



Private Security Contractors in Iraq and Afghanistan: Legal Issues

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Summary

U.S. departments and agencies contributing to combat or stability operations overseas are relying on private firms to perform a wider scope of security services than was previously the case. The use of private security contractors (PSCs) to protect personnel and property in Iraq and Afghanistan has been a subject of debate in the press, in Congress, and in the international community. While PSCs are widely viewed as being vital to U.S. efforts in the region, 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 military personnel, as well as the adverse impact PSCs may be having on U.S. counterinsurgency efforts.

Contractors working for the U.S. military, the State Department, or other government agencies during contingency operation in Iraq and Afghanistan 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. Contractors who commit crimes in Iraq or Afghanistan are subject to U.S. prosecution 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). Section 552 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 jurisdiction, although the military trial of a civilian contractor would likely be subject to legal challenge on constitutional grounds. Despite congressional efforts to expand court-martial jurisdiction and jurisdiction under MEJA, some contractors may remain outside the jurisdiction of U.S. courts, civil or military, for improper conduct in Iraq or Afghanistan.

This report discusses the legal framework that applies to PSCs in Iraq and Afghanistan. After presenting a general description of the types of law applicable, including international humanitarian law and relevant status of forces agreements, the report addresses some implications of international law and a multilateral proposal for the adoption of international “best practices” regarding the use of PSCs. The report follows up with a discussion of jurisdiction over PSC personnel in U.S. courts, whether federal or military courts, identifying possible means of prosecuting contractor personnel who are accused of violating the law overseas in the context of U.S. military operations, including a listing of known cases that have occurred or are pending. Finally, the report briefly discusses the possible implication of the roles of private security contractors with respect to inherently governmental functions.

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Introduction

U.S. departments and agencies engaged in combat or stability operations overseas are relying on private firms to perform a wider scope of security services than was previously the case.¹ Rather than relying on the U.S. Armed Forces to provide protection from insurgents and other risks inherent in such an environment, the State Department, USAID, and reportedly, the Central Intelligence Agency² have outsourced a variety of security services. The Department of Defense (DOD) also employs civilian contractors to perform certain security services.³ The use of private security contractors (PSCs) to provide security for personnel and property in Iraq and Afghanistan has been a subject of debate in the press, in Congress, and in the international community. Due to a spate of high-profile incidents involving contractors allegedly shooting civilians, using excessive force, committing other crimes, or otherwise behaving in a manner that may be offensive to the local population, there is concern that the reliance on contractors may be undermining U.S. counterinsurgency efforts in Iraq and Afghanistan. Some have questioned whether the legal framework is adequate to cover the activities of armed civilians performing roles that in previous conflicts were assigned to soldiers, or whether such activities could run counter to international law.

Congress has, over the past decade, enacted legislation to close jurisdictional gaps that have made prosecution of civilian employees difficult for crimes they commit overseas. As a result, there is statutory authority to subject civilian contractor personnel to prosecution in federal and sometimes military court in many cases, largely depending on the type and seriousness of the offense alleged, where the offense occurred, the nationality of the perpetrator or victim, and the nature of the contract employment and government agency (or armed force) affiliation. The bases of jurisdiction, which remain relatively untested by the courts, may not have closed all of the gaps, and in cases they do cover, may affect agency responsibility for investigating and prosecuting the crimes as well as the venue for prosecution. While some contractor personnel have been subject to prosecution in the United States for crimes they allegedly committed in Iraq and Afghanistan, it appears that many more investigations into possible criminal conduct have not resulted in charges, at least not yet.

The foreign affairs implications of these issues are illustrated by the Iraqi reaction to the 2007 incident at Nisoor Square involving Blackwater Worldwide private security guards on contract with the State Department, who reportedly opened fire in the crowded traffic circle in the belief that they were engaged in a firefight with insurgents. Outrage among the Iraqi population over the incident, which resulted in the deaths of 17 civilians, spurred the Iraqi government to revoke Blackwater's operating license (the company has since changed its name to Xe Services) and to negotiate an end to the immunity from Iraqi legal processes such contractors previously enjoyed.⁴

¹ Iraq and Afghanistan appear to be the first two instances where the U.S. government has used private contractors extensively for protecting persons and property in combat or stability operations, although private contractors have performed security guard functions in other circumstances. For a discussion on DOD's use of contractors in Iraq and Afghanistan, see CRS Report R40764, *Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis*, by Moshe Schwartz.

