances involving U.S. military operations. Accordingly, the section includes law suits that are brought by a variety of plaintiffs: third-party bystanders and their survivors, members of the military and their survivors, and PMC personnel and their survivors. There have been many more civil cases brought by military and PMC personnel and their survivors, than have been brought by individuals who have no affiliation with the PMC or the military. Thus, there are very few cases and fewer court decisions involving the type of individuals widely envisioned to be the “victim” of military contractors’ misdeeds, such as an Iraqi or Afghan civilian who is an innocent bystander. The claims and defenses raised in the former category of cases, however, are often same as those raised in the latter and are instructive for that reason. Furthermore, any lawsuit against PMCs for monetary damages, regardless of the status of the plaintiff, serves to regulate their behavior directly and/or indirectly. The Appendix to this Report sets forth a detailed annotation of the civil law cases involving PMC and PMC personnel.

Also included in this section is a short discussion of the Foreign Claims Act (FCA), a statute that essentially provides monetary compensation from the U.S. government for harm suffered by the local civilian population in an area of armed conflict when the harm is caused by U.S. military forces. Though the compensation is paid by the U.S. government and not PMCs, discussion of this statute is informative insofar as FCA claims involving PMCs have been brought.

The Foreign Claims Act

The Foreign Claims Act (“FCA”)¹⁷³ was initially enacted toward the end of World War II as a means of promoting friendly relations between the United States and inhabitants of foreign countries. It has been amended numerous times since then, most recently in 1980. In essence, the FCA allows for the payment of money from U.S. government funds to inhabitants of foreign countries who have been caused injury to their person or property by U.S. armed forces overseas. The claims process is not a court proceeding but rather an administrative proceeding that occurs in the local area where the harm occurred. The claims are heard by a commission (Federal Claims Commission or “FCC”) and are made up of one to three members. Accordingly, the FCA is implemented by U.S. Army Regulations.¹⁷⁴ A payable claim under the FCA is “a claim for death, personal injury, or loss of or damage to property . . . if the alleged damage results from noncombat activity or a negligent or wrongful act or omission of Soldiers or civilian employees of the Armed Forces of the United States . . . regardless of whether the act or omission was made within the scope of their employment.”¹⁷⁵ “Employees” includes non-U.S. citizen employees who were recruited elsewhere by employed in a country of which they are not a citizen but excludes non-U.S. citizen employees in the country in which they were recruited unless the act or omission was made in the scope of employment.¹⁷⁶

The FCA exempts several types of claims, such as when the injury results from the negligent or wrongful act of the claimant or their agent, but the most significant and widely relied upon exemption covers injuries arising out of combat activities, which is defined as activity resulting directly or indirectly from enemy action, or alternatively as engagement in (or preparation for) armed conflict.¹⁷⁷ Another provision used to deny claims with some frequency is that which exempts claims by nationals of the country at war with the U.S. unless the claims commission or local commander determines that the claimant is friendly to U.S. at the time of the incident.¹⁷⁸

The monetary payout is somewhat limited—\$2500 per claim, or on rare occasion, \$50,000 if the claim is complex and decided by a 3-member FCC—and acceptance of payment constitutes full and final satisfaction and release of the U.S. and its employees from further liability arising out of incident. While local law is used to determine which elements of damage are payable and which individuals are entitled to compensation, U.S. federal law determines whether the actor, who committed the negligent act or failed to act, is an employee of the U.S. Armed Forces for purposes of a payable claim under the FCA.¹⁷⁹ “[C]ivilian officials and employees,” “civil service and other full-time employees” of the Department of Defense (DOD) and the Department of the Army (DA) are included, as well as “persons acting in an official capacity for the DOD or DA.”¹⁸⁰

Though not explicitly exempted, the acts of employees or contractor personnel of private military companies under contract with the DOD or DA do not appear to be covered

¹⁷³ 10 U.S.C. §2734.

¹⁷⁴ Army Regulation (AR) 27-20, Ch. 10, Foreign Claims Act, effective 8 March 2008.

¹⁷⁵ *Id.* at 10-3(a).

¹⁷⁶ *Id.*

¹⁷⁷ 10 U.S.C. §2734.

¹⁷⁸ AR 27-20, 10-4(i).

¹⁷⁹ *Id.* at 2-2(b).

¹⁸⁰ *Id.* Civilian employees of a “non-appropriated fund instrumentality” are also covered if the instrumentality is a federal agency. To determine whether an instrumentality is a federal agency, relevant factors are: whether it is an integral part of the Army and what degree of control and supervision DA personnel exercise over it.

under the FCA. Indeed, while the U.S. Army paid out thirty-two million dollars in Iraq and Afghanistan between 2001 and 2007,¹⁸¹ only one case out of hundreds is described as a killing or injury by contractor personnel. The claim was brought by the wife of an Iraqi man who was allegedly shot and killed by a contractor. The claim was denied because “contractors are not governmental employees.”¹⁸²

Thus, the FCA is relevant to the discussion of PMCs to the degree that FCA claims relating to government contractors are of a nature and number that affect how the government ultimately handles its military contractors from both a contract and a regulatory perspective. Currently, the number of contractor-related FCA claims is too low to raise any concerns in this area. Of more significant interest is the position taken by government officials in the FCA claims process regarding the nature of the relationship between the DOD and PMCs and contractor personnel, which is particularly relevant to a PMC’s assertion of defenses in response to civil lawsuits.

A. Claims

There are essentially three categories of civil lawsuits involving PMCs and their personnel’s allegedly wrongful conduct, which occurs overseas: (1) suits brought by third-party civilians or their survivors against the PMC or its personnel; (2) suits brought by members of the military or their survivors against the PMC or its personnel; and (3) suits brought by the PMC employees or their survivors against the PMC. Though the public’s concern has focused primarily on the first category, the latter two categories make up the majority of lawsuits and only a handful of lawsuits have been brought by nationals of the country in which the PMC and its personnel were operating. Those cases arise out of incidents, such as the Blackwater “shootout” in Nisoor Square, other separate shootings and beatings of Iraqi and Afghan nationals, and the Abu Ghraib prison scandal or other prisons in Iraq.

