

CRS Report for Congress

Private Security Contractors in Iraq: Background, Legal Status, and Other Issues

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Prepared for Members and
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Summary

The United States is relying heavily on private firms to supply a wide variety of services in Iraq, including security. From the information available in published sources, this apparently is the first time that the United States has depended on contractors to provide such extensive security in a hostile environment, although it has previously contracted for more limited security services in Afghanistan, Bosnia, and elsewhere. In Iraq, private firms known as Private Security Companies (PSC) are currently providing security services such as the protection of individuals, non-military transport convoys, buildings and other economic infrastructure, as well as the training of Iraqi police and military personnel.

By providing security for reconstruction and stabilization efforts, private contractors contribute an essential service to U.S. and international efforts to bring peace to Iraq, according to many analysts and policymakers. Nonetheless, the use of armed contractors raises several concerns, including transparency and accountability. Transparency issues include the lack of public information on the terms of their contracts, including their costs and the standards governing their hiring and performance, as well as the background and training of those hired under contract. The apparent lack of a practical means to hold contractors accountable under U.S. law for abuses and other transgressions, and the possibility that they could be prosecuted by foreign courts, is also a source of concern.

Contractors working with the U.S. military (or with any of the coalition forces) in Iraq are non-combatants who have no combat immunity under international law if they engage in hostilities, and whose conduct may be attributable to the United States. Section 522 of the John Warner National Defense Authorization Act for FY2007 (P.L. 109-364) makes military contractors supporting the Armed Forces in Iraq subject to court-martial, but until the Department of Defense publishes implementing regulations, it is more likely that contractors who commit crimes in Iraq would be prosecuted under criminal statutes that apply extraterritorially or within the special maritime and territorial jurisdiction of the United States, or by means of the Military Extraterritorial Jurisdiction Act (MEJA). Iraqi courts do not have jurisdiction to prosecute contractors without the permission of the relevant member country of the Multi-National Forces in Iraq. It is possible that some contractors may remain outside the jurisdiction of U.S. courts, civil or military, for improper conduct in Iraq.

This report summarizes what is currently known publically about companies that provide personnel for security missions in Iraq and some sources of controversy surrounding them. A treatment of legal status and authorities follows, including an overview of relevant international law as well as Iraqi law, which currently consists primarily of Coalition Provisional Authority (CPA) orders that remain in effect until superseded. The various possible means for prosecuting contractors under U.S. law in civilian or military courts are detailed, followed by a discussion of possible issues for Congress. This report will be updated as events warrant.

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Private Security Contractors in Iraq: Background, Legal Status, and Other Issues

Introduction

The 110th Congress is grappling with a broad range of issues regarding the use of private contractors to provide security for people and property in Iraq and elsewhere. For over a decade, the United States has gradually increased the types of tasks and roles for which it contracts private companies in military operations. Congress has generally accepted the concept of using unarmed private contractors to carry out support functions in military operations, such as providing food and laundry services, although not without concerns regarding the costs of contracts and alleged favoritism in issuing them. But Iraq is in some ways an atypical situation. There, the United States is relying heavily, apparently for the first time in an unstable environment, on private firms to supply a wide variety of security services.¹ Especially given a shortage of U.S. troops, private security contractors are widely viewed as vital to U.S. efforts to stabilize and reconstruct Iraq. Nevertheless, many Members are concerned about transparency, accountability, and legal and symbolic issues raised by the use of armed civilians to perform security tasks formerly performed by the military, as well as possible long-term effects on the military.

This report first summarizes available information on the private contractors providing security services under U.S. government contracts in Iraq.² It then

¹ Iraq appears to be the first case where the U.S. government has used private contractors extensively for protecting persons and property in potentially hostile or hostile situations where host country security forces are absent or deficient, but it is not the first time private contractors have been used for such purposes. In Afghanistan, there appears to be some contracting for protecting Afghani government officials, but so far reports on its extent suggest it is more limited than in Iraq. The U.S. General Accounting Office (GAO) reported that contractors have provided security guards in the Balkans and Southwest Asia, noting that in Bosnia “the Army replaced soldiers at the gate and base perimeter with contracted security guards.” *Military Operations: Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DOD Plans*. GAO-03-695, June 2003, p 8. The United States also uses private contractors (U.S. and foreign citizens) for guard duty at U.S. military installations and U.S. embassies and consulates in a number of countries where stability generally is not an issue.

² This report does not deal with private contractors whose function is to gather intelligence from prisoners, even though reports indicate that they may be armed. For information on (continued...)

provides information on relevant U.S., international, and Iraqi law, and legal issues involved in the use of armed contractors. It concludes with a discussion of issues involving the need for and suitability of private contractors, costs, and oversight and control, as well as potential foreign policy implications.

Background

The U.S. government is just one of many entities — including other governments, international organizations, and nongovernmental organizations — that employ private security contractors in Iraq. The U.S. use of private security contractors in Iraq represents a continuation of a trend that has seen the increasing growth — by many nations and organizations, including the United Nations — of the use of private contractors to provide security, as well as a variety of other functions in support of stabilization and reconstruction efforts.³

Private security contractors (PSCs) protect individuals, buildings and other infrastructure, and transport convoys.⁴ Currently, U.S. contracts for these services in Iraq are issued by agencies of the Department of Defense (DOD) and the Department of State (DOS). There are many companies providing private security services in Iraq, but only a handful appear to be contracted directly by the U.S. government. (A State Department website lists some 28 such companies operating

² (...continued)

such contractors, see CRS Report RL32395, *U.S. Treatment of Prisoners in Iraq: Selected Legal Issues*, by Jennifer K. Elsea.

³ According to one publication, “Not since the 17th century has there been such a reliance on private military actors to accomplish tasks directly affecting the success of military engagements. Private contractors are now so firmly embedded in intervention, peacekeeping, and occupation that this trend has arguably reached the point of no return.” Fred Schreier and Marina Caparini. *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*. Geneva, Switzerland: Geneva Centre for the Democratic Control of Armed Forces, March 2005. p. 1. For discussions on the growth of private companies providing security and other support to military efforts worldwide, see, for example: Deborah D. Avant. *The Market for Force: The Consequences of Privatizing Security*. Cambridge, UK; New York: Cambridge University Press, 2005; Simon Chesterman and Chia Lehnardt. *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*. Oxford, UK; New York: Oxford University Press, 2007; and Singer, Peter W. *Corporate Warriors: The Rise of the Privatized Military Industry*. Ithaca, NY: Cornell University Press, 2003. For a discussion of United Nations use of such contractors, see William J. Durch and Tobias C. Berkman. *Who Should Keep the Peace? Providing Security for the Twenty-First-Century Peace Operations*. Washington, D.C.: The Henry L. Stimson Center, September 2006. pp. 83-84.

⁴ The term “security” can encompass a wider variety of functions. This report uses the narrowest definition, that is, the provision of protective services. In its work, GAO adds the provision of security advice and planning. In other works, the term can also include military and police training, repair and maintenance for weapons systems, prison administration, interrogation, and intelligence. A few works use the term to refer to the entire spectrum of military functions performed by private contractors, including logistics and base maintenance.

there,⁵ but this list appears to be incomplete as it does not include at least one company with a U.S. government contract.) An unknown number are, however, providing security services indirectly under subcontracts with U.S. contractors. There is no count of the total number of contractors or subcontractors who carry weapons while performing services contracted for by the United States.

The numbers employed under U.S. government contracts in Iraq for functions once carried out by the U.S. military are but estimates. An estimated 20,000 to 30,000 individuals perform protective security functions for private firms under U.S. government contracts.⁶ Of these, a little over 2,500 were serving under Department of State contracts as of May 2007 (see **Table 1** below). The great majority of the remainder are most likely under DOD contracts, although at least one other U.S. agency has contracted for private security personnel at some point.

Private security contractors constitute a small but significant portion of the many thousands of individuals employed under U.S. government contracts to perform the spectrum of functions once carried out by U.S. military personnel. According to a July 2007 news report, some 182,000 are employed under U.S. government contracts.⁷ Of these, some 127,000 are under DOD contracts, according to testimony at April 2007 congressional hearings.⁸

In recent congressional hearings, Representative Patrick T. McHenry, a member of the House Oversight and Government Reform Committee, stated that approximately 60 private security companies are currently working for the U.S.

⁵ Security Companies Doing Business in Iraq, available at [http://travel.state.gov/travel/cis_pa_tw/cis/cis_1763.html].

⁶ A *Washington Post* article of May 27, 2007, attributes estimates of 20,000 to 30,000 armed security contractors working in Iraq to the "Pentagon and company representatives." Steve Fainaru and Saad Al-Izzi. U.S. Security Contractors Open Fire in Baghdad. *Washington Post*. May 27, 2007. p. A21. The Government Accountability Office (GAO) reported in 2006 that the Director of the Private Security Companies Association of Iraq estimated that as of March 2006, there were a total of 181 private security companies with just over 48,000 employees working in Iraq. (U.S. Government Accountability Office. *Rebuilding Iraq: Actions Still Needed to Improve the Use of Private Security Providers*. Testimony of William Solis, Director, Defense Capabilities and Management, before the Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform. GAO-06-865T. June 13, 2006.)

⁷ T. Christian Miller. "Private Contractors Outnumber U.S. Troops in Iraq." *Los Angeles Times*. July 4, 2007. Sources cited are State Department and Defense Department figures.

⁸ CQ Transcriptions. *Opening remarks of Rep. Martin T. Meehan, Chairman*. House Armed Services Subcommittee on Oversight and Investigations Holds Hearing on Iraqi Security Forces Contracting. April 25, 2007. The *New York Times* attributes to the Pentagon a figure of about "126,000 men and women" as serving as contractors alongside U.S. troops in Iraq. John M. Broder and James Risén. Death Toll for Contractors Reaches New High in Iraq. *New York Times*. May 19, 2007.

government in Iraq, “according to the research we’ve done.”⁹ DOD has not released figures on the number of private contractors providing protective services under DOD contracts. In May, the Department of State listed 2,522 private security contractors working under its two security contracts, but did not know how many such contractors were working on subcontracts under Department of State and USAID reconstruction contracts. (See below for details on the Department of State contract).

Most individuals hired by the companies providing security services under U.S. government contracts or subcontracts are Iraqis, and a good number are third-country nationals. Of the 182,000 total contractors cited above, some 118,000 (i.e., about two-thirds) are Iraqis, and some 43,000 (about one-quarter) are third-country nationals. Only some 21,000 (a little over one-eighth) are Americans, according to the same news article.¹⁰ According to a DOD official, just 17% of the total 127,000 individuals working under DOD contracts or subcontracts in Iraq (i.e., somewhat over 21,000) are U.S. citizens, although the proportion may be different for private security contractors.¹¹ Citizens of Chile, Fiji, Nepal, South Africa, the United Kingdom, and other countries reportedly carry arms under private security contracts. Peter Singer of the Brookings Institution estimates that citizens of some 30 countries are employed by private security companies in Iraq.¹² Nonetheless, most of those working in Iraq as private security contractors are Iraqi, according to Doug Brooks of the International Peace Operations Association (IPOA), an industry group.¹³ U.S. citizens also work for foreign companies providing security for foreign employers.

Pay scales for these contractors reportedly vary depending on their experience and perceptions of risk, as well as their nationality. When the hiring of such contractors first became controversial, the news media reported (in April 2004) a pay range of \$500 to \$1,500 per day.¹⁴ Now, however, some analysts state that pay is on

⁹ CQ Transcriptions. House Oversight and Government Reform Committee Holds Hearings on Waste, Fraud and Abuse in Iraq Reconstruction, Part 2. February 7, 2007. (Part 1 of these hearings was held on February 6; Part 3 on February 8.)