² See James Risen and Mark Mazzetti, *Blackwater Guards Tied to Secret C.I.A. Raids*, NY TIMES, December 10, 2009, at A1.

³ See CRS Report R40764, *Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis*, *supra* note 1.

⁴ See "Iraqi Law and Status of U.S. Forces," *infra*.

News of the dismissal of the criminal indictments against five contract employees in connection with the incident⁵ appears to have further strained U.S.-Iraq relations, with Iraqi officials calling the outcome “unacceptable”⁶ and vowing to seek redress.⁷ The United Nations Working Group on the use of mercenaries released a statement calling on the United States and Iraq “to cooperate to ensure that the Nissour Square incident is fully remedied and, in relation to the crimes that may have been committed, those responsible fully held accountable as appropriate.”⁸

This report discusses the legal framework that applies to contractor personnel serving in Iraq and Afghanistan, including matters peculiar to private security contractors. After presenting a general description of the types of law applicable, the report addresses some implications of international law and proposals for the adoption of international “best practices” regarding the use of PSCs and an international convention to regulate and oversee their use. There follows a description of the treaty frameworks applicable in Iraq and Afghanistan, in particular agreements that function as “status of forces” agreements.⁹ The report briefly discusses the possible implication of the roles of private security contractors with respect to inherently governmental functions. Finally, the report discusses jurisdiction over contractor personnel in U.S. courts, whether federal or military, identifying possible means of prosecuting contractor personnel who are accused of violating the law overseas in the context of U.S. military operations and providing a brief listing of known cases that have occurred or are pending.

Legal Status and Authorities

Contractors to the coalition forces in Iraq and Afghanistan operate under three levels of legal authority: (1) the international order of the laws and usages of war, resolutions of the United Nations Security Council, and relevant treaties; (2) U.S. law; and (3) the domestic law of the host

⁵ U.S. District Judge Urbina dismissed the indictments on the basis that the prosecution had improperly built its case on compelled statements given by the defendants to State Department investigators during its investigation of the incident. The defendants had been ordered to cooperate with the investigation under penalty of termination and had signed standard forms that indicated their statements would not be used for purposes of criminal prosecution. Statements given under such circumstances are constitutionally entitled to immunity, the judge held, and should not have been available to the DOJ prosecutors for the purpose of seeking an indictment or for virtually any other use in connection with the prosecution. *United States v. Slough*, Crim. Action No. 08-0360 (RMU), slip op. (D.D.C., Dec. 31, 2009).

⁶ See *Iraq: U.S. Blackwater Case Dismissal “Unacceptable,”* REUTERS, Jan. 1, 2010.

⁷ See *Iraq to Appeal Dismissal of Charges Against US Security Guards*, VOA, Jan. 1, 2010, available at <http://www1.voanews.com/english/news/middle-east/Iraq-Regrets-Dismissal-of-Case-Against-Blackwater-Guards—80466832.html>. Xe Services has reportedly settled a number of lawsuits with victims’ families, but the Iraqi government has stated its intent to bring its own lawsuit against the company and urge the United States to appeal the dismissal of criminal charges.

⁸ Press Release, United Nations, UN Experts Say that the Nissour Square Killings in Iraq Should Not Remain Unpunished, United Nations (Jan. 7, 2010), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/1EC40FEDEDBEF542C12576A4004BE677?opendocument>. The Department of Justice has not indicated what action it plans to take, if any. The Department could seek another set of indictments if untainted evidence is available to support them, but the court’s opinion makes that eventuality seem unlikely. The government could also appeal the ruling, or it could pursue prosecution of related crimes, if any were committed. For example, compelled statements such as those at issue could be used in a prosecution for making a false statement.

⁹ A status of forces agreement (SOFA) is generally a bilateral treaty or executive agreement that establishes the framework under which U.S. military personnel operate in a foreign country, addressing how the domestic laws of the foreign jurisdiction apply to U.S. military personnel and sometimes other U.S. personnel while in that country. For general information regarding SOFAs, see CRS Report RL34531, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?*, by R. Chuck Mason.

countries. Under the authority of international law, contractors and other civilians working with the military are civilian non-combatants whose conduct may be attributable to the United States¹⁰ or may implicate the duty to promote the welfare and security of the local population.¹¹ The courts of Iraq and Afghanistan have jurisdiction to prosecute them pursuant to applicable status of forces agreements. 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 (also known as humanitarian law), particularly those parts relating to belligerent occupation and non-international armed conflict, appears to be relevant to conduct in Iraq¹² and Afghanistan,¹³ depending on when the conduct took place. The status of

¹⁰ 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. 2 AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 207 (1987). 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 violation and provide redress. *Id.* at § 901, comment a.