Typically, only the first category of plaintiff has raised an Alien Tort Statute (ATS) claim due to the restriction on who can bring such a claim, while all three categories have raised common law or state law claims based in tort. In recent litigation, some plaintiffs have also raised claims under the Torture Victim Protection Act (TVPA). This section will address these three types of claims, discussing briefly the relevant cases.

1. Alien Tort Statute

The Alien Tort Statute (ATS) has been used by the first category of plaintiffs, that is, non-U.S. citizens (or their families) who have been injured or killed by the conduct of PMC personnel. The ATS is a federal statute which provides: “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁸³ In essence, the ATS is used by non-U.S. citizens to obtain monetary compensation for torts based on violations of international law. Though the ATS was enacted in 1789, it has only been widely used since 1980 after the U.S. Court of Appeals for the Second Circuit ruled in *Filartiga v. Pena-Irala* that a non-U.S. citizen could sue another non-U.S. citizen in U.S. courts for torts that had occurred outside of

¹⁸¹ This figure includes “solatia payments” which are payments in accordance with local custom as an expression of sympathy toward a victim or their family and are made from local operation and maintenance funds, not from the claims expenditure allowance. *Id.* at 10-11.

¹⁸² See Documents released to American Civil Liberties Union in a Freedom of Information Act (FOIA) request available at www.aclu.org/natsec/foia/log.html).

¹⁸³ 28 U.S.C. §1350.

the United States.¹⁸⁴ For the next two decades, the lower courts (federal district and circuit courts) issued various and often contradictory holdings with respect to the ATS. However, in 2004, the Supreme Court, for the first time, addressed the ATS in *Sosa v. Alvarez-Machain*.¹⁸⁵

In *Sosa*, the Court put to rest the debate over whether the ATS is merely a jurisdictional statute or provides a cause of action for any violation of international law, holding that the ATS, though jurisdictional in nature, permits a non-U.S. citizen to bring claims limited to asserting violations which are “specific, universal, and obligatory” norm of international law. The Court found that ATS claims based on the present-day law of nations should “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” such as “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” The Court found that the prohibition on arbitrary detention was not clearly defined such that it rose to the level of specificity, universality or obligation required, perhaps signaling a fairly strict standard for what could be construed as a violation of the law of nations. Though not particularly relevant to the case before it, the Court observed that the prohibitions on torture and extrajudicial killing, on the other hand, do meet such a standard and thus were of the type of claims that could be brought under the ATS.

Lower courts continue to grapple with the question of which types of torts fall within the ambit of an international norm violation, using the “specific, universal and obligatory” test as a guideline.¹⁸⁶ Whether an ATS suit can lie against a private actor or the defendant must have been a government official or agent (a public actor) at the time of the alleged tort is another area of differing opinions between the lower courts,¹⁸⁷ while the Supreme Court has not yet addressed the question.

It is no surprise then that plaintiffs who are Iraqi nationals, such as in *Saleh v. Titan*, *Ibrahim v. Titan*, *Atban v. Blackwater/In re Xe*, and *Al-Quraishi* brought claims under the ATS against the PMCs and their personnel for torture, extrajudicial killing, war crimes, crimes against humanity, and other international law violations.

The *Saleh* and *Ibrahim* cases (now consolidated) were brought by a number of Iraqi nationals, who had been detained and tortured in the Abu Ghraib prison in Iraq, against private civilian companies (Titan and CACI), that had provided linguists/translators and interrogators under contracts with the DOD. As detailed above in the Introduction section of this Report, plaintiffs accused Titan and CACI contractors of beating them, depriving them of food and water, subjecting them to long periods of excessive noise, forcing them to be naked for prolonged periods, holding a pistol to the head of one of them and pulling the trigger, threatening to attack them with dogs, exposing them to cold, urinating on them, depriving them of sleep, making them listen to loud music, photographing them while naked, forcing

¹⁸⁴ 630 F.2d 876, 890 (2d Cir. 1980).

¹⁸⁵ 124 S. Ct. 2739 (2004).

¹⁸⁶ *Mora v. New York*, 524 F.3d 183, 208 (2d Cir. 2008) (failure to inform a detained alien of his right to consular access under the Convention on Consular Relations was an arbitrary detention not specific enough to qualify as a violation of customary international law); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 117–23 (2d Cir. 2008) (finding that there was a lack of consensus in the international community as to whether the use of a herbicide that harms humans is a banned poison); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000) (finding war crimes and genocide of universal concern); *Filartega v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (finding that torture is violation of customary international law).

¹⁸⁷ *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (finding private actor could be sued under ATS); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1092 (N.D. Cal. 2008) (citing *Kadic*); *but see Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (finding that under D.C. Circuit law, the law of nations does not apply to private actors).

them to witness the abuse of other prisoners, including rape, sexual abuse, beatings, electrocution, withholding food, forbidding prayer, and ridiculing them for their religious beliefs. The ATS claims in these cases ultimately did not fare well as the D.C. District Court dismissed the ATS claims against both defendants, holding that under D.C. Circuit case precedent, ATS claims against private actors were not actionable.¹⁸⁸ The D.C. Circuit recently affirmed the lower court's decision regarding the ATS claims.¹⁸⁹

Perhaps in light of the law developing in the D.C. federal courts, a separate lawsuit, *Al-Quraishi v. Nakhla*, was brought in the federal district court in Maryland by seventy-two Iraqi nationals against L-3, which had provided translators to the U.S. military in Abu Ghraib prison and other U.S.-run detention centers/prisons throughout Iraq. The plaintiffs alleged they had been beaten, hung by their hands and feet, given electrical shocks, threatened with death and rape, sexually abused, subject to forced nudity, stress positions, sleep and sensory deprivation, and confined in small spaces. Plaintiffs brought both ATS and state-law tort claims. Denying the defendants' motion to dismiss, the court concluded, with respect to the ATS claims, that an ATS claim could be brought against private parties, which would include a corporation, that cruel, inhuman and degrading treatment (CID) is cognizable under ATS, and that even if CID requires action under 'color of law,' that does not entitle the actor to sovereign immunity.¹⁹⁰