¹⁰ Private Contractors Outnumber U.S. Troops in Iraq. *op.cit.* There appears to be some disconnect between the numbers report in this article and the earlier testimony on DOD contractors, unless it can be assumed that virtually all Americans working as contractors in Iraq, except for the approximately 2,500 working under Department of State security contracts, are working under DOD contracts or subcontracts.

¹¹ CQ Transcriptions. *Remarks of Gary Motsek, Assistant Deputy Undersecretary of Defense for Program Support, Office of the Undersecretary of Defense for Acquisition, Technology and Logistics.* House Armed Services Subcommittee on Oversight and Investigations Holds Hearing on Iraqi Security Forces Contracting. April 25, 2007. The percentage of U.S. citizens may have changed somewhat, as Mr. Mostek indicated that new figures were due in May 2007.

¹² Conversation with Peter Singer, Brookings Institution, June 13, 2007.

¹³ E-mail correspondence from Doug Brooks, President, International Peace Operations Association, July 2, 2007.

¹⁴ David Barstow. Security Companies: Shadow Soldiers in Iraq. *New York Times*, April 19, (continued...)

the average lower globally as the supply of those desiring such work has risen,¹⁵ even as risk may be perceived as increasing. The highest amounts are paid to highly experienced former military personnel, such as former U.S. and British special forces, with lower amounts paid to personnel from Third World countries such as Chile and Nepal, and the lowest amounts going to locally hired Iraqis.

Like soldiers, private security contractors incur the risk of death and injury from insurgents in Iraq. U.S. Army Corps of Engineers data reportedly show that an increasing proportion of registered supply convoys has been attacked, rising from 5.5% in 2005 to 14.7% for 2007 through May 10 (i.e., about the first 18 weeks of 2007).¹⁶ Of those involved in the 12,860 Corps-registered convoys that transported supplies in Iraq from August 2004 through May 10, 2007, some 132 “security employees and drivers” were killed and 416 were wounded, according to a report on that data.¹⁷ (The cause of death and injury was not reported, however, and may include accidents and well as shooting deaths. The totals for all convey may well be substantially higher as there are likely deaths and injuries associated with convoys that are not registered with the Corps’ Reconstruction Logistics Directorate.) Convoy-related deaths appear to be a significant portion of total private contractor deaths. An earlier news report cited Department of Labor statistics showing 917 private contractors have died and more than 12,000 have been wounded in battle or in job-related accidents in the four years since the war (i.e., March 2003 through March 2007); of these, some 146 died and another 3,430 were wounded or injured in the first three months of 2007.¹⁸ During that same period, some 244 U.S. soldiers died, according to the news report.

The total cost to the U.S. government of such security services in Iraq is not known. Estimates of the portion of reconstruction project costs consumed by security have varied. A 2006 SIGIR report surveying nine major U.S. contractors found their costs to range from a low of 7.6% to a high of 16.7%, whereas the State Department estimated it in 2005 as 16%-22%.¹⁹ This year, House Oversight and Government Reform Committee Chairman Henry Waxman stated at the committee’s February hearings on Iraq reconstruction that almost \$4 billion “has been paid for private security services in the reconstruction effort alone.”²⁰

¹⁴ (...continued)
2004.

¹⁵ Interview with Doug Brooks, December 13, 2006.

¹⁶ Steve Fainaru. Iraq Contractors Face Growing Parallel War. *Washington Post*. June 16, 2007. p. A12.

¹⁷ *Ibid.*

¹⁸ *New York Times*. May 19, 2007. *op.cit.* The article states that the New York Times obtained the data through a Freedom of Information Act request it filed with the Department of Labor.

¹⁹ As cited in CRS Report RL31833, *Iraq Reconstruction Assistance*, by Curt Tarnoff. April 6, 2007. p. 25.

²⁰ CQ Transcriptions. House Oversight and Government Reform Committee Holds Hearings (continued...)

Whether the use of private contracts for such services is cost effective is another question that cannot be answered definitively with current information. The Government Accountability Office (GAO), in a recent report on costs of operations and maintenance support services notes that appropriate information is lacking to make such a calculation for such services and that the analyses needed to make such a determination “can be expensive and time-consuming.”²¹

State Department and DOD Private Security Contracts²²

Little information is publically available on State Department and DOD contracts for private security services in Iraq. The State Department has recently made available the names of the companies holding its primary contracts for such protective services and the numbers of security personnel serving directly and indirectly under those contracts. The State Department has not made public the names of the subcontractors who perform security services for those carrying out reconstruction activities under State Department contracts. The DOD has not publically released information on its contractors and subcontractors; information on these subjects must be compiled from secondary sources.

State Department Private Security Contracts. The State Department has three prime security contractors hired under a Worldwide Personal Protective Services (WPPS) umbrella contract, dating from July 2005, according to information provided by the department: *Blackwater U.S.A.*; *DynCorp International, LLC*, and *Triple Canopy, Inc.*²³ WPPS contracts are used to provide bodyguards and “static” guards (i.e., guards for buildings and other infrastructure) in Baghdad and other areas throughout Iraq. Triple Canopy also holds another State Department contract to provide local guard services for the U.S. Embassy and other sites in the Baghdad “Green Zone,” which are under Chief of Mission control.

Blackwater USA, founded in 1997 and headquartered in Moyock, North Carolina, has provided a variety of protective services in Iraq. It was one of the original companies providing such services to the Coalition Provisional Authority (CPA), including protection for CPA chief Paul Bremer as well as other CPA employees and visiting dignitaries. Its staff includes former military, intelligence, and law enforcement personnel. According to news reports and its website, Blackwater was founded by three former Navy SEALs.

²⁰ (...continued)

on Waste, Fraud and Abuse in Iraq Reconstruction, Part 2. February 7, 2007. This is about a fifth of the \$20 billion in spending through FY2007 from the Iraq Relief and Reconstruction Fund and over a tenth of the \$35 billion in total U.S. Reconstruction Assistance, as computed in CRS Report RL31833, *op. cit.*, p. 3.

²¹ U.S. Government Accountability Office. *Trends in Operation and Maintenance Costs and Support Services Contracting*. GAO-07-631. May 2007.

²² Information on the Department of State in this paragraph from the author’s interview with State Department officials on May 24, 2007.

²³ The WPPS contracts are also used to provide security services not only in Iraq, but also in Afghanistan, Bosnia, and Israel.

DynCorp International LLC evolved, according to its website, from a company formed in 1946 that provided support and services to U.S. military aircraft and weapons systems under Air Force contracts. Named DynCorp since 1987, it was acquired in 2003 by Computer Sciences Corporation (CSC) and now has nearly 14,000 employees in 30 countries.²⁴ Besides the WPPS contract, DynCorp also holds another State Department contract, under the Bureau of International Narcotics and Law Enforcement, to provide police training and related services in Iraq.

Triple Canopy, Inc., founded in September 2003, bills its operational leadership as “comprised of former operators from tier-one special operations units....” Its two founders and co-chairman both served with the U.S. Army Special Forces, one with Special Forces “Delta Force” unit.²⁵

The State Department provided information on the number of people performing under contracts with these companies, as well as related subcontracts, and identified them by nationality group (i.e., U.S. citizen, Iraqi citizen, and other foreign nationals). The numbers of those serving are only the DOS’s prime contractors and their subcontracts. It does not include private security personnel who have been hired by DOS contractors providing other services, for instance, guards hired by a company that has a contract to provide engineers.

The U.S. Agency for International Development initially contracted Knoll, Inc. to provide security for its personnel, but now they receive protection under the State Department contracts. USAID contractors hire their own security; a USAID official stated that the organization has no accounting of the number of security companies for personnel providing security to USAID contractors.²⁶

Table 1. Department of State Security Contractors in Iraq

Company	Number of Americans	Number of Iraqis	Number of Third-Country Nationals	Total
<i>Worldwide Personal Protective Services Contracts</i>				
Blackwater, USA	744	12	231	987
DynCorp International, LLC	100	15	36	151
Triple Canopy	101	2	154	257
Total WPPS	945	29	421	1,395

²⁴ Information on the company’s history and size from its website at [<http://www.dyncorpinternational.com>]. DynCorp’s performance under the INL contract was reviewed by the OSIGIR. Review of DynCorp International, LLC, Contract Number S-LMAQM-04-C-0030, Task Order 0338, for the Iraqi Police Training Program Support. SIGIR-06-029. DoS-OIG-AUD/IQO-07-20, January 30, 2007. According to this report, the contract was awarded in February 2004, for a base year and four renewable one-year options. Its potential value was \$1.8 billion.

²⁵ From the company’s history posted on the Triple Canopy website at [<http://www.triplecanopy.com>].

²⁶ Telephone conversation of June 26, 2006.

<i>Local Guard Service Contract</i>				
Triple Canopy	113	122	992	1, 227

Source: Department of State.

Notes: The information was provided in May 2007, from data collected May 9, 2007. It comes with the warning that the actual numbers of employees working in Iraq vary widely on a daily basis due to personnel rotations, medical evacuations, and R&R travel.

DOD PSC Contract Information from Secondary Sources. There is little public information at this point on DOD contracts for security services; it is not even clear how many companies provide such services directly or indirectly under DOD contracts. In 2004, CRS prepared a list of nine companies that public source information, primarily press reports and websites, described as providing security services to the Coalition Provisional Authority in Iraq,²⁷ which may have indicated the existence of a DOD contract.²⁸ A scan of the same sources this year yields much less information, with only four companies linked to recent and current DOD security contracts or subcontracts.

There is authoritative secondary information on only one company, *Aegis Defense Services Limited*, that directly provides security services under a DOD contract. On May 25, 2004, DOD contracted *Aegis Defence Services Limited*, a British firm, to provide a variety of security-related services, including intelligence and protective services. According to an audit report prepared by the Office of the Special Inspector General for Iraq Reconstruction, Aegis was contracted “to provide a comprehensive security management team that provides anti-terrorism support and analysis, close personal protection, movement and escort security, and security program management”²⁹ throughout Iraq. Under the contract, Aegis is to “continuously gather, interpret, and expeditiously disseminate information on the security situation throughout Iraq...” and to provide “guidance and coordination for the security planning and protection of the ten major prime reconstruction contractors and their subcontractors.” The contract also calls for Aegis to provide a range of

²⁷ These companies were identified and discussed in the May 28, 2004 edition of this report. They varied greatly in size and several offered a wide variety of security-related and other services. Some were founded decades ago, some within the last few years. The companies were: ArmorGroup, Blackwater Security Consulting (now Blackwater USA), Custer Battles, Diligence LLC, Erinys Iraq, Global Risk Strategies, ISI Iraq, Special Operations Consulting-Security Management Group (SOC-SMG), and The Steele Foundation. Sources consulted for these profiles include company websites, where available, news articles, and government sources cited in that edition of the report.

²⁸ The U.S. Department of the Army was named the CPA’s “executive agent” with the responsibility of executing contracts on behalf of the CPA, but it appeared that not all of those contracts were issued by the Army.