¹¹ See, e.g., UN Security Council (UNSC) Resolution 1483 ¶ 4 (May 22, 2003) (calling upon the Coalition Provisional Authority, “consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future”); *id.* ¶ 5 (calling upon “all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907”) After the handover of sovereignty to the Iraqi government, the Multi-National Forces in Iraq retained the UN mandate to contribute to the provision of security and stability necessary for the successful completion of the political process. UNSC Resolution 1511 ¶ 13 (October 16, 2003) (authorizing “a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure”).

¹² 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 (MFN-I) operated pursuant to a UN mandate established by UNSC Resolution 1511 (October 16, 2003) and continued by UNSC Resolution 1546 (June 8, 2004), UNSC Resolution 1637 (November 8, 2005), UNSC Resolution 1723 (November 28, 2006), and UNSC Resolution 1790 (December 18, 2007). The resolutions affirmed the importance for MFN-I to “act in accordance with international law, including obligations under international humanitarian law ...,” but do not clarify what those obligations entail. UNSC Resolution 1770 (August 10, 2007) makes reference to “international humanitarian law, including the Geneva Conventions and the Hague Regulations,” as applying in Iraq, at least in the context of protecting those associated with the UN humanitarian relief effort. In 2006, Secretary of State Rice assured the Security Council that “[t]he forces that make up MNF will remain committed to acting consistently with their obligations and rights under international law, including the law of armed conflict.” Letter dated 17 November 2006 from the Secretary of State of the United States of America to the President of the Security Council, Annex II to UNSC Resolution 1723. Although UNSC Res. 1790 expired December 31, 2008, the Security Council remains seized of the situation in Iraq through the United Nations Assistance Mission for Iraq (UNAMI). UNSC Res. 1883 (August 7, 2009) urges

all those concerned, as set forth in international humanitarian law, including the Geneva Conventions and the Hague Regulations, to allow full unimpeded access by humanitarian personnel to all people in need of assistance, and to make available, as far as possible, all necessary facilities for their operations, and to promote the safety, security, and freedom of movement of humanitarian personnel and United Nations and its associated personnel and their assets....

This language affirms the view of the Security Council that international humanitarian law continues to apply in Iraq. UNSC resolutions are accessible at http://www.un.org/Docs/sc/unsc_resolutions.html.

armed contract personnel under humanitarian law falls into a grey area.¹⁴ While civilians accompanying the armed forces in the field are generally entitled to treatment as prisoners of war (POW)¹⁵ if captured by an enemy state during an international armed conflict (a war between two or more states), they are considered civilians (non-combatants) who are not authorized to take a direct part in hostilities.¹⁶

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,¹⁷ 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 for purposes of treatment in case of capture.¹⁸ Because contract employees fall outside the military chain of command,¹⁹ even those who appear to meet the

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¹³The legal framework operating in Afghanistan has also likely varied over time depending on the transition to the new government, although it is difficult to discern what, if any, practical difference the specific source of law has on its content. U.S. forces in Afghanistan are serving under two separate missions, one of which is under UN mandate and the other of which is recognized by the UN Security Council, although not under an official mandate. The International Security Assistance Force (ISAF) is a NATO-led coalition deployed to Afghanistan under UN mandate after the fall of the Taliban government. UNSC Res. 1386 (December 20, 2001). In its most recent re-approval of ISAF’s mandate, the Security Council called “for compliance with international humanitarian and human rights law and for all appropriate measures to be taken to ensure the protection of civilians.” UNSC Res. 1833 (September 22, 2008).