Plaintiffs in the original *Atban* case were Iraqi nationals, (and their survivors), who were injured or killed when employees of Blackwater, a private security company under contract with the Department of State, opened fire in Nisoor Square in Baghdad, Iraq, killing and injuring several bystanders. The plaintiffs brought several international law claims under the ATS, filing suit in the D.C. District Court. The case was later refiled in the federal court for the Eastern District of Virginia and consolidated with other cases against Blackwater (now Xe Services), Erik Prince and several other entities affiliated with Blackwater, and restyled as *In re XE Services Alien Tort Litigation*. The cases involved plaintiffs alleging they or their relatives had been injured or killed by Blackwater contractors in the Nisoor Square incident and in other separate and unrelated incidents.¹⁹¹ Defendants filed a motion to dismiss the ATS claims, among other claims, but the district court largely denied the motion, finding the claim that defendants had committed war crimes was cognizable under the ATS.¹⁹² The consolidated case ultimately settled in January 2010.

In *Estate of Manook v. Research Triangle Institute International*, plaintiffs brought a lawsuit against a private corporation that had contracted with USAID and its private security company—Unity Resources—which had been hired to provide protection to the company's

¹⁸⁸ *Saleh v. Titan*, 436 F Supp2d 55 (D.D.C. 2006) and *Ibrahim v. Titan*, 391 F. Supp.2d 10 (D.D.C. 2005) (relying on *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)). See also *Al Shimari et al. v. CACI Premier Tech., Inc., et al.*, 657 F.Supp.2d 700 (E.D.Va. 2009). In *Al Shimari*, four Iraqi citizens brought ATS claims, among others, against CACI based on their detention in Abu Ghraib prison "hard sites." Their ATS claims were dismissed by the district court. *Id.* at 726. The plaintiffs did not appeal the dismissal of the ATS claims.

¹⁸⁹ *Saleh et al. v. Titan et al.*, 580 F.3d 1 (D.C. Cir. 2009).

¹⁹⁰ *Al-Quraish, et al. v. Nakhla, et al.*, 2010 WL 3001986, *27-45 (D.Md. July 29, 2010).

¹⁹¹ Other incidents include alleged beatings and shootings of Iraqi citizens in seven separate incidents in Iraq and the death of an Iraqi citizen caused by firing into a crowd near Baghdad's Al Watahba Square.

¹⁹² *In re Xe Services Alien Tort Litigation*, 665 F.Supp.2d 569, 588-590 (E.D.Va. 2009). The court ultimately found that war crimes were cognizable under the ATS but a claim of summary execution was not because no state action was involved or alleged. The court allowed the majority of the plaintiffs to amend their complaint to allege facts sufficient to state a claim under the ATS and dismissed other plaintiffs' claims whose facts—even if repled—would not state a claim under the ATS.

employees in Iraq. The plaintiffs alleged that Unity contractors shot and killed two Iraqi nationals in a vehicle, one of them being a young girl who was a passenger. The D.C. District Court dismissed the ATS claims and transferred the remaining state-law tort claims to the Eastern District of North Carolina. In dismissing the ATS claims, the D.C. District Court concluded that the defendants were private actors and therefore not amenable to an ATS claim.¹⁹³

2. Torture Victim Protection Act

Thus far, only one PMC case has involved a claim raised under the Torture Victim Protection Act of 1991 (TVPA). Given the outcome in *Estate of Manook v. Research Triangle Institute International*—perfunctory dismissal and no appeal of the TVPA claim—it is unlikely the TVPA will serve as a successful mechanism for providing monetary compensation to victims of PMCs and their personnel. The TVPA establishes a civil action against an “individual who, under actual or apparent authority, or color of law, of any foreign nation” subjects another to “torture” or “extrajudicial killing.”¹⁹⁴ On account of the requirement, “color of law of a foreign nation,” the statute has generally been used to sue foreign officials or private entities affiliated with or working for foreign governments.¹⁹⁵ In *Manook*, the D.C. District Court determined, without even reaching whether a foreign nation had to be implicated, that the defendants were private entities who were not acting under “color of state law” and therefore dismissed the TVPA claims.¹⁹⁶

3. State Law Torts

Typically, plaintiffs who have alleged torts in violation of international law under the ATS also alleged torts in violation of domestic law based on the same conduct. Accordingly, plaintiffs in the *Saleh, Atban/In re Xe*, and *Manook* line of cases have all brought claims alleging torts in violation of state law (often referred to as “state law tort claims” or “common law tort claims”), including but not limited to: assault and battery, wrongful death, wrongful imprisonment, intentional infliction of emotional distress, and negligence (including negligent infliction of emotional distress and negligent hiring, training and supervision). The state law tort claims have generally fared better in litigation involving PMCs than the ATS claims, as the scope of who can be sued under state law tort theories is less restrictive.

The two other categories of plaintiffs mentioned above—(1) members of the military and their survivors and (2) contractor personnel and their survivors—have relied primarily, if not exclusively, upon state law tort claims to sue PMCs and their personnel. Typically, the PMC and contractor personnel are sued for their negligent acts or failure to act, and/or negligence in hiring, training and supervising, as is the case when the PMC is sued by an individual with whom it is not affiliated.

These latter two categories of cases involve members of the military (injured by PMC personnel while deployed in Iraq or Afghanistan), or their survivors (if the service member was killed), who sue the PMC personnel for his own negligent acts and sue the PMCs for negligent hiring, training and supervision of the personnel and for the negligent acts of the personnel under the *respondeat superior* doctrine, which essentially holds an employer liable for the employee’s torts if the act was expressly authorized by the employer or it occurred within the scope of the employee’s employment. These cases also involve PMC personnel (injured while working in Iraq or Afghanistan), who sue their own PMC for fraud,

¹⁹³ *Manook v. Research Triangle Institute International, et al.*, 693 F. Supp.2d 4, 19 (D.D.C. 2010); see also *Manook v. Research Triangle Institute International, et al.*, 2010 WL 3199874 (E.D.N.C.).