²⁹ Office of the Special Inspector General for Iraq Reconstruction (SIGIR). Audit Report: Compliance with Contract No. W911S0-C-0003 Awarded to Aegis Defense Services Limited. Report Number 05-005. April 20, 2005. p. 1. The audit found several deficiencies in the areas of personal security detail qualifications, regional operations centers, and security escorts and movement control (p. 3), which the Aegis website states had been corrected by the time the audit was issued [<http://www.aegisworld.com/aegis-faq.html>].

guard services to DOD Project and Contracting Office (PCO) personnel and offices, as well as to PCO reconstruction contractor personnel. Such services include security escort teams for travel to reconstruction sites, around-the-clock personal security details for senior PCO management, and static guards for PCO facilities.³⁰

The Aegis contract extended over a base year and two optional renewable years: the first year was valued at approximately \$92 million, the second at \$97 million, and the third at \$103 million,³¹ for a potential total value of \$292 million. The contract was to expire at the end of May 2007, but reportedly has been extended for up to six months because of challenges to the process for a new contract to provide the same intelligence and protective services. Aegis reportedly is bidding on the new contract, valued up to \$475 million, as are several other companies, including the two challengers, Blackwater Security Consulting and Erinys Iraq.³²

FedSpending.org, a website operated by a nongovernmental organization³³ indicates that a third company, *Erinys International, Iraq*, held a DOD contract to provide security services in Iraq during FY2006. A recent news article reports that Erinys works “side-by-side” with Aegis “in Baghdad’s Green Zone on similar but separate contracts.”³⁴ Erinys was one of the nine contractors CRS identified in 2004.³⁵

Triple Canopy, Inc. has been identified in the press as providing security services to a DOD contractor, KBR. This identification surfaced as a result of the court case brought by two former Triple Canopy employees.

ArmorGroup International, a British company founded some 25 years ago, was also identified in a recent news article as a U.S. government contractor. According

³⁰ SIGIR, *op.cit.*, p. 3.

³¹ *Ibid.*

³² Alec Klein and Steve Fainaru. Firms Protest Exclusion From Iraq Security Bid. *Washington Post*. May 5, 2007.

³³ FedSpending.org [<http://www.fedspending.org>] is a project of OMB Watch. It provides data in readily retrievable form that it obtains from the Federal Procurement Data System (FPDS) — Next Generation and other federal government sources through Eagle Eye Publishers, Inc.

³⁴ *Washington Post*. May 5, 2007. *op. cit.*

³⁵ Erinys Iraq held a major contract to protect Iraq’s oil fields, and trained Iraqis for that task. The contract reportedly was worth \$39 million over two years. Also, according to its website in 2004, Erinys Iraq had a contract with the U.S. Army Corps of Engineers to provide “nationwide personal security details and protective services.” According to one news account at the time, the company was a joint venture between Erinys International, (founded in 2001 and cited by some sources as a South African company, by another as British) and associates of Ahmad Calaba. (*Financial Times*, December 12, 2003. *op.cit.*) At that time, the company employed a small number of former British special operations personnel as managers and trainers, according to one source (telephone interview with Patrick Culled, April 16, 2004), and some 14,000 Iraqis to guard the wells, according to a variety of reports.

that article, ArmorGroup, with some 1,200 employees in Iraq, “protects 32 percent of all nonmilitary supply convoys” and has lost some 26 employees in Iraq.³⁶ It is not clear from the article whether ArmorGroup operates as a contractor or subcontractor for all of its work, but other information indicates it works as a subcontractor. ArmorGroup is reportedly a leading contender for the Aegis contract now up for bids. ArmorGroup was one of the nine contractors CRS identified in 2004.³⁷

The U.S. military plans to let three large security contracts valued at about \$1.4 billion this year, according to a recent news report. One is the U.S. Army Corps of Engineers contract for up to \$475 million in intelligence and protective services that is currently under challenge, as discussed above. The others are (1) a contract to protect U.S. bases in Iraq valued up to \$480 million, and (2) a contract to protect reconstruction convoys valued up to \$450 million.³⁸ The news report also states that the Army has “tested a plan to use private security on military convoys for the first time, a shift that would significantly increase the presence of armed contractors on Iraq’s dangerous roads.”³⁹

Sources of Controversy

Public awareness of the extent to which private contractors were being used for security purposes was highlighted by the deaths on March 31, 2004, of four Blackwater guards in Fallujah. The guards were three former Army Rangers and a former Navy SEAL. They were killed while escorting trucks carrying supplies for a private company that provided food services to U.S. military dining facilities in Iraq, and their bodies were then dragged through the streets and hung for display. Days later, Blackwater personnel again hit the news as they reportedly fought a prolonged gun battle in Najaf on April 4, 2004, defending the U.S. government headquarters there. These events sparked congressional debate over the role of private contractors in U.S. military operations, the desirability of using such contractors, and the appropriate legal and contractual framework to control them.

Concerns over the quality of security personnel being hired under U.S. government contracts were triggered by news reports that possible human rights violators were being hired. According to one source, in February 2004, Blackwater

³⁶ *Washington Post*. June 16, 2007. *op.cit.*

³⁷ ArmorGroup provided security services to the CPA. According to its website, ArmorGroup provides “defensive, protective security services to national governments, multinational corporations and international peace and security organisations operating in hazardous environments.” It currently has some 9,000 employees and “long term” operations in 38 countries, [<http://www.armorgroup.com>]. A 2005 publication provides a list of ArmorGroup clients, apparently for security guarding supply convoys and humanitarian aid deliveries, at that time: “UN agencies, the governments of the UK [United Kingdom], US, Switzerland, Sweden, Japan, and Canada, the EU [European Union], ECHO [the European Commission’s humanitarian aid department], USAID, the ICRC [International Committee of the Red Cross], as well as a number of NGO’s including the International Rescue Committee, CARE, and Caritas.”

³⁸ *Washington Post*. June 16, 2007. *op.cit.*

³⁹ *Ibid.*

started training former Chilean commandos — some of whom served during the Pinochet years in Chile — for duty in Iraq.⁴⁰ Another news report at the time indicated that four guards killed in January while working for an Erinys subcontractor had served in South Africa's security forces during the apartheid era, and one of them had applied for amnesty for crimes that he had committed.⁴¹

More recently, Congress has taken a renewed interest in questions about accountability and transparency. In November 2006, news reports about a lawsuit filed in Fairfax [VA] County Circuit Court brought to light allegations that a Triple Canopy employee in Iraq twice had fired want only at Iraqi civilians in the summer of 2005 and possibly killed one person. The two Triple Canopy employees filing the lawsuit state that they were fired for reporting that their supervisor had committed the act. According to a news report, the Triple Canopy employee was operating at the time under a KBR subcontract when the alleged shootings occurred.⁴² Most recently, a news article discussing an incident in which a Blackwater guard shot dead an Iraqi driver in May 2007 quoted an Iraqi official's statement that the Iraqi Interior Ministry had received four previous complaints of shootings involving Blackwater employees.⁴³

The House hearings also revealed that the U.S. government has not been aware of the extent to which contractors and subcontractors employ private security personnel, and of the broad network of subcontracts over which the U.S. government, according to some, has exercised little oversight.

Legal Status and Authorities

Contractors to the coalition forces in Iraq operate under three levels of legal authority: (1) the international order of the laws and usages of war and resolutions of the United Nations Security Council; (2) U.S. law; and (3) Iraqi law, including orders of the CPA that have not been superceded. Under the authority of international law, contractors working with the military are civilian non-combatants whose conduct may be attributable to the United States.⁴⁴ Iraqi courts do not have

⁴⁰ Barry Yeoman, "Need an Army? Just Pick Up the Phone" [Op-Ed], *New York Times*, April 2, 2004.

⁴¹ *New York Times*, April 19, 2004. *op.cit.*

⁴² Tom Jackman. U.S. Contractor Fired on Iraqi Vehicles for Sport, Suit Alleges. *Washington Post*. November 17, 2006.

⁴³ *Washington Post*. May 27, 2007, *op.cit.*

⁴⁴ Conduct that violates international obligations is attributable to a State if it is committed by the government of the State or any of its political subdivisions, or by any official, employee, or agent operating within the scope of authority of any of these governments, or under color of such authority. AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Vol II (1987), § 207. Principles of State responsibility require a State in breach of an obligation to another State or international organization, without justification or excuse under international law, to terminate the (continued...)

jurisdiction to prosecute them for conduct related to their contractual responsibilities without the permission of the Sending State.⁴⁵ Some contractors, particularly U.S. nationals, may be prosecuted in U.S. federal courts or military courts under certain circumstances.

International Law

The international law of armed conflict, particularly those parts relating to belligerent occupation (at least for conduct that occurred prior to the handover of sovereignty on June 28, 2004) and non-international armed conflict, appear to be relevant in Iraq.⁴⁶ The status of armed contract personnel in such circumstances falls into a grey area.⁴⁷ While civilians accompanying the Armed Forces in the field are generally entitled to treatment as prisoners of war (POW)⁴⁸ if captured by an enemy

⁴⁴ (...continued)

violation and provide redress. *Id.* at § 901, comment a.

⁴⁵ CPA Order 17, Status of the CPA, MNFI, Certain Missions and Personnel in Iraq, June 27, 2004, § 4 (Contractors) available at [http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf] (last visited May 4, 2007). A “Sending State” is defined in § 1(5) of CPA Order 17 to mean “a State providing personnel, International Consultants, services, equipment, provisions, supplies, material, other goods or construction work to: (a) the CPA, (b) the MNF [Multi-National Forces], (c) international humanitarian or reconstruction efforts, [and] (d) Diplomatic or Consular Missions...”

⁴⁶ The relevance of various sources of international law may have fluctuated as the status of the Iraqi government has transformed from an interim government to a permanent government with a permanent Constitution. For a description of law applicable in Iraq after June 28, 2004, see CRS Report RL31339, *Iraq: Post-Saddam Governance and Security*, by Kenneth Katzman. The Multi-National Forces in Iraq (MNF-I) are currently fulfilling a UN mandate established by United Nations Security Council (UNSC) Resolution 1511 (October 16, 2003) and continued by UNSC Resolution 1546 (June 8, 2004), UNSC Resolution 1637 (November 8, 2005), and UNSC Resolution 1723 (November 28, 2006). The resolutions affirm the importance for MNF-I to “act in accordance with international law, including obligations under international humanitarian law...” but do not clarify what those obligations entail. UNSC resolutions are accessible at [<http://www.un.org/Docs/sc/unscreolutions.html>].

⁴⁷ See Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 401 (2004); P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 525-26 (2004) (arguing that international law applicable to privatized military firms is nonexistent or outdated).

⁴⁸ Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (entered into force October 21, 1950) [hereinafter “GPW”]. GPW art. 4(A)(4) extends POW status to

Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose

(continued...)

State during an international armed conflict, they are considered civilians (non-combatants) who are not authorized to take part in hostilities.⁴⁹

Can Contractors Be “Combatants”? A critical question appears to be whether the duties of contractors amount to “taking an active part in hostilities.” In an international armed conflict or occupation,⁵⁰ only members of regular armed forces and paramilitary groups that come under military command and meet certain criteria (carry their weapons openly, distinguish themselves from civilians, and generally obey the laws of war) qualify as combatants.⁵¹ Because contract employees fall outside the military chain of command,⁵² even those who appear to meet the criteria as combatants could be at risk of losing their right to be treated as POWs if captured by the enemy.

The Geneva Conventions and other laws of war do not appear to forbid the use of civilian contractors in a civil police role in occupied territory, in which case they might be authorized to use force when absolutely necessary to defend persons or property.⁵³ Given the fluid nature of the current security situation in Iraq, it may sometimes be difficult to discern whether civilian security guards are performing law-enforcement duties or are engaged in combat. If their activity amounts to combat, they would become lawful targets for enemy forces during the fighting, and,

⁴⁸ (...continued)

with an identity card....

⁴⁹ Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, October 18, 1907, Annex art. 3, 36 Stat. 2277, 2296 (entered into force January 26, 1910) [hereinafter “Hague Regulations”].

⁵⁰ The 1949 Geneva Conventions share several types of common provisions. The first three articles of each Convention are identical. Common Article 2 defines the scope of application of the Geneva Conventions in international armed conflicts as “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties ... [and] all cases of partial or total occupation of the territory of a High Contracting Party....”