Operation Enduring Freedom (OEF) refers to the U.S.-led coalition that initiated military action in Afghanistan in 2001, whose counter-terrorism efforts have received recognition by the UN Security Council. *E.g.* UNSC Res. 1833. While OEF does not operate under a UN mandate, UNSC resolutions have recognized its existence. *See, e.g.*, UNSC Res. 1776 § 5 (2007); UNSC Res. 1707 § 4 (2007); UNSC Res. 1746 § 25 (2007). UNSC Res. 1868 (March 23, 2009) “underlines” the need for “all parties to ... comply fully with applicable international humanitarian law” and contains reminders about the protection of civilians and the use of prohibited weapons.

¹⁴ *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).

¹⁵ 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

[p]ersons 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 with an identity card....

¹⁶ 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”].

¹⁷ 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....”

¹⁸ *Id.* at 4; Department of the Army Field Manual (FM) No. 3-100.21, *Contractors on the Battlefield* ¶ 2-33, January 3, 2003.

¹⁹ *See* FM 3-100.21, *supra* note 18, ¶ 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.

criteria as combatants could be at risk of losing their right to be treated as POWs if captured by the enemy. Contractors who take a direct part in hostilities may nonetheless be considered combatants for the purposes of distinguishing such persons from civilians, who are protected from direct attack. If the conflict in question is a non-international armed conflict (i.e., an armed conflict where a party is a non-state actor) within the meaning of Common Article 3 of the Geneva Conventions (CA3),²⁰ customary international law would no longer distinguish between “unlawful” and “lawful combatants” or establish a right to POW status.²¹ 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.

After conducting a series of conferences with legal representatives of various nations and non-governmental institutions, the International Committee of the Red Cross (ICRC) produced a report providing “interpretive guidance” regarding the definition of “direct participation in combat.”²² Noting that the questions of whether an individual is entitled to POW status and whether an individual is entitled to be protected from direct attack are separate, the report discusses whether contractors should be considered civilians or members of armed forces for the purposes of protection from attack. It concludes that “all armed actors [in an international armed conflict] showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party.”²³ Such membership would be determined based on whether an individual serves a “continuous combat function,” that is, whether the person’s role in the organization ordinarily involves direct participation in hostilities.²⁴ Such a role would involve acts that meet the following criteria:

- a threshold of harm likely to result from the act affecting the adversary’s military operations or capacity, or inflicting death, injury or destruction on protected persons or objects;
- direct causation between the act (or the military operation of which that act constitutes an integral part) and the expected harm; and
- a belligerent nexus between the act and the hostilities ongoing between the parties to an armed conflict.²⁵

²⁰ 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).

²¹ 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 18, does not distinguish between international and non-international armed conflicts.

²² INTERNATIONAL COMMITTEE OF THE RED CROSS, *INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* (2009) [hereinafter “ICRC”], available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/direct-participation-guidance-2009-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf) The guidance is not legally binding and does not necessarily reflect a majority opinion of the participating experts.

²³ *Id.* at 22.

²⁴ *Id.* at 33.

²⁵ *Id.* at 48. The report notes that the “general war effort” including “war-sustaining activities,” such as producing weapons or providing finances, food or shelter to the armed forces of a party may ultimately reach the threshold of harm under the first criterion, but would not be sufficiently “direct” to satisfy the second. *Id.* at 52. On the other hand, transporting ammunition directly to troops on the front line would, under the ICRC view, amount to direct participation (continued...)

In the case of private contractors on the battlefield, the ICRC advises that such determinations should be made “with particular care and due consideration for the geographic and organizational closeness” of such personnel to the armed forces and the hostilities.²⁶ Under the ICRC view, contractors who are not authorized to act as combatants by a party to the conflict but nevertheless participate directly in hostilities would continue to be considered civilians for the purposes of international humanitarian law, but would lose their protection against direct attack for such time as they do so. Contractors and other civilian employees who have for all practical purposes been incorporated into the armed forces of a party to the conflict by being assigned to perform a “continuous combat function” would be considered members of an organized armed force who are not entitled to protection under the principles of distinction.²⁷ Under this view, private security personnel under contract with the State Department assigned to protect embassy personnel from enemy attacks would likely be considered combatants, as would private security providers assigned to protect military supply convoys from insurgents because their purpose, although defensive in nature, would affect hostilities and could require engagement with enemy forces.