¹⁹⁴ 28 U.S.C. 1350.

¹⁹⁵ See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y Feb. 28, 2002).

¹⁹⁶ *Manook*, 693 F. Supp.2d at 20; see also *Manook*, 2010 WL 3199874, at *4.

misrepresentation, and negligence; survivors of PMC personnel (killed while working in Iraq or Afghanistan), who sue PMCs for wrongful death and negligence.

B. Defenses

There are a number of defenses a PMC can raise when facing claims under the Alien Tort Statute and state law tort theories. The defenses arise primarily due to the PMC's contractual relationship with the government—a public entity—and the location and circumstances in which that contract is serviced or fulfilled.

First, PMCs and their personnel are typically hired to work overseas in some fashion with or for U.S. military troops in locations where the military is engaged in active combat, in post-conflict military activity or both, such as in Iraq or Afghanistan. This factor raises substantial foreign affairs and military policy concerns, thus giving rise to a number of defenses potentially available to PMCs. Second, PMCs claim that because they are, in essence, effectuating government policies and decisions, or acting for or on behalf of the government, or are performing government-like functions, they should be entitled to the same immunities the government or government employees would be entitled to if sued for the same conduct.

1. The Political Question Doctrine

The political question doctrine is a judicially-created doctrine that prevents a court from taking jurisdiction over a claim because it is a “political question,” which cannot be answered by the judicial branch.¹⁹⁷ The political question doctrine protects the separation of powers of the three branches of government and prevents federal courts from overstepping their constitutionally defined role.¹⁹⁸ Political questions are deemed non-justiciable; therefore, a court can consider the merits to the degree necessary to determine whether the matter is inappropriate for judicial resolution.¹⁹⁹ In cases involving “foreign relations” and “military affairs,” the political question doctrine is almost always raised by the defendant in attempt to have the case dismissed for lack of jurisdiction. And courts can be rather reluctant to intervene in such matters, particularly during wartime.²⁰⁰

In recent cases involving PMCs and contractor personnel who are working overseas with the U.S. military in Iraq or Afghanistan, PMCs have raised the political question doctrine as a means of avoiding liability. Indeed, the doctrine has been implicated in almost every case surveyed for this Report.²⁰¹ In the relevant PMC cases, the preliminary issue of whether

¹⁹⁷ *Marbury v. Madison*, 5 U.S. 137, 170 (1803) (“questions, in their nature political . . . can never be made in this court”).

¹⁹⁸ *Baker v. Carr*, 369 U.S. 186, 210 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers.”)

¹⁹⁹ *Id.* at 198.

²⁰⁰ See, e.g., *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (claim regarding acts of Ohio National Guard was political question); *Atkepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (claim raising negligence by Navy was political question); *Atkepe v. United States*, 925 F.Supp. 731, 736 (M.D. Fla. 1996) (“generally, all cases involving foreign affairs potentially raise nonjusticiable political questions”); *Occidental of Umn al Qaywaayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir. 1978) (claim raising foreign relations generally beyond authority of court’s adjudicative powers).

²⁰¹ See, e.g., *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008); *McMahon v. Presidential Airways*, 502 F.3d 1331 (11th Cir. 2007); *In re KBR, Burn Pit Litigation*, 2010 WL 3543460 (D. Md. Sept. 8, 2010); *In re Xe Services Alien Tort Litigation*, 665 F.Supp.2d 569 (E.D.Va. 2009); *Harris v. Kellog Brown & Root*, 2009 WL 1248060 (W.D. Penn. March 31, 2009); *Carmichael v. Kellog Brown & Root*, 564 F.Supp.2d 1363 (N.D. Ga. 2008); *Getz v. Boeing Co.*, 2008 WL 2705099 (N.D. Cal. 2008); *Potts v Dyncorp Int’l LLC*, 465 F.Supp.2d 1245

the status of defendant as a *private* corporation prevents the defendant from raising the political question doctrine to bar suit has had varied treatment by the courts. Some courts have found that the defendant's status has little relevance to whether a claim raises a political question, noting the Supreme Court's dictate: "[T]he identity of the litigant is immaterial to the presence of [political question] concerns in a particular case."²⁰² One court, on the other hand, discussed at length the fact that the defendant PMC was a private defendant, stating that the doctrine "has almost never been applied to suits involving private defendants."²⁰³ Another court, in comparing cases dismissed on political question grounds to the one before it in which PMCs were sued for their part in the torture and abuse at Abu Ghraib, noted that those cases involved the United States itself as the defendant, while in the instant case, plaintiffs were suing *private* parties for actions of a type that violate clear United States policy.²⁰⁴

In analyzing the issue, courts typically look to the factors set forth by the Supreme Court in *Baker v. Carr*: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²⁰⁵ Only one of these factors need be "inextricable from the case at bar" to implicate the political question doctrine.

In the relevant PMC cases, courts that have dismissed claims on the basis of the political question doctrine have looked to the contract between the PMC and the governmental department or agency (such as DoD) in order to determine whether and to what extent the military was supervising or had control over the actions of the PMC employees. These courts have concluded essentially that taking jurisdiction would have required the court to decide a question that the Constitution intended to be left to the legislative or executive branches, or that the court would have to substitute its judgment for that of the military, and as such would have evinced a lack of respect for the political branches.²⁰⁶ Courts that have refused to dismiss claims on the basis of the political question doctrine have largely relied on the first two *Baker* factors, finding that hearing the claim would not require judicial examination of military policy or military decision-making and/or finding that there does exist judicially discoverable and manageable standards for resolving such claims, which, in these cases, are governed by simple negligence standards.²⁰⁷ In *In re Xe Services*, the U.S. Government actually appeared as an interested party, arguing that the defendants were not

(M.D. Ala. 2006); *Smith v. Halliburton*, 2006 WL 2521326 (S.D. Tex. 2006); *Whitaker v. Kellogg Brown & Root*, 444 F.Supp2d 1277 (M.D. Ga. 2006); *Lessin v. Kellogg Brown & Root*, 2006 WL 3940556 (S.D. Tex. 2006); *Ibrahim v. Titan*, 391 F.Supp.2d 10 (D.D.C. 2005).