⁵¹ *Id.* at 4; Department of the Army Field Manual (FM) No. 3-100.21, Contractors on the Battlefield ¶ 2-33, January 3, 2003.

⁵² See FM 3-100.21, *supra* note 34, ¶ 1-22:

Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders do not have direct control over contractors or their employees (contractor employees are not the same as government employees); only contractors manage, supervise, and give directions to their employees.

⁵³ Army doctrine does not allow civilians to be used in a “force protection” role. See *id.* ¶ 6-3 (“Contractor employees cannot be required to perform force protection functions described [in ¶ 6-2] and cannot take an active role in hostilities but retain the inherent right to self-defense.”). Force protection is defined as “actions taken to prevent or mitigate hostile actions against DOD personnel, resources, facilities and critical information.” *Id.* ¶ 6-1. An Army combatant commander may issue military-specification sidearms to contractor employees for self-defense purposes, if the contractor’s company policy permits employees to use weapons and the employee agrees to carry the weapon. *Id.* ¶ 6-29.

if captured by an enemy government (if one should emerge), could potentially be prosecuted as criminals for their hostile acts.⁵⁴

On the other hand, if the conflict in Iraq is a non-international armed conflict within the meaning of Common Article 3 of the Geneva Conventions (CA3),⁵⁵ customary international law would no longer distinguish between “unlawful” and “lawful combatants.”⁵⁶ Contractors captured by enemy forces who had engaged in hostilities would be entitled to the minimum set of standards set forth in CA3, but their right to engage in hostilities in the first place would likely be determined in accordance with the prevailing local law. In this case, Iraqi law, including CPA orders that have not been rescinded, apply.⁵⁷

Are They “Mercenaries”? Mercenaries are persons who are not members of the armed forces of a party to the conflict but participate in combat for personal gain. They may be authorized to fight by a party to the conflict, but their allegiance to that party is conditioned on monetary payment rather than obedience and loyalty.⁵⁸ For this reason, mercenaries are sometimes treated as “unlawful combatants” or “unprivileged belligerents,” even though their employment is not strictly prohibited by international law.⁵⁹ As discussed above, they may not qualify for POW treatment under GPW, and those meeting the definition of “mercenary” under the 1977 Protocol I to the Geneva Conventions⁶⁰ are explicitly denied combatant status.⁶¹ Because mercenaries are not entitled to combat immunity, they may be tried, and if

⁵⁴ The Army discourages the use of contractors in roles that could involve them in actual combat. Major Brian H. Brady, *Notice Provisions for United States Citizen Contractor Employees Serving With the Armed Forces of the United States in the Field: Time to Reflect Their Assimilated Status in Government Contracts?*, 147 MIL. L. REV. 1, 62 (1995) (citing Department of the Army, AR 700-137, Army’s Logistics Civil Augmentation Program (LOGCAP) ¶ 3-2d(5)(1985) “Contractors can be used only in selected combat support and combat service support activities. They may not be used in any role that would jeopardize their role as noncombatants.”)

⁵⁵ Common Article 3, expressly applicable only to conflicts “not of an international nature,” has been described as “a convention within a convention” to provide a general formula covering respect for intrinsic human values that would always be in force, without regard to the characterization the parties to a conflict might give it. See JEAN PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* 32 (1975).

⁵⁶ Common Article 3 does not provide for POW status. Its protections extend to all persons who are not or are no longer participating in combat. FM 3-100.21, *supra* note 34, does not distinguish between international and non-international armed conflicts.

⁵⁷ See *infra*.

⁵⁸ See Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 187 (2000) (recounting origin of prohibition on mercenaries after the Middle Ages).

⁵⁹ See Singer, *supra* note 30, at 534.

⁶⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 47, June 8, 1977, *reprinted in* 16 I.L.M. 1391.

⁶¹ *Id.* art. 43.

found guilty, punished for their hostile actions (including by the death penalty), even if such actions would be lawful under the law of war if committed by a soldier. Soldiers with a nationality other than that of the party on whose side they fight are not automatically considered mercenaries.⁶² Article 47 of Protocol I defines a mercenary as follows:

2. A mercenary is any person who:
 - (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) Does, in fact, take a direct part in the hostilities;
 - (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
 - (e) Is not a member of the armed forces of a Party to the conflict; and
 - (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.⁶³

Under this definition, it appears that contractor personnel who are not U.S. nationals, the nationals of other coalition allies or Iraqi nationals, and who were hired to — and in fact do — take part in hostilities might be considered to be mercenaries, assuming the definition in Protocol I applies as customary international law in the context of the current hostilities in Iraq. On the other hand, it is not altogether clear what constitutes “direct participation in an armed conflict,” and some of the other requirements are inherently difficult to prove, particularly the element of motivation.⁶⁴

Iraqi Law (Including Coalition Provisional Authority Orders)

Contractors to U.S. agencies or any of the multinational forces or diplomatic entities in Iraq operate under the law of the government of Iraq, which includes orders issued by the CPA prior to the hand-over of sovereignty to the Iraqi Interim

⁶² See HILAIRE MCCOUBREY, 2 INTERNATIONAL HUMANITARIAN LAW 145 (1998) (noting that not all foreigners in service of armed forces of other countries should be treated as “mercenaries,” as some may serve with the approval of their home governments or for moral or ideological reasons); HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 75 (1979) (describing entitlement to POW status of nationals of neutral states or states allied with enemy state as well-settled, while status of an individual who is a national of a capturing state or its allies is subject to dispute).

⁶³ The United States has not ratified Protocol I; however, some of its provisions may be considered binding as customary international law. See Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocol Additional to the 1949 Geneva Convention*, 2 AM. U. J. INT’L L. & POL’Y 419 (1987).

⁶⁴ See Singer, *supra* note 30, at 532 (commenting on similar definition found in the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, to which the United States is not a party).

Government that have not been rescinded or superceded.⁶⁵ Under CPA Order Number 17, as revised June 27, 2004, contractors are exempt from Iraqi laws for acts related to their contracts.⁶⁶ That order provides that “[c]ontractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts...,” but that they are subject to all relevant regulations with respect to any other business they conduct in Iraq (section 4(2)). Contractors are also immune from Iraqi legal processes for acts performed under the contracts (section 4(3)). Iraqi legal processes could commence against contract personnel without the written permission of the Sending State, but that State’s certification as to whether conduct at issue in a legal proceeding was related to the terms and conditions of the relevant contract serves as conclusive evidence of that fact in Iraqi courts (section 4(7)).

CPA Order Number 3, as revised on December 31, 2003,⁶⁷ governs the use of weapons. It restricts the authority to carry weapons to members of Iraqi security forces and Coalition forces, and “groups and individuals who have been authorized to carry weapons in the course of their duties by the CPA or Commander, Coalition Forces or their duly authorized delegates,” (section 3). It further provides that “private security firms may be licensed by the Ministry of the Interior to possess and use licensed Firearms and Military Weapons, excluding Special Category Weapons, in the course of their duties, including in public places.” *Id.* All others must apply to the Iraqi Ministry of the Interior for a license in order to possess a weapon. The unauthorized use or possession of weapons is subject to penalty.

CPA Memorandum Number 17⁶⁸ provides for the registration and regulation of private security companies (PSC) operating in Iraq. Two annexes to the Memorandum provide for binding Rules for the Use of Force (Annex A) and is a Code of Conduct (Annex B) that all PSC employees must follow. Section 9 prohibits PSC employees from conducting law enforcement activities; however, section 5 of Annex A permits PSC employees to stop, detain, search, and disarm civilians where the employees’ safety requires it or if such functions are specified in the contract. Section 6 prohibits PSC employees from joining Coalition or Multi-national Forces

⁶⁵ The Coalition Provisional Authority dissolved at the end of June, 2004, but certain orders issued by the CPA, as modified by CPA Order 100, were to remain in place unless modified or rescinded by the Iraqi Government. *See* CRS Report RS21820, *Iraq: June 30, 2004, Transition to Sovereignty*, by Kenneth Katzman and Jennifer K. Elsea.

⁶⁶ Under CPA Order 17, Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors, June 23, 2003, Coalition forces were immune from Iraqi legal processes for their conduct during the period the CPA is in power. CPA Order 100 modified CPA Order 17 to substitute the MNF-I for the CPA and otherwise reflect the new political situation. *See* CPA Order 17, as amended June 17, 2004, *available at* [http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Re_v_with_Annex_A.pdf].

⁶⁷ CPA Order 3, Weapons Control December 31, 2003, *available at* [http://www.iraqcoalition.org/regulations/20031231_CPAORD3_REV_AMD_.pdf].

⁶⁸ CPA Memorandum Number 17, Registration Requirements for Private Security Companies (PSC), June 26, 2004, *available at* [http://www.iraqcoalition.org/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf].

in “combat operations except in self-defense or in defense of persons as specified in [their] contracts.” Section 9 makes PSC subject to all “applicable criminal, administrative, commercial and civil laws and regulations,” and provides that their “officers and employees may be held liable under applicable criminal and civil legal codes,” except as otherwise provided by law.

U.S. Law

U.S. contractor personnel and other U.S. civilian employees in Iraq may be subject to prosecution in U.S. courts. Additionally, persons who are “employed by or accompanying the armed forces” overseas may be prosecuted under the Military Extraterritorial Jurisdiction Act of 2000 (MEJA)⁶⁹ or, in some cases, the Uniform Code of Military Justice (UCMJ).⁷⁰ However, some contractor personnel who commit crimes might not fall within the statutory definitions described below, and thus might fall outside the jurisdiction of U.S. criminal law, even though the United States is responsible for their conduct as a matter of state responsibility under international law.⁷¹

Prosecution in U.S. Federal Court. U.S. contractor personnel and other U.S. civilian employees in Iraq are subject to prosecution in U.S. courts under a number of circumstances. Jurisdiction of certain federal statutes extends to U.S. nationals at U.S. facilities overseas that qualify as part of the special maritime and territorial jurisdiction (SMTJ) of the United States.⁷² For crimes involving a U.S. citizen as a perpetrator or a victim, the SMTJ includes

- (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and
- (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

⁶⁹ P.L. 106-523, 114 Stat. 2488 (2000), *codified at* 18 U.S.C. §§ 3261 -67.

⁷⁰ Chapter 47 of title 10, U.S. Code.

⁷¹ *See supra* note 27.

⁷² 18 U.S.C. § 7(9) (as amended by the § 804 of the USA PATRIOT Act, P.L. 107-56, title VIII, October 26, 2001, 115 Stat. 377) (excluding persons covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261).

Criminal statutes that apply within the SMTJ include maiming,⁷³ assault,⁷⁴ kidnapping,⁷⁵ murder⁷⁶ and manslaughter.⁷⁷ The Department of Justice (DOJ) is responsible for prosecuting crimes in this category. A CIA contractor was convicted under this provision for the assault of a detainee in Afghanistan.⁷⁸

Extraterritorial Jurisdiction. In addition, many federal statutes prescribe criminal sanctions for offenses committed by or against U.S. nationals overseas,⁷⁹ including the War Crimes Act of 1996.⁸⁰ The federal prohibition on torture applies to acts outside the United States regardless of the nationality of the perpetrator (non-U.S. nationals need only be “found” in the United States to be prosecuted).⁸¹

The War Crimes Act, as amended by the Military Commissions Act of 2006,⁸² prohibits “grave breaches” of Common Article 3,⁸³ which are defined to include torture, cruel or inhuman treatment, performing biological experiments, murder of an individual not taking part in hostilities, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages. Federal jurisdiction is established for these crimes when they are committed by or against U.S. nationals or U.S. servicemembers. Other criminal proscriptions with extraterritorial reach include assaulting, killing or kidnapping an internationally

⁷³ 18 U.S.C. § 114 punishes any individual who, within the SMTJ and with the intent to torture, maim, or disfigure, “cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or ... throws or pours upon another person, any scalding water, corrosive acid, or caustic substance....”