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 contractors might be authorized to use force when absolutely necessary to defend persons or property.²⁸ It may sometimes be difficult, however, to discern whether civilian security guards are performing law-enforcement duties or are engaged in combat.²⁹ If their activity amounts to combat, they would become lawful targets for enemy forces during the fighting, and, if captured by an enemy government (if one should emerge), could potentially be prosecuted as criminals for their hostile acts.³⁰ Contract personnel who intentionally kill or injure civilians could be liable for such conduct regardless of their combatant status.³¹

(...continued)

in hostilities. *Id.* at 56. Defensive actions would also qualify. Both the laying and clearing of mines would qualify as combat activity, so long as such acts are intended to affect hostilities rather than, say, protect private property against harm from either side.

²⁶ *Id.* at 37.

²⁷ *Id.* at 39.

²⁸ Army doctrine does not allow civilians to be used in a “force protection” role. *See* FM 3-100.21, *supra* note 18, ¶ 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 contract company policy permits employees to use weapons and the employee agrees to carry one. *Id.* ¶ 6-29.

²⁹ *See* ICRC, *supra* note 22, at 38 (defining defense of military personnel and objectives against enemy attacks as direct participation in hostilities, but describing the protection of those same targets against crime or violence unrelated to the hostilities as law enforcement).

³⁰ 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.”)

³¹ Combatants who intentionally harm non-combatants may be liable for violating the law of war, while non-combatants would be liable for violating domestic law.

Are They “Mercenaries”?

Mercenaries are persons who are not members of the armed forces of a party to the conflict but participate in combat primarily 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.³² For this reason, mercenaries are sometimes treated as “unlawful combatants” or “unprivileged belligerents,” even though their employment is not strictly prohibited by international law.³³ As discussed above, they may not qualify for POW treatment under the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), and those meeting the definition of “mercenary” under the 1977 Protocol I to the Geneva Conventions³⁴ are explicitly denied combatant status.³⁵ Because mercenaries are not entitled to combat immunity, they may be tried, and if 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.³⁶ 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.³⁷

Under this definition, it appears that contractor personnel who are not U.S. nationals, the nationals of other coalition allies or nationals of the host country, 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. On the other hand, what constitutes “direct participation in an armed conflict” is not fully settled, and some of the other requirements are inherently difficult to prove, particularly the element of

³² 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).

³³ See Singer, *supra* note 14, at 534.

³⁴ 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.

³⁵ *Id.* art. 43.

³⁶ 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).

³⁷ 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).

motivation.³⁸ There is no distinction based on the offensive or defensive nature of the participation in combat.

The United Nations Commission on Human Rights (UNCHR) has taken an interest in the role of mercenaries in armed conflicts and in 1987 appointed a special rapporteur on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.³⁹ The mandate of the special rapporteur was later expanded to cover “the impact of the activities of private companies offering military assistance, consultancy and security services on the international market on the exercise of the right of peoples to self-determination.”⁴⁰ A UNCHR working group on the use of mercenaries, established in 2005 to take the place of the special rapporteur,⁴¹ concluded that some private security companies operating in zones of armed conflict are engaging in “new forms of mercenarism.”⁴² The working group has expressed concern about the role of private security contractors in both Iraq and Afghanistan, and has urged the international community to adopt regulations for their use.⁴³

The working group drafted a new International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies.⁴⁴ The draft convention emphasizes that states should have an effective monopoly on the use of force, and that states are responsible under international law for their use of force whether on their own territory or beyond, and whether conducted by national armed forces or private armed groups operating under the state’s license or contract. It declares that “[n]o State Party can delegate or outsource fundamental State functions to non-State actors,”⁴⁵ and requires states parties to establish rules regarding the use of force, authorities and responsibilities of state bodies empowered to use coercive and combative measures (including “special operations”) within the framework of domestic and international law.

³⁸ See Singer, *supra* note 14, 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).

³⁹ UNCHR Res. 1987/16.

⁴⁰ UNCHR Res. 2004/5.

⁴¹ UNCHR Res. 2005/2. The working group’s mandate includes “to monitor mercenaries and mercenary-related activities in all their forms and manifestations in different parts of the world and to study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights.” See Report of the Working Group of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, UN Doc. A/62/301, available at <http://www2.ohchr.org/english/issues/mercenaries/docs/A.62.301.pdf>. The working group defines as “private military and private security companies” private companies that perform “all types of security assistance and training, and provide consulting services, including unarmed logistical support, armed security guards, and those involved in defensive or offensive military and/or security-type activities, particularly in