²⁰² *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990).

²⁰³ *McMahon v. Presidential Airways, Inc.*, 460 F.Supp.2d 1315, 1319 (M.D. Fla. 2006), *aff'd*, *McMahon*, 502 F.3d 1331.

²⁰⁴ *Ibrahim*, 391 F.Supp.2d at 16, *aff'd in part, rev'd in part, Saleh et al. v. Titan et al.*, 580 F.3d 1 (D.C. Cir. 2009).

²⁰⁵ *Baker*, 369 U.S. at 217.

²⁰⁶ *Carmichael*, 564 F.Supp.2d at 1372; *Whitaker*, 444 F.Supp.2d at 1281; *Saleh*, 436 F.Supp.2s at 57; *Lane v. Halliburton*, 2006 WL 2796249, *1 (S.D. Tex. 2006), *rev'd and remanded*, *Lane v. Halliburton*, 529 F.3d at 563; *Smith*, 2006 WL 2521326 at *6; *Ibrahim*, 391 F.Supp.2d at 16.

²⁰⁷ *Halliburton*, 529 F. 3d at 560; *McMahon*, 502 F.3d at 1363-64; *Al-Quraishi*, 2010 WL 3001986 at *12; *In re Xe Services*, 665 F.Supp.2d at 601-602; *Potts*, 465 F.Supp.2d at 1249-53; *Lessin*, 2006 WL 3940556 at *3.

acting as employees of the U.S. and that the contracts at issue provided for multiple layers of Xe management to oversee the day-to-day operations of its employees who were under the direct supervision of Xe management.²⁰⁸

2. Defenses Relating to the Federal Tort Claims Act (FTCA)

a. Introduction

As mentioned above, when faced with claims for monetary damages, PMCs have raised defenses that are grounded in their contractual relationship with the government, which is generally immune from suit. Under a judicially-created doctrine, the government is entitled to sovereign immunity, unless specifically waived. Pursuant to the Federal Tort Claims Act (FTCA), the government waives its sovereign immunity for personal injury caused by the negligent acts or omissions of its employees who are acting within the scope of their employment.²⁰⁹ However, there are several exceptions, which, most relevant to the Report, include the “discretionary function,” “combatant activities,” and “foreign country” exceptions.²¹⁰ Additionally, under the Westfall Act, government employees are not liable for torts committed within the scope of their employment, making an FTCA claim against the government the exclusive remedy for such torts, and, therefore, subject to the same exceptions.²¹¹ Thus, a person injured by the negligence of a government employee has a very limited remedy for obtaining compensatory monetary damages and is often barred altogether given the number of exceptions present in the FTCA.

Under the statutory terms of the FTCA, however, government contractors are not considered “government employees” and, therefore, are not statutorily entitled to the same immunities.²¹² Accordingly, in attempt to limit their liability for the negligence of their employees, PMCs typically raise FTCA-related exceptions not as “government employees” but rather under the same principles of immunity to which the government is entitled with respect to these exceptions. As this Report will demonstrate, case law has developed in such a way as to make FTCA-related exceptions available as affirmative defenses to PMCs.

In many cases involving a FTCA defense, courts seem to resort to utilizing the policy underlying the political question doctrine for analyzing whether FTCA-related defenses bar the claims. In other words, courts have looked at the degree of control the military had over the contractor and whether reviewing the claim would involve passing upon military policy, judgments and decision-making, which is essentially what courts examine in determining whether a claim involves a political question.

b. The General Contractor Defense (GCD)

i. Introduction

The General Contractor Defense (GCD), sometimes referred to as the Military Contractor Defense (MCD) when DOD contractors are involved, initially arose out of the “discretionary function” exception of the FTCA and, as such, was an unknown and infrequently-used defense. Yet, the marked increase in the use of PMCs in Iraq and Afghanistan has resulted in a growing number of civil lawsuits against PMCs, which has

²⁰⁸ *In re Xe Services*, 665 F.Supp.2d at 601.

²⁰⁹ 28 U.S.C. §1346, §2671-2680.

²¹⁰ 28 U.S.C. §2680.

²¹¹ 28 U.S.C. §2679.

²¹² 28 U.S.C. §2671 (“employee of the government” includes persons acting on behalf of any “federal agency,” which includes “corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.”).

turned the GCD into a frequently-raised defense in PMC litigation and the topic of voluminous scholarship. This has resulted in confusing and sometimes contradictory treatment of the GCD by courts and scholars.

In brief, there are two approaches to the GCD and other FTCA-related defenses. Many scholars, (and some courts), tend to identify almost any PMC-raised defense (excluding the political question doctrine) as a GCD, or as an expansion upon the traditional GCD. Other courts tend to simply analyze each PMC defense on its own terms with little regard to whether it is a traditional GCD or an expansion. Accordingly, this Report will follow the latter approach and provide a brief synopsis of each FTCA-related defense on its own merits.

ii. The GCD (the *Boyle* Doctrine)

Pursuant to a circuit court split, the General Contractor Defense was crystallized by the Supreme Court in *Boyle v. United Technologies Corp.*²¹³ *Boyle* was a products liability suit brought by the estate of a Marine helicopter pilot who had drowned when his helicopter crashed and the pilot was unable to escape. The plaintiff, alleging design defects, sued the helicopter's manufacturer, which had been supplying helicopters and equipment under contract to the government. As a preliminary matter, the Court determined that "uniquely federal interests" were at stake and that application of state law liability theories presented a "significant conflict" with federal policies or interests.²¹⁴ The Supreme Court looked to the "discretionary function" exception in the FTCA, which maintains the government's sovereign immunity for claims based upon "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved by abused."²¹⁵ The Court reasoned that if the helicopter's design was a result of discretionary government policy decisions, liability of the private contractor, who was merely executing such decisions, should not be permitted.²¹⁶