⁷⁴ 18 U.S.C. § 113 (prohibiting assault with intent to commit murder or a felony, assault with a dangerous weapon, assault “by striking, beating, or wounding,” simple assault, and assault resulting in serious or substantial bodily injury).

⁷⁵ 18 U.S.C. § 1201 (punishing “whoever seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof ...”).

⁷⁶ 18 U.S.C. § 1111 (unlawful killing of a human being with malice).

⁷⁷ 18 U.S.C. § 1112 (voluntary or involuntary unlawful killing of a human being without malice).

⁷⁸ Department of Justice Press Release, *David Passaro Sentenced to 100 months imprisonment: First American Civilian Convicted of Detainee Abuse During the Wars in Iraq and Afghanistan*, February 13, 2007, available at [<http://charlotte.fbi.gov/dojpressrel/2007/ce021307.htm>].

⁷⁹ See CRS Report 94-166, *Extraterritorial Application of American Criminal Law* by Charles Doyle.

⁸⁰ P.L. 104-192, § 2(a), 110 Stat. 2104 (August 21, 1996)(codified as amended at 18 U.S.C. § 2441.

⁸¹ 18 U.S.C. § 2340-40B.

⁸² P.L. 109-366 § 6, 120 Stat. 2632 (Oct. 17, 2006).

⁸³ 18 U.S.C. § 2441(d).

protected person, or threatening to do so.⁸⁴ Jurisdiction exists over these offenses if the victim or offender was a U.S. national, or if the offender is afterwards found in the United States.

Military Extraterritorial Jurisdiction Act (MEJA). Persons who are “employed by or accompanying the armed forces” overseas may be prosecuted under the Military Extraterritorial Jurisdiction Act (MEJA) of 2000⁸⁵ for any offense that would be punishable by imprisonment for more than one year if committed within the special maritime and territorial jurisdiction of the United States.⁸⁶ Persons “[e]mployed by the armed forces” is defined to include civilian employees of the Department of Defense (DOD) as well as DOD contractors and their employees (including subcontractors at any tier), and civilian contractors and employees from other federal agencies and “any provisional authority” (e.g., the CPA), to the extent that their employment is related to the support of the DOD mission overseas.⁸⁷ It does not appear to cover civilian and contract employees of agencies engaged in their own operations overseas. It also does not cover nationals of or persons ordinarily residing in the host nation.

In December 2005, DOD issued proposed regulations for implementing MEJA, but the rules have not yet gone into effect.⁸⁸ DOD Instruction 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members*, March 3, 2005, implements policies and procedures pursuant to MEJA. Under the Instruction, the DOD Inspector General (IG) has the responsibility to inform the Attorney General whenever he or she has reasonable suspicion that a federal crime has been committed.⁸⁹ The DOD IG is also responsible for “implementing investigative policies” to carry MEJA into effect. The Instruction notes that the Domestic Security Section of the DOJ Criminal Division has agreed to “provide preliminary liaison” with DOD and other federal entities and to designate the appropriate U.S. Attorney’s Office to handle a case.

It appears that only one successful prosecution of a DOD contractor has occurred under MEJA. A contractor working in Baghdad pleaded guilty to possession of child pornography in February 2007.⁹⁰

⁸⁴ 18 U.S.C. § 112 (assault); 18 U.S.C. § 1116 (killing); 18 U.S.C. § 1201 (kidnapping); 18 U.S.C. § 1203 (hostage-taking); 18 U.S.C. § 878 (threats).

⁸⁵ P.L. 106-523, 114 Stat. 2488 (2000), *codified at* 18 U.S.C. § 3261-67.

⁸⁶ 18 U.S.C. § 3261.

⁸⁷ 18 U.S.C. § 3267(1)(A), as amended by The Ronald W. Reagan National Defense Authorization Act for FY2005, P.L. 108-375 § 1088, 118 Stat. 2066 (October 28, 2004).

⁸⁸ 70 *Fed. Reg.* 75,999 (December 22, 2005).

⁸⁹ DoD Instruction 5525.11 § 5.

⁹⁰ Press Release, United States Attorney for the Eastern District of Virginia, Military Contractor Sentenced for Possession of Child Pornography in Baghdad (May 25, 2007), *available at* [<http://www.usdoj.gov/>].

Uniform Code of Military Justice (UCMJ). Contract personnel may be subject to military prosecution under the Uniform Code of Military Justice (UCMJ) for conduct that takes place during hostilities in Iraq in some circumstances, although any trial of a civilian contractor by court-martial is likely to be challenged on constitutional grounds. Article 2(a)(10), UCMJ,⁹¹ as amended by § 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (P.L. 109-364)(“FY07 NDAA”), extends military jurisdiction in “time of declared war or a contingency operation,”⁹² to “persons serving with or accompanying an armed force in the field.” Additionally, if offenses by contract personnel can be characterized as violations of the law of war, the UCMJ may extend jurisdiction to try suspects by court-martial⁹³ or by military commission.⁹⁴

Prior to the FY2007 NDAA, the UCMJ covered civilians serving with the Armed Forces in the field only in “time of war.” As a reflection of the constitutional issues that arise whenever civilians are tried in military tribunals,⁹⁵ as recognized by a series of Supreme Court cases beginning in 1957 with *Reid v. Covert*,⁹⁶ courts have

⁹¹ 10 U.S.C. § 802(a)(10). For summaries of legislative history and application of the provision (and its predecessors) prior to amendment, see David A. Melson, *Military Jurisdiction over Civilian Contractors: a Historical Overview*, 52 NAVAL L. REV. 277 (2005); Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U. L. REV. 367 (2006).

⁹² “Contingency operation” is defined under 10 U.S.C. § 101(a)(13) to mean a military operation that —

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301 (a), 12302, 12304, 12305, or 12406 of [title 10], chapter 15 of [title 10], or any other provision of law during a war or during a national emergency declared by the President or Congress.

⁹³ 10 U.S.C. § 818 (providing jurisdiction over “any person who by the law of war is subject to trial by military tribunal”).

⁹⁴ 10 U.S.C. § 821 (preserving “concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals”); *cf. Ex Parte Quirin*, 317 U.S. 1 (1942).

⁹⁵ *See, e.g., Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1945).

⁹⁶ *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion overturning two cases involving civilian spouses convicted of capital crimes by courts-martial, pursuant UCMJ Art. 2(11) as “persons accompanying the armed forces,” for the murders of their military spouses at overseas bases); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960)(applying *Reid* to non-capital case involving civilian dependent); *Grisham v. Hagan*, 361 U.S. 278 (1960)(extending *Covert* to prohibit court-martial of civilian employee of the Army for a capital offense); *McElroy v. Guagliardo*, 361 U.S. 281 (1960) (same, with respect to non-capital offense). UCMJ art. 2(11) defines as persons subject to the UCMJ those who, “[s]ubject to any treaty or agreement to which the United States is or may be a party or to (continued...) ”

interpreted the phrase “in time of war” to mean only wars declared by Congress.⁹⁷ In *Covert*, a plurality of the Supreme Court rejected the proposition that Congress’s power to regulate the land and naval forces justifies the trial of civilians without according the full panoply of due process standards guaranteed by the Bill of Rights. The Supreme Court has also found that former servicemembers who have severed all ties to the military cannot be tried by court-martial for crimes they committed while on active duty.⁹⁸

The trial of civilian contractors by courts-martial will likely be subject to challenge on constitutional grounds. Congress’s authority to “make Rules for the Government and Regulation of the land and naval Forces”⁹⁹ empowers it to prescribe rules for courts-martial that vary from civilian trials and are not restricted by all of the constitutional requirements applicable to Article III courts. In addition to the express exception in the Fifth Amendment regarding the right to presentment and indictment in “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,” the Supreme Court has found implicit exceptions to other fundamental rights as they pertain to servicemembers.¹⁰⁰ Statutes relating to courts-martial have withstood objections based on due process.¹⁰¹ While the UCMJ offers soldiers procedural protections similar to and sometimes arguably superior to those in civilian courts,¹⁰² courts have been reluctant to extend military jurisdiction to civilians.¹⁰³

⁹⁶ (...continued)

any accepted rule of international law, [are] serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.”

⁹⁷ See *Robb v. U. S.*, 456 F.2d 768 (Ct. Cl. 1972); *U.S. v. Averette*, 41 C.M.R. 363 (1970); see also *Latney v. Ignatious*, 416 F.2d 821 (D.C. Cir. 1969)(finding that even if the Vietnam conflict constituted a “war” within the meaning of the UCMJ, conduct must be intimately connected to military in order for jurisdiction under Art. 2(10) to apply).

⁹⁸ *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

⁹⁹ U.S. CONST., art. I, § 8, cl. 14.

¹⁰⁰ See, e.g., *Kahn v Anderson*, 255 US 1 (1921)(Sixth Amendment does not require jury in cases subject to military jurisdiction); *Weiss v. United States*, 510 U.S. 163 (1994) (rejecting challenge to the military justice system based on the fact that military judges are not “appointed” by the President within the meaning of Article II of the Constitution, and the judges are not appointed to fixed terms of office); *Parker v. Levy*, 417 U.S. 742, 758 (1974) (stating, in the context of First Amendment protections, that “[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline may render permissible within the military that which would be constitutionally impermissible outside it”).

¹⁰¹ See AM. JUR. 2D Military and Civil Defense § 221.

¹⁰² For a comparison of due process rights, see CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, by Jennifer K. Elsea.

¹⁰³ *Reid v. Covert*, 354 U.S. 1, 21 (1957)(“Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.”);
(continued...)

On the other hand, the *Covert* Court distinguished the peacetime court-martials of civilian spouses at issue from *Madsen v. Kinsella*,¹⁰⁴ in which a military spouse was tried by military commission in occupied Europe, on the basis that

[that case] concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with Army or not.¹⁰⁵

If *Madsen* remains valid, if and for so long as the United States is considered an “occupying power” in Iraq, it may be acceptable under the Constitution to subject DOD contractors there to military jurisdiction.

Further, the *Covert* plurality held open the possibility that civilians who were part of the armed services could be tried by court-martial during wartime.¹⁰⁶ While the Court has suggested in dicta that courts-martial are never proper for the trial of civilians,¹⁰⁷ it has never expressly stated that the Constitution forbids military jurisdiction over civilians who might properly be said to be “in” the Armed Forces during war.¹⁰⁸ Lower courts addressed the issue during World War II, and upheld courts-martial of civilian employees of the U.S. Army in Eritrea.¹⁰⁹ Merchant seamen were sometimes tried by court-martial by the Navy. One such conviction was overturned by a federal court on habeas corpus review because the offense charged, striking a superior officer, was essentially a military charge.¹¹⁰ However, another court upheld the conviction of a merchant seaman for desertion.¹¹¹

Assuming the Constitution permits the trial of civilians accompanying the Armed Forces in wartime, a particular case will also have to satisfy the statutory

¹⁰³ (...continued)

O’Callahan v. Parker, 395 U.S. 258, 267 (1969)(“[C]ourts-martial have no jurisdiction to try those who are not members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline.”), *overruled on other grounds by* Solorio v. United States, 483 U.S. 435 (1987)(overturning “service-connection rule” in favor of a rule based strictly on military status).

¹⁰⁴ 343 U.S. 341 (1952).