The Court then went on to state the conditions necessary to preempt state tort law liability claims against government contractors concerning design defects: (1) the United States established, approved, reasonably precise specifications for the allegedly defective military equipment; (2) the equipment conformed to those specifications; and (3) the contractor/supplier warned the United States about the dangers involved in use of equipment that were known to supplier but not to the United States.²¹⁷ Thus, under *Boyle*, government contractors who *design and manufacture* military equipment are typically not liable to individuals injured by such equipment under the GCD or MCD.²¹⁸

It was only recently, in 2003, when the GCD was applied to immunize a government contractor, which was providing a *service*. In *Hudgens v. Bell*, the Eleventh Circuit held that the GCD recognized in *Boyle* was applicable to a government contractor that had maintained helicopters for the Army and who had been sued by individuals injured when the helicopter crashed, claiming the helicopters had been negligently maintained. The plaintiff had argued that the defense applied only to design defects but the court found otherwise.²¹⁹ The court, though recognizing that *Boyle* had applied to procurement contracts, looked at whether

²¹³ 487 U.S. 500 (1988).

²¹⁴ *Id.* at 504-13.

²¹⁵ 28 U.S.C. §2680(a).

²¹⁶ *Boyle*, 487 U.S. at 511-12.

²¹⁷ *Id.* at 512.

²¹⁸ *See, e.g., Baily v. McDonnell Douglas Corp.*, 989 F.2d 794, 801 (5th Cir. 1993) and failure to warn cases, *in re Joint E&S Dist. NY Asbestos Litig.* 897 F.2d 626 (2d Cir. 1990).

²¹⁹ 328 F.3d 1329, 1334 (11th Cir. 2003).

subjecting a contractor to liability under state tort law would create a significant conflict with a unique federal interest and finding it so, concluded that the GCD was applicable to the service contract between DynCorp and the government.²²⁰

Hudgens set precedent for the *Boyle* doctrine and its “discretionary function” approach (which was only one part of the analysis) to apply in cases of service contracts, such as those at issue in the cases involving Blackwater (security services contractors), Titan and CACI (interpreter and interrogation services contractors at Abu Ghraib prison), and other contractors providing services to the government in Iraq and Afghanistan.²²¹ And, indeed, *Hudgens* was relied upon, in part, to dismiss certain claims against Titan.

The GCD/MCD/*Boyle* doctrine was raised in the *Saleh/Ibrahim v. Titan/CACI* set of cases, in which the court found the doctrine preempted plaintiffs’ state law tort claims, and in *Al-Quraishi*, in which the court found the doctrine did not preempt plaintiffs’ state law tort claims.²²²

c. The Combatant Activities Exception

The “combatant activities” (CA) exception under the FTCA allows the government to maintain its sovereign immunity for “any claim arising out of the combatant activities of the military or naval forces, or Coast Guard during time of war.”²²³ Like the political question doctrine, this exception has been raised as a defense by almost every PMC sued for the negligent acts of its personnel in Iraq and Afghanistan.²²⁴ Because the suit is against the PMC, not the government, and a PMC is not a government employee or entity under the FTCA, nor does the exception apply directly to PMCs, the combatant-activities exception defense, as applied to contractors, is actually one based on the principle of preemption, as was used in *Boyle*.

Two cases, *Koohi v. United States* and *Bentzlin v. Hughes Aircraft Co.*, set the stage for the frequent use of the CA exception defense in recent PMC litigation. In *Koohi*, the Ninth Circuit examined the applicability of the CA exception in the context of claims against the United States for the negligent operation of a U.S. warship and claims against the weapons manufacturer for design defects.²²⁵ The plaintiffs were heirs of civilian passengers who died during an accidental shooting of a passenger aircraft during the “tanker war” hostilities between Iran and Iraq in the 1980s. The court found there was no doubt that the

²²⁰ *Id.*

²²¹ In *McMahon v. Presidential Airways*, a case involving government contractors that provided air transportation and operation support services to DoD in Afghanistan, the GCD under *Boyle* and *Hudgens* was relied upon by the court to extent it was a “colorable defense” for purposes of removal from state to federal court. 410 F.Supp.2d 1189, 1197-98 (M.D. Fla. 2006).

²²² *Saleh et al. v. Titan et al.*, 580 F.3d at 5; *Al-Quraishi*, 2010 WL 3001986 at *27.

²²³ 28 U.S.C. §2680(j).

²²⁴ *In re KBR, Burn Pit Litigation*, 2010 WL 3543460 (D. Md. Sept. 8, 2010); *Al-Quraish, et al. v. Nakhla, et al.*, 2010 WL 3001986 (D.Md. July 29, 2010); *Harris v. Kellogg Brown & Root*, 2009 WL 1248060 (W.D. Penn. March 31, 2009); *Fisher v. Halliburton et al.*, 390 F.Supp.2d610 (S.D. Tex. 2005); *Lane v. Halliburton*, 2006 WL 27 96249 (S.D. Tex. 2006); consolidated as *Lane v. Halliburton et al.*, 529 F.3d 548 (5th Cir 2008); *McMahon v. Presidential Airways, Inc.*, 410 F.Supp.2d 1189 (M.D. Fla. 2006); 460 F.Supp.2d 1315 (M.D. Fla. 2006); 502 F.3d 1331 (11th Cir. 2007); *Carmichael v. Kellogg Brown & Root Services, Inc.*, 564 F.Supp.2d 1363 (N.D. Ga. 2008); *Saleh v. Titan*, 436 F.Supp.2d 55 (D.D.C. 2006) and *Ibrahim v. Titan*, 391 F.Supp.2d 10 (D.D.C. 2005); consolidated as *Ibrahim v. Titan Corp.*, 556 F.Supp.2d 1 (D.D.C. 2007); *Smith v. Halliburton Co. et al.*, 2006 WL 252 1326 (S.D. Tex. 2006); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F.Supp.2d 1277 (M.D. Ga. 2006); *Lessin v. Kellogg Brown & Root*, 2006 3940556 (S.D. Tex. 2006).