¹⁰⁵ 354 U.S. at 35, & n.10.

¹⁰⁶ Reid v. Covert, 354 U.S. 1, 33-36 (1957).

¹⁰⁷ O’Callahan v. Parker, 395 U.S. 258 (1969).

¹⁰⁸ *Covert*, 354 U.S. at 23 (noting “there might be circumstances where a person could be ‘in’ the armed services for purposes of [Congress’s authority to regulate the armed services] even though he had not formally been inducted into the military”).

¹⁰⁹ Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945)(concluding that accompanying an armed force under “stark war conditions” justified trial by court-martial of a civilian employee for a criminal offense); *In re diBartolo*, 50 F. Supp. 929, 930 (S.D.N.Y. 1943).

¹¹⁰ Hammond v. Squire, 51 F. Supp. 227 (D. D.C. 1943).

¹¹¹ McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943).

requirements of the UCMJ. To determine whether a civilian contractor who is suspected of having committed an offense is subject to prosecution under the UCMJ, it will be necessary to determine whether he is “serving with or accompanying an armed force” that is operating “in the field.” The phrase “serving with or accompanying” the forces was historically construed to require that the civilian’s “presence [must be] not merely incidental to, but directly connected with or dependent upon, the activities of the armed forces or their personnel.”¹¹² 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.”¹¹³

The phrase “in the field” means serving “in an area of actual fighting” at or near the “battlefront” where “actual hostilities are under way.”¹¹⁴ Whether an armed force is “in the field” is “determined by the activity in which it may be engaged at any particular time, not the locality where it is found.”¹¹⁵ Therefore, it appears that contractors will not be subject to military jurisdiction merely because of their employment in Iraq. They might, however, be subject to jurisdiction even if the conduct occurs outside of Iraq, so long as there is sufficient connection to military operations there.¹¹⁶

Other likely issues include whether civilian contractors may be prosecuted for military crimes, such as disrespect of an officer or failure to obey a lawful command. In addition, if misconduct by a contract employee results in his or her immediate

¹¹² *United States v. Burney*, 21 C.M.R. 98 (1956) (concluding that a contractor’s connection with the military, despite his indirect employment through a private company, was sufficient to constitute “serving with or accompanying” an armed force). Some of the factors leading to the court’s conclusion were that

[T]he accused worked directly for the benefit of the Air Force, he was supervised by Air Force personnel, he was quartered and messed on a military installation by military personnel, and he was accorded privileges normally granted only to military personnel. The operational success of that military command depended upon civilians such as this accused, and each of the services has found it necessary to rely on civilian technicians to repair and maintain the highly specialized signal and radar equipment now being used.

¹¹³ *In re diBartolo*, 50 F. Supp. 929, 930 (S.D.N.Y. 1943).

¹¹⁴ *Reid v. Covert*, 354 U.S. 1, 35 (1957).

¹¹⁵ *Burney*, 21 C.M.R. at 109.

¹¹⁶ *Ex parte Gerlach*, 247 F. 616, 617 (S.D.N.Y. 1917) (stating that “the words ‘in the field’ do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications where military operations are being conducted”); *Hines v. Mikell*, 259 F. 28, 34 (4th Cir.), *cert. denied*, 250 U.S. 645 (1919) (upholding court-martial jurisdiction over a civilian at Camp Jackson, South Carolina, during the First World War by finding that “any portion of the army confined to field training in the United States should be treated as ‘in the field’”).

dismissal by the contractor, military jurisdiction may also cease.¹¹⁷ DOD has not yet published any guidance indicating how the new law is to be implemented.

Issues for Congress

The use of private contractors in military operations raises many questions regarding the appropriateness and practicality of entrusting private companies with duties that have been traditionally reserved for military personnel. Several issues are particularly sensitive when States hire private contractors for potentially hostile situations. Some are even more sensitive when State-hired contractors carry arms, even on a strictly defensive basis.¹¹⁸ These issues, as related to contractors as a whole and to private security contractors in particular, are briefly discussed below.

Need for and Suitability of Private Contractors¹¹⁹

Many defense analysts and analysts have viewed private contractors as an indispensable “force multiplier,” especially needed over the past decade to ease the strain on a downsized military.¹²⁰ By supplementing overstretched active duty personnel, beginning in the early 1990s, with contractors for jobs that do not require military expertise such as feeding, housing, and otherwise caring for soldiers’ basic needs, policymakers hoped to meet the demands on the force while minimizing an increase in the number of military personnel and repeated call-ups of reserve units. The U.S. government’s subsequent turn to private contractors for a assistance with

¹¹⁷ At least one court has concluded otherwise. See *Perlstein v. United States*, 151 F.2d 167 (3d Cir. 1945)(military jurisdiction remained valid over fired contract employee so long as he remained in military garrison). However, this conclusion might not be followed today in light of *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), in which the Court held a serviceman who had been discharged was no longer amenable to court-martial.

¹¹⁸ To some analysts, however, providers of armed protection are not the most worrisome of the gamut of providers of military services, at least as far as those contracted by non-governmental organizations (NGOs) are concerned. “While it is conceivable that some regulation might be useful, in fact, informal voluntary agreements between the NGO community and PSCs mean that such regulation is not critical and may in fact reduce the level of flexibility that makes these agreements possible.” The companies these analysts find of most concern for regulation are the private military companies (PMCs) “that generally work for states and provide military services designed to significantly impact strategic situations....*active* PMCs willing to carry weapons into combat, and *passive* PMCs that focus on training and organizational issues.” *Privatising Security*, *op. cit.*, p. 36.

¹¹⁹ This section and the following section draw on the section on commercial contractors in CRS Report 97-454 F, *Peacekeeping Options: Considerations for U.S. Policymakers and the Congress*, by Marjorie Ann Browne, Ellen Collier (Consultant), and Nina Serafino.

¹²⁰ For instance, in a 2005 study, the Defense Science Board referred to the private sector as the “fifth force provider” in stability operations, i.e., in addition to the four branches of the armed services, and recommended that a new institution be established to “effectively exploit” the private sector. Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics. *Institutionalizing Stability Operations Within DoD*. September 2005. p. 38.

a wide variety of security needs served the same purposes. In Iraq, particularly, the use of private contractors may serve a variety of other interests. As Iraqis may well constitute a sizable majority of private security contractors, the use of private contractors provides a cultural and linguistic advantage over the use of U.S. soldiers and ameliorates much potential friction with the local populations, according to one expert. They may also as forestall possible criticism from U.S. taxpayers for using U.S. soldiers to protect the profit-making companies that carry out U.S. reconstruction efforts.¹²¹

Without private contractors, the U.S. military would not have sufficient capabilities to carry out an operation of the scale of Iraq, according to many analysts. If the United States wishes to engage in and contribute to sizable stabilization and reconstruction operations without contractor support to the U.S. military, policymakers would probably need to contemplate an increase in the number of U.S. troops, perhaps increasing incentives to attract volunteers or re-instituting the draft. On the other hand, some analysts question whether the use of private security providers in Iraq and elsewhere is beneficial to the U.S. military in the long run. Although contracting private sector firms for guard duties may help alleviate the current shortage of military personnel, analysts point to potential downsides to the “force multiplier argument.” One important area of concern is whether their use is detrimental to military force structure; other areas are their potential effect on the military mission, their flexibility, and their quality of the personnel hired.

Effects on the U.S. Military Force Structure. In arguments on the general use of military contractors that could also apply to the security sector, analysts for the 1995 Commission on Roles and Missions (CORM) found that reliance on contractors could prove detrimental to military capabilities in a number of ways, the first of which was that it could keep the United States “from building and maintaining capacity needed for strategic or other important missions.”¹²² Anecdotal reports that private security firms have been hiring away military personnel, particularly special forces personnel, with high salaries seem to illustrate the possibility that a competing private sector could deplete the military of highly trained personnel in needed specialties.

Proponents of the use of private sector security providers discount such concerns, stating that the numbers employed by private security companies are too low to have a significant effect on U.S. capabilities. Quantifiable evidence of a

¹²¹ E-mail correspondence from Doug Brooks, July 9, 2007.

¹²² The other two ways in which they judged the use of contractors could adversely affect military capabilities were by limiting training opportunities in some military specialties (which has occurred in some cases with non-security contractors: see GAO Report GAO-03-695, *op.cit.* p. 9) and result in inadequate stocks of equipment needed to perform certain tasks. Christine Cervenak and George T. Raach. “Contracting and Privatization in Peace Operations,” in *Peace Operations: Developing An American Strategy*, edited by Antonia Handler Chayes and George T. Raach. Washington, D.C.: National Defense University Press, 1995, pp. 137-151. Although possible equipment needs have not been raised as an issue, it is conceivable that if the U.S. military were to deploy to an operation where it was providing more security, it might find itself with a shortage of the types of armored vehicles now brought to Iraq by private security firms.

detrimental effect is lacking. A 2005 GAO analysis shows that the *average* attrition rates for military occupational specialties preferred by private security providers were lower in FY2004 (when demand for such providers in Iraq was high) than in fiscal years 2000 and 2001. (These specialties were Army and Navy enlisted and officer special operations forces, Army infantry, and military police from all four services.) In the *particular* case of Army Special Forces enlisted personnel, however, attrition was somewhat higher in 2004 than in 2000 and 2001. The GAO pointed out that a variety of factors could play into an individual's decision to leave the services.¹²³

Effects on the U.S. Military Mission in Iraq. Recent reports also point to possible complications for military commanders with the use of private security guards. Many analysts point out that the primary mission of private security personnel is to ensure the security of the individuals, the transport convoys, and the property they were hired to protect. News reports from Iraq indicate that this may have led in some cases to a disregard of the sensitivities of and consequences for the Iraqi public.¹²⁴ For a U.S. commander in Iraq, whose mission may well entail the winning of "hearts and minds," such a disregard is problematic, some analysts argue. These reports, however, discuss incidents involving contractors who are American, not Iraqi or other foreign nationals; as noted above, proponents argue that a sizable presence of Iraqis among those providing security under U.S. contracts overall reduces the possible friction that the use of U.S. soldiers in these positions would entail.

Concerns Regarding Flexibility. Some also argue that military forces have additional benefits in hostile situations. Although some have argued that private contractors can be deployed more quickly than military forces, others have argued that military commanders can respond more quickly to changing situations when military forces rather than contractors are used. Commanders do not exercise "command and control" over private contractors, nor do they have the authority to amend contracts in the midst of an operation to reallocate contract employees to

¹²³ U.S. Government Accountability Office. *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers*. GAO-05-737. July 2005. p. 43. "While available data indicate that attrition, in almost all of the military specialties favored by private security providers, has returned to pre-September 11, 2001 levels, the data do not indicate why personnel are leaving the military and what they are doing after they leave.... Officials at the Army Human Resources Command told us that after September 11, 2001, the opportunities for employment in the security field became more widespread as government agencies as well as private companies and organizations recognized the need to improve their security. These officials as well as officials from the Special Operations Command noted that they are losing personnel not only to private security firms operating in Iraq but also to security management companies operating in the United States, and security operations in other government agencies. Service officials at these commands also attributed the attrition rates to other factors, such as the attraction of a strong civilian economy, high operational tempo, and concerns about various quality of life conditions."

¹²⁴ For example, see *Washington Post*, November 17, 2006, *op.cit.*

perform necessary tasks that fall outside the terms of the contract.¹²⁵ Proponents of the use of private security contractors discount such concerns, however, arguing that they are not employed on the battlefield, where such flexibility is a needed.

Concerns About Reliability and Quality. Questions are also raised regarding the reliability and quality of service provided by private contractors compared to military personnel, particularly in risky situations. Proponents of the use of private security contractors argue that they are as responsible as serving military personnel because many are former soldiers or individuals equally dedicated to the national mission. Skeptics voice concerns that individual contractors may be less reliable in some situations as they probably bear lesser costs than military personnel if they refuse to perform a particular task. According to a 2003 GAO report, DOD recognized the risk that contractors might not be available in crisis or hostile situations.¹²⁶ Nevertheless, proponents argue that private security contractors, as well as other contractors, have been “remarkably robust in terms of reliability.”¹²⁷ There is little evidence to the contrary.¹²⁸

The quality of private security providers is also a matter of concern. The larger companies particularly have reputations for supplying high-quality personnel. Some wonder, however, if they can maintain that standard as demand increases, and in the face of possible pressures to decrease costs. Although U.S. companies have generally hired U.S. professional military personnel with established careers, who may still possess the discipline, professionalism, and *esprit de corps* that the U.S. Armed Forces seeks to instill in its soldiers, the increasing use of private personnel may reduce the quality of contractor recruits, some fear. On the other hand, some analysts point out that private companies can maintain top quality people in the field indefinitely, whereas the military is required to rotate soldiers regularly. Those who favor the use of such contractors also argue that private companies can maintain standards because they can draw from a larger and more competitive pool of personnel than the U.S. military does, including former military personnel from elite forces of other countries and former police personnel.

¹²⁵ GAO-05-737, *op.cit.*, p. 20, and DOD Report to Congressional Defense Committees, as required by Section 1206 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (P.L. 108-375), October 28, 2004, p. 6, hereafter referred to as the Section 1206 Report.

¹²⁶ See GAO Report GAO-03-695, *op.cit.* The GAO noted that despite this determination, it “found little in the way of backup plans to replace mission essential contractor services during crises if necessary.” p 16.

¹²⁷ E-mail correspondence from Doug Brooks, July 9, 2007.

¹²⁸ A recent news report from a Santiago, Chile newspaper reported that in 2005 “the Your Solutions security firm sent 147 Chileans into conflict zones in Iraq; 28 of the recruits broke their contracts and returned home early, claiming they received inadequate training and poor equipment.” The article implies that these Chileans were contracted on behalf of a U.S. company, but does not state that directly nor name a U.S. firm. Mike Hager. *The Santiago Times*. “Chile’s Iraq Mercenaries Under Investigation by U.N. Group.” July 9, 2007, as posted online by Wordpress.org at [<http://www.worldpress.org/Americas/2853.cfm>]. A report

Some critics are also concerned about the high number of non-U.S. citizens hired under U.S. government contracts, especially third-country nationals from lesser-developed countries who are difficult to screen. A GAO official noted in June 2006 testimony that (1) private security companies and DOD “have difficulty completing comprehensive criminal background screenings for U.S. and foreign nationals when data are missing or inaccessible,” and (2) “[n]o U.S. or international standards exist for establishing private security provider and employee qualifications.”¹²⁹ A year later, this situation does not appear to have changed significantly.

Nevertheless, the companies have incentives and opportunities to control quality, proponents argue. Companies employing individual contractors have opportunities to observe their behavior and performance during training sessions and, according to analysts, can screen out potential misfits at that stage. U.S. government agencies establish some baseline standards in contracts, by specifying either performance standards and/or precise qualifications to be met. U.S. government agencies have mandated changes — under threat of penalties — when contracted personnel are perceived as not up to standard, according to Doug Brooks, of the IPOA. In addition, according to Brooks, there are many examples of companies that act proactively to address client complaints.¹³⁰ The IPOA, an industry association, has instituted a system to review complaints concerning its member and to sanction those found to have violated the associations code of conduct. (Information on the code of conduct and enforcement mechanism can be accessed through the organizations website at [<http://www.ipoaonline.org>]). IPOA members include four of the six companies listed above (i.e., ArmorGroup, Blackwater USA, DynCorp International, and Erinys International).

Oversight and Control/Coordination Issues

Many analysts claim that the U.S. government is unable to adequately oversee and control or coordinate the performance of military contractors in general and private security contractors in particular. Members are concerned with transparency issues that impede oversight by Congress, as well as control and coordination in the field.

Transparency and Congressional Oversight. Some Members have been concerned with the dearth of information made available to Congress by the Administration and to the public on U.S. government contracts with contractors in general and private security contractors in particular. As oversight hearings held by several committees in 2006 and 2007 demonstrate,¹³¹ the executive branch either has not kept sufficient records to produce or has been unwilling to present basic, accurate information on the companies employed under U.S. government contracts and subcontracts in Iraq. The lack of contracting personnel, discussed below, may be responsible at least in part for this problem.

¹²⁹ GAO Report GAO-06-865T. *op.cit.*

¹³⁰ E-mail correspondence from Doug Brooks, July 9, 2007.

¹³¹ For hearing citations, see footnotes 8, 9, and 20.

Oversight in the Field. One industry professional has described the oversight situation as “a nightmare” and stated that “the better” companies would prefer closer oversight.¹³² Some U.S. government officials also believe that U.S. agencies do not adequately supervise contracts. At the field level, this problem is attributed by many, including U.S. government personnel, to a lack of contracting officer’s representatives (CORs),¹³³ who are responsible for supervising the contracted work. Arguing for an increase in such personnel, they state that over the years, the number of such representatives has been cut sharply in the Departments of Defense and State, while the number of contractors has escalated.

Control and Coordination in the Field. The GAO has issued several reports regarding DOD contracting in Iraq that address or touch on issues regarding the use of private security contractors, several of which mention control and coordination issues. As pointed out above, military commanders do not have a “command and control” relationship with contractors, and thus must know how to secure cooperation from contractors to promote order in the theater of operations.¹³⁴ In June 2006 testimony before Congress, a GAO official cited two major related problems: (1) that private security providers did not coordinate with the U.S. military when they entered the “battle space” in Iraq, and (2) that military units were not trained prior to deployment on (a) private security provider operating procedures and (b) the role of the Reconstruction Operations Center (ROC).¹³⁵ (The ROC is charged with coordinating interaction between military and private security personnel.) In March 2007, DOD set forth a new requirement that companies enter data on their personnel, before deployment, into a new “Synchronized Predeployment and

¹³² Interview with Doug Brooks, *op.cit.*

¹³³ A COR “is an individual appointed in writing by a contracting officer to act as the eyes and ears of the contracting officer,” according to Army doctrine. “This individual is not normally a member of the Army’s contracting organizations ... but most often comes from the requiring unit or activity.” U.S. Army. Headquarters. *Contractors on the Battlefield*. Field Manual No. 3-100.21. January 2003. p. 4. According to the same source, a contracting officer is “the official with the legal authority to enter into, administer and/or terminate contracts.”

¹³⁴ According to the Section 1206 Report, *op.cit.*, however, the terms and conditions of contracts with private security (and other) companies largely set the parameters for the military-contractor relationships. “The interaction between U.S. military forces and security contractors in Iraq is one of coordination rather than control because private security contractors have no direct contractual relationship with the commander. If a Federal agency or a reconstruction contractor issued a contract that required the private security firm to coordinate with military units ... such a contract would need to contain clauses ... giving the Commander coordination authority over private security contractors.” Nevertheless, according to the document, Commanders can, to a certain extent, “influence the discipline of contractor employees [by] working with the contracting officer to pursue contract remedies. Commanders can also limit or revoke any benefits or special status of a contractor employee accompanying the force, if the contractor employee violates the Commander’s instructions or directives.” p. 6.

¹³⁵ GAO Report GAO-06-865T. *op.cit.*

Operational Tracker” (SPOT).¹³⁶ In April 2007 testimony, the Comptroller General stated that the GAO continued “to find little evidence that DOD has improved training for military personnel on the use of contractors prior to deployment.”¹³⁷

Cost Issues

Proponents of the use of private security contractors argue that they are less expensive than using U.S. military forces because private companies can employ locals and third-country nationals, whose earnings are a fraction of U.S. servicemembers. Private contractors can incur much lower costs by using local hires extensively, as they do not have to transport them, house or feed them, and can pay them wages that are relatively low compared to those of U.S. servicemembers. Private security contractors in Iraq keep costs low by employing many Iraqis, according to proponents.

The relative direct cost advantage of contractors can vary, and may diminish or disappear altogether, depending on the circumstances and contract conditions. Apart from the direct cost of salaries, which will vary according to the mix of countries of origin of employed personnel offered, the costs to the U.S. government of private security contracts can depend on any benefits provided and the terms negotiated in a contract or a subcontract. Thus, one recent congressional analysis found that in the case of personnel provided by one company (i.e., Blackwater USA), the total cost of private security personnel was “significantly higher than the direct costs that would be incurred by the [U.S.] military” because of markups and other costs charged the U.S. government.¹³⁸

Calculations of the relative advantage or disadvantage of private security contractors also vary depending on whether indirect costs are taken into account. For

¹³⁶ Office of the Under Secretary of Defense, Acquisition, Technology, and Logistics. Memorandum for Directors of Defense Agencies, et.al. *Class Deviation — Synchronized Predeployment and Operational Tracker*. March 19, 2007. Accessed July 11, 2007, through [<http://www.acq.osd.mil/dpap/policy/policyvault/2007-0605-DPAP.pdf>].

¹³⁷ U.S. Government Accountability Office. *Stabilizing and Rebuilding Iraq: Conditions in Iraq are Conducive to Fraud, Waste, and Abuse*. Statement of David M. Walker, Comptroller General of the United States, before the Subcommittee on Defense, House Committee on Appropriations, GAO-07-525T. April 23, 2007.

¹³⁸ A February 7, 2007, Memorandum to Members of the Committee on Oversight and Government Reform, written by the Committee’s Majority Staff and posted on the Committee’s website, states that the “security services provided by Blackwater would typically be performed by an Army Sergeant, whose salary, housing, and subsistence pay range from approximately \$140 to \$190 per day, depending on rank and years of service. These equate to an annual salary ranging from approximately \$51,100 to \$69,350 per year.” According to the memo, Blackwater was providing those services in conjunction with a Kuwaiti company, Regency Hotel & Hospital Company, to ESS Support Services Worldwide “which in turn was providing dining services and construction for other contractors such as KBR and Fluor Corporation.” Taking markups and other costs into account, the memo concluded that the “Blackwater costs are four to tens time higher” than the costs of a U.S. soldier. (Memo last accessed June 19, 2007, through [<http://oversight.house.gov>], pp. 4-5.)

instance, the U.S. government does not pay for benefits such as health insurance or incur long-term liabilities such as disability compensation and pensions when private security contractors are employed. Nor does it (as far as is known) pay to purchase and maintain their equipment. On the other hand, some analysts have argued that the total costs of private security contracts have been underestimated because they do not include the subsidy that the U.S. government in effect provides contracting companies when former U.S. soldiers, trained at taxpayer expense, are employed.

Implications for U.S. Foreign Policy

The use of private security contractors who are hired to carry weapons, albeit just for defensive purposes, is problematic in ways that the use of contractors for routine tasks might not be, some policymakers fear.

Accountability. U.S. and foreign constituencies may well expect personnel who are legally permitted to use deadly force to be highly trustworthy. Thus, accountability issues, such as the U.S. government's practical inability to discipline errant contract employees and the perceived difficulties of holding U.S. and third-country national employees legally accountable for abuses or criminal acts may become more salient when contractors are armed. A lack of strict accountability in case of an abuse by a contractor could severely undermine goodwill toward the United States or incur liability on the part of the United States for a breach of its international obligations.