²²⁵ 976 F.2d 1328 (9th Cir. 1992).

“tanker war” constituted a “time of war” for purposes of the CA exception.²²⁶ The court reasoned that the action was preempted by the exception even as to the defense contractors because “one purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action.”²²⁷

After *Koohi*, it was but a short step to finding that claims against a PMC for manufacturing defective missiles that killed marines during Operation Desert Storm were preempted by the CA exception, as in *Bentzlin*.²²⁸ There, the court relied both on the preemptive principle put forth in *Boyle* and the combatant exception raised in *Koohi* to immunize government contractors from liability: “the federal interest in controlling military policy in war” preempted state law tort claims.²²⁹ Despite the seemingly expansive application to PMCs in *Koohi* and *Bentzlin* and the regularity with which PMC have raised the CA exception in recent litigation, the majority of courts have been reluctant to limit liability against PMCs on the basis of this exception, relying more on the political question doctrine as a basis for limiting liability. The only case, thus far, in which the court dismissed claims against a PMC on the basis of the CA exception is that involving Titan and CACI (the linguist and interrogator contractors at the Abu Ghraib prison).²³⁰

d. The Feres Doctrine

The *Feres* Doctrine is a judicially-created exception to the government’s waiver of sovereign immunity under the FTCA for state law torts. The *Feres* Doctrine was created by the Supreme Court and stands for the proposition that members of the armed forces are barred from bringing suit against the government for injuries that “arise out of or are in the course of activity incident to [military] service.”²³¹ As a result, soldiers may not recover for their service-related injuries in tort suits against the government, even if the tort suit is not barred by an explicit exception to the FTCA. The meaning of “incident to service” has been a matter of much dispute, but it is clear that it operates broadly to bar most tort claims that arise in the course of a soldier’s duties, whether in peacetime or wartime, in combat or on a base.²³² As applicable to PMCs, however, the Supreme Court in *Boyle* rejected the *Feres* Doctrine as a basis for a governmental contractor defense, stating that it would be “in some respects too broad and in some respect too narrow.”²³³

Only one PMC defendant in recent litigation has raised the *Feres* Doctrine as a defense. In *McMahon v. Presidential Airways, Inc.*, survivors of soldiers who were killed when the airplane they were in crashed in Afghanistan brought suit against the contractors that provided air transportation and operation support services to DOD. Citing *Boyle* and engaging in its own lengthy examination, the Eleventh Circuit held that private contractors for the military are not entitled to immunity under the *Feres* Doctrine.²³⁴

e. Foreign Country Exception

²²⁶ *Id.* at 1335.

²²⁷ *Id.* at 1137.

²²⁸ 833 F.Supp. 1486 (C.D. Cal. 1993).

²²⁹ *Id.* at 1493.

²³⁰ *Ibrahim v. Titan Corp.*, 556 F.Supp.2d 1 (D.D.C. 2007); *aff’d in part, rev’d in part, Saleh et al. v. Titan et al.*, 580 F.3d 1 (D.C. Cir. 2009) (dismissing all of plaintiffs’ claims).

²³¹ *Feres v. United States*, 340 U.S. 135, 146 (1950).

²³² *See., e.g., Feres*, 340 U.S. at 137; *Jimenez v. United States*, 158 F.3d 1228, 1229 (11th Cir. 1998).

²³³ *Boyle*, 487 U.S. at 510.

²³⁴ *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1356 (11th Cir. 2007).

The FTCA also provides that the government does not waive its sovereign immunity for “[a]ny claim arising in a foreign country.”²³⁵ The only PMC case to expound upon this exception is *McMahon v. Presidential Airways*, which the court was considering the exception in the context of whether the contractor had a “colorable defense” to support removal from state to federal court.²³⁶ There the court declined to find that the “foreign country” exception was a colorable defense because the purpose of the exception is to protect the government from being subjected to the laws of a foreign jurisdiction.²³⁷ To date, no other PMCs have raised this exception, perhaps due to the clear rationale underlying the exception.

3. The Defense Base Act

The Defense Base Act (DBA) is a federal statute that essentially limits a contractor company’s liability to its employees who are performing work for the military overseas. The DBA provides that the “liability of an employer . . . under this chapter shall be exclusive and in place of all other liability of such employer . . . to his employees (and their dependents) coming within the purview of this chapter . . .”²³⁸ The DBA provides an employee’s exclusive remedy if the employee is engaged in employment outside the United States and under a contract between his employer and the United States for the purpose of engaging in public work, including contracts and project in connection with national defense and war activities where the employee suffered an injury within the course and scope of his employment.²³⁹

In the context of relevant PMC litigation, the DBA is only available as a defense to PMC employers who are sued by their employees for PMC employers’ negligent or fraudulent acts, such as in the case of *Fisher v. Halliburton* and *Nordan v. Blackwater*.²⁴⁰ A narrow exception to the DBA’s exclusivity provision applies where the employer acts with specific intent to injure the employee. In *Fisher*, the plaintiffs had alleged that the defendants knew and intended that plaintiffs would be attacked by enemy insurgents and the basis of such allegations, the court refused to dismiss the Halliburton’s claims on the basis of the DBA.²⁴¹

* * *

An Appendix at the end of this Report contains detailed annotations of the civil cases involving PMCs and their personnel.

CONCLUSION

The growth of the private military industry in the United States was sparked, in part, by unanticipated military needs first in Iraq, and later in Afghanistan, and subsequently met with a civilian and military legal regime that itself was simply undeveloped and underdeveloped in its specificity. The necessity to create a more robust accountability regime

²³⁵ 28 U.S.C. § 2680(k).

²³⁶ 410 F. Supp.2d 1189, 1199 (M.D. Fla. 2006).