Human Rights Concerns: Possible Employment of Human Rights Violators. One of the earliest concerns regarding the use of private security contractors was whether the United States' commitment to observe and promote human rights and humanitarian law is undermined by the types of personnel hired by some contractors. For some policymakers, the reported employment of South Africans who served in the military during the years of apartheid, one of whom reportedly has confessed to human rights abuse, and of Chileans, who reportedly served during the period of military rule, is problematic.¹³⁹ Employment of such personnel indicates not only a lack of transparency in the U.S. contracting system, as the names of those contracted is kept confidential, but also a lack of adherence by contractors to U.S. foreign policy interests and goals, they argue. At best, some argue, it sends dubious signals about U.S. seriousness about human rights and, at worst, raises the possibility that such contractors may commit abuses in Iraq, for which the United States may be responsible under international law.

As of 2007, concerns about the affiliations of foreign providers have diminished, especially, as some proponents point out, the most prominent human rights abuses that have occurred in Iraq to date, most notably Abu Graib, were committed by U.S. military personnel and American contractors. Contracting companies, one proponent argues, have strong legal and financial incentives to ensure

¹³⁹ See, for example, Jonathan Franklin, "Chile: US Contractor Recruits Guards for Iraq in South Africa," *Guardian* [London], March 5, 2004, (the contractor referred to is Blackwater) and Julian Rademeyer, "Iraq Victim Was Top-Secret Apartheid Killer," *Sunday Times* [South Africa], April 18, 2004.

such human rights abuses do not occur, as they would be a clear breach of contract and could lead to catastrophe.¹⁴⁰ Some analysts also argue that the most important consideration in hiring security personnel is their degree of military professionalism and training in the disciplined use of weapons, as former soldiers with good records are much less likely to commit abuses and fire their weapons without good cause than less qualified personnel.

Human Rights Concerns: Alleged Mistreatment of Third-Country Private Security Contractors. A developing area of concern in international human rights circles is the alleged mistreatment of third-country nationals employed as private security contractors. Over the past year, the United Nations Working Group on the Use of Mercenaries has collected complaints related to such abuse in five countries from which private security personnel are recruited (i.e., Chile, Ecuador, Fiji, Honduras, and Peru) and urged the government of those countries to adopt national legislation and adhere to international treaties in order to provide a legal framework to protect against mistreatment. Complaints include contractual irregularities, poor working conditions, partial or non-payment of salaries, and neglect of basic needs such as access to medical services. No companies are named in statements issued by the Working Group, but the statements on Fiji and Peru mention Iraq as a place of employment of nationals of those countries.¹⁴¹ While there is no indication that U.S. companies (or the United Nations, for that matter) have employed the complainants in Iraq or elsewhere, to the extent that mistreatment is believed to be the result of U.S. employment of such contractors, such allegations can damage perceptions of the United States.

Perception of State Authority and Commitment. A third issue with foreign policy implications is the desirability of entrusting the capability to legally use force on behalf of the United States to private, including non-U.S. citizens. Although many analysts perceive the officially-sanctioned private use of force as significantly eroding the modern state's monopoly on the use of force, whether this erosion is beneficial or detrimental to U.S. foreign policy and to the international order is a matter of dispute.¹⁴² To the extent that private companies are perceived as participating in combat operations, it may be difficult for the United States to persuade other states to recognize contractors' rights to protection under the Geneva Conventions. On a symbolic level, the use of private companies instead of national military forces may be perceived by some observers as signaling a lesser U.S. commitment.

¹⁴⁰ E-mail correspondence from Doug Brooks. July 9, 2007.

¹⁴¹ United Nations Press Release. *UN Working Group on the Use of Mercenaries Concludes Visit to Fiji*, May 18, 2007, and United Nations Press Release. *UN Working Group on Use of Mercenaries Concludes Visit to Peru*, February 5, 2007.

¹⁴² For an examination of a variety of related issues and perspectives, see, among others: Deborah Avant, *The Privatization of Security and Change in the Control of Force*, International Studies Perspectives, Vol. 5, Issue 2, May 2004; David Shearer, *Outsourcing War*, Foreign Policy Magazine, Fall 1998; and P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Ithaca and London: Cornell University Press, 2003.

Selected Legislation

S. 674 (Obama) — Transparency and Accountability in Military and Security Contracting Act of 2007

S. 674 would require the Secretaries of Defense, State, and the Interior; the Administrator of the U.S. Agency for International Development (USAID); and the Director of National Intelligence to provide information within 90 days of enactment on U.S. government contractors and subcontractors working in Afghanistan and Iraq, with particularly detailed requirements for information on private security contractors. Also contains provisions intended to improve coordination between the U.S. Armed Forces and contractors performing private security functions, and to clarify the legal status of contract personnel.

Introduced February 16, 2007. (Similar to H.R. 369.) Referred to the Senate Armed Services Committee.

S. 1547 (Levin) — National Defense Authorization Act for FY2008

Section 871 of S. 1547 would require the Secretary of Defense to prescribe, within 120 days of enactment, regulations on the selection, training, equipping, and conduct of personnel performing private security functions under a covered contract or covered subcontract in a combat area. These would include processes for (1) registering, processing, and accounting for such personnel; (2) authorizing and accounting for their weapons, and (3) investigating the death and injury of such personnel and their discharge of weapons, as well as incidents of alleged misconduct. The regulations would also provide guidance to commanders of combatant commands on orders, directives, and instructions to contractors and subcontractors performing private security functions relating to force protection, security, health, safety, relations and interaction with locals, and rules of engagement. Would revise the relevant Federal Acquisition Regulation to require all contracts and subcontracts for such personnel to conform with these regulations. Section 872 would allow the Secretary of Defense to procure products and services, including security services, in Iraq and Afghanistan under special conditions.

Introduced June 5, 2007. Senate Armed Services Committee reported an original measure the same day (S.Rept. 110-77). Referred to the Senate Select Committee on Intelligence June 13, 2007; reported (amended) by the committee on June 29, 2007 (S.Rept. 110-125). Placed on the Senate Legislative Calendar under General Orders, Calendar No. 260, June 29, 2007.

H.R. 369 (Price) — Transparency and Accountability in Military and Security Contracting Act of 2007

H.R. 369 would require the Secretaries of Defense and State and the Administrator of the U.S. Agency for International Development to prescribe minimum hiring standards and issue equipment guidance for contracts regarding

private security contractors and would require contractors to provide specified information on costs and personnel and update it during the period of contract performance. Also contains provisions intended to improve coordination between the U.S. Armed Forces and contractors performing private security functions, and to clarify and extend the Military Extraterritorial Jurisdiction Act (MEJA). Would extend MEJA to cover contractors “while employed under a contract (or subcontract at any tier) awarded by any department or agency of the United States, where the work under such contract is carried out in a region outside the United States in which the Armed Forces are conducting a contingency operation.” MEJA covers contractors only if employed by “the Armed Forces outside the United States,” or if employed by other federal agencies or provisional authority, to the extent their employment is related to the support of the DOD mission overseas. (This last provision is also included in H.R. 2740, below.)

Introduced January 10, 2007. (Similar to S. 674.) Referred to the House Armed Services Committee (HAS) and the Judiciary Committee. Referred to the HAS Subcommittee on Readiness, February 1, 2007. Referred to the Judiciary Committee’s Subcommittee on Crime, Terrorism, and Homeland Security, February 2, 2007.

H.R. 528 (Lynch) — Iraq Contracting Fraud Review Act of 2007

H.R. 528 would require the Secretary of Defense, acting through the Defense Contract Audit Agency, to review all defense contracts relating to reconstruction or troop support in Iraq involving any contractors, subcontractors, or federal officers or employees that have been indicted or convicted for contracting improprieties.

Introduced January 17, 2007. Referred to the House Armed Services Committee.

H.R. 663 (Blumenauer) — New Direction for Iraq Act of 2007

H.R. 663 contains provisions regarding Iraq contracts on war profiteering, the recovery of funds from terminated contracts, and congressional oversight.

Introduced January 24, 2007. Referred to the House Committees on Armed Services and Foreign Affairs. House Foreign Affairs Committee hearing held, March 20, 2007.

H.R. 897 (Schakowsky) — Iraq and Afghanistan Contractor Sunshine Act

H.R. 897 would require the Secretary of Defense, Secretary of State, Secretary of the Interior, and the Administrator of the U.S. Agency for International Development to provide Congress with copies and descriptions of contracts and task orders over \$5 million.

Introduced February 7, 2007. Referred to the House Armed Services and Foreign Affairs Committees. House Foreign Affairs Committee hearing held March 20, 2007.

H.R. 1581 (Lantos) — Iraq Reconstruction Improvement Act of 2007

H.R. 1581 would mandate a variety of measures to improve oversight and transparency regarding reconstruction contracts in Iraq.

Introduced March 20, 2007. Referred to the House Armed Services, Foreign Affairs, and Judiciary Committees. Referred on April 20, 2007, to the Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law.

H.R. 1585 (Skelton) — National Defense Authorization Act for FY2008

As passed by the House, Section 831 of H.R. 1585 would prohibit (with waivers permitted on national security grounds) the Departments of Defense and State and the United States Agency for International Development from entering into contracts in Iraq and Afghanistan after January 1, 2008, unless the heads of those agencies have entered into a memorandum of understanding (MOU) regarding contracting in Iraq and Afghanistan, including matters related to authorizing the carrying of weapons, establishing minimum qualifications for personnel carrying weapons, and setting rules of engagement for the use of those weapons. The MOU is also to cover the identification of a common database for information on all contracts in Iraq and Afghanistan. Section 832 would require the Comptroller General to review contracts in Iraq and Afghanistan every six months and submit a report to Congress on that review. Section 833 covers definitions.

Introduced March 20, 2007. Referred to the House Armed Services Committee. Referred to HASC subcommittees April 10, 2007. Subcommittee mark-ups held May 2-8, 2007. Committee consideration and mark-up held May 9, 2007. Reported (amended) May 11, 2007 (H.Rept. 110-146). Supplemental report filed May 14, 2007 (H.Rept. 110-146, part 2). Substitute amendment passed House May 17, 2007. Placed on Senate calendar, June 5, 2007; laid before the Senate by unanimous consent, June 28, 2007.

H.R. 2740 (Price) — MEJA Expansion and Enforcement Act of 2007

H.R. 2740 would extend the coverage of the Military Extraterritorial Jurisdiction Act (MEJA) to include all persons "while employed under a contract (or subcontract at any tier) awarded by any department or agency of the United States, where the work under such contract is carried out in a region outside the United States in which the Armed Forces are conducting a contingency operation." Currently, MEJA covers contractors only if employed by "the Armed Forces outside the United States," or if employed by other federal agencies or "provisional authority," to the extent their

employment is related to the support of the DOD mission overseas. The bill would mandate that the Federal Bureau of Investigation (FBI) establish a “Theater Investigative Unit” for each contingency operation in which covered contract personnel are working to investigate suspected misconduct. It would also require that the Department of Justice Inspector General report to Congress within 30 days of enactment on the investigation of abuses alleged to have been committed by contract personnel.

Introduced June 15, 2007. Referred to the House Judiciary Committee.

H.Res. 97 (Murphy, Patrick) — Providing for Operation Iraqi Freedom Cost Accountability

H.Res. 97 resolves that the Department of Defense Inspector General and the Special Inspector General for Iraq Reconstruction should report to Congress on the expenditure of military and reconstruction funds in Iraq and on the types and terms of U.S. contracts there. Resolves that Congress should create a “Truman Commission” to conduct an ongoing investigation of the award and implementation of U.S. contracts with regard to Operation Iraqi Freedom.

Introduced January 24, 2007. Referred to the House Armed Services and Foreign Affairs Committees. House Foreign Affairs Committee hearing held March 20, 2007.