²³⁷ *Id.*

²³⁸ 42 U.S.C. § 1651(c).

²³⁹ *Fisher v. Halliburton*, 390 F.Supp.2d 610, 613 (S.D. Tex. 2005).

²⁴⁰ *Id.*; 382 F.Supp.2d 801 (E.D.N.C. 2005).

²⁴¹ *Fisher*, 390 F.Supp.2d at 613-14.

has, in turn, given birth to a host of alterations to applicable civil and criminal liability laws that have yet to be fully tested.

Additionally, the course of the U.S. regulatory regime over the use of PMCs and contractor personnel appears far from complete. Despite the internal efforts by agencies such as the Department of Defense and Department of State to remedy problems with the use and oversight of military contractors, regulatory and monitoring bodies, such as the Commission on Wartime Contracting and the Government Accountability Office (GAO) continue to document the need for better management and accountability, clearer standards and policy, and improved screening and training of contractors, and tracking of information.²⁴²

Over the last few years, several legislative initiatives have been put forth and, while some bills, or compromised versions of bills, have passed, many more have not and thus continue to percolate on the Hill. It is far from clear whether, given their stagnation, they will ever become law. For example, legislation introduced in the U.S. Senate in August 2008 entitled the “Restoring America’s Integrity Act” (RAIA) prohibits contractors from engaging in interrogation. At the end of 2008, Congress passed the NDAA FY2009, which specifically states that interrogation is an inherently governmental function and cannot be appropriately transferred to the private sector.²⁴³

The Transparency and Accountability in Military and Security Contracting Act of 2007, introduced by then Senator Obama, would have required departments and agencies (*eg.*, Defense, State, Interior) to provide detailed information on contractors and subcontractors, particularly security contractors, in Iraq and Afghanistan, to Congress, improve coordination between military and PMCs, and clarify the legal status of personnel by expanding MEJA. At the end of 2007, Congress passed the NDAA FY 2008, obligating DoD, DoS, and USAID to enter into a Memorandum of Understanding (MOU) relating to contracting in both Iraq and Afghanistan.²⁴⁴ NDAA FY2008 specified a number of issues to be covered in the MOU, including delineating responsibility for investigating possible violations of the UCMJ and MEJA, and the identification of common databases to serve as repositories of information on contract and contractor personnel.²⁴⁵ And, in July 2008, DoD, DoS and USAID signed an MOU in which they agreed the Synchronized Predeployment and Operational Tracker (SPOT) would be the system of record for the statutorily-required contract and personnel information.²⁴⁶

On the other hand, examples of stagnant bills are far more plentiful: (1) Then Senator Hillary Clinton attempted to draw the regulatory circle closer by proposing legislation that contractors who had violated criminal laws would be barred from obtaining federal

²⁴² See, *e.g.*, *At What Cost? Contingency Contracting in Iraq and Afghanistan*, Interim Report, Commission on Wartime Contracting in Iraq and Afghanistan, June 2009; *Testimony Before the Subcommittee on Oversight and Investigations, Committee on Armed Services, House of Representatives, IRAQ AND AFGHANISTAN, “Agencies Face Challenges in Tracking Contracts, Grants, Cooperative Agreements, and Associated Personnel,”* Government Accountability Office (GAO), March 23, 2010; *Testimony Before the Subcommittee on Defense, Committee on Appropriations, House of Representatives, WARFIGHTER SUPPORT, “Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations,”* March 17, 2010.

²⁴³ NDAA FY2009, sec. 1036.

²⁴⁴ NDAA FY2008, sec. 861.

²⁴⁵ *Id.*, sec. 861-862.

²⁴⁶ See *Testimony Before the Subcommittee on Oversight and Investigations, Committee on Armed Services, House of Representatives, IRAQ AND AFGHANISTAN, “Agencies Face Challenges in Tracking Contracts, Grants, Cooperative Agreements, and Associated Personnel,”* Government Accountability Office (GAO), at 2-3, March 23, 2010.

contracts;²⁴⁷ (2) Representative Jan Schakowsky introduced legislation designed to eliminate the use of contractors considered particularly problematic over the course of the Iraq War, in particular, Blackwater;²⁴⁸ (3) As a Senator, President Obama introduced legislation—the Security Contractor Accountability Act of 2007—that would grant U.S. federal courts jurisdiction to prosecute contractors of *all* U.S. agencies operating near a conflict area, establish a special FBI Theatre Investigative Unit to investigate suspected misconduct of contractor personnel in theatre, and create new reporting requirements on the DOJ to disclose how such allegations are being disposed of;²⁴⁹ (4) The Freeze Private Contractors in Iraq Act, introduced in the House, would prohibit DoD/DoS from increasing number of PSCs it uses to perform security functions in Iraq; (5) The Stop Outsourcing Security Act, introduced in both the Senate and the House, would require that only U.S. government personnel provide security to all personnel at any U.S. diplomatic or consular mission in Iraq, require the President to report to Congress on the status of planning for transition away from using private contractors for mission critical functions, and require certification that PMCs meet certain stds including no criminal or human rights abuse record.

Regardless of the disposition of any particular piece of legislation, the final contours of the regulation and criminal and civil accountability of contractors continues to remain an open question. As troop levels in Iraq and Afghanistan continue or begin to decrease, as promised by President Obama, there is great potential for the currently developing set of regulations and laws to remain in an undeveloped stage until the next conflict abroad. Undoubtedly, it would be far better to continue the development of this regime despite the drawdown of troops so as to avoid altogether a Blackwater/Nisoor Square incident in the future, or in the very least, to have a comprehensive of laws and the necessary funding in place to hold contractors accountable for their conduct.

²⁴⁷ U.S. Federal News, “Senator Clinton Presses for Greater Accountability, Oversight for Iraq Reconstruction Contracts,” July 16, 2008.

²⁴⁸ Philip Ewing, *Blackwater plans private navy*, NAVY TIMES, July 21, 2008, p. 10.

²⁴⁹ Security Contractor Accountability Act of 2007 (S. 2147) (2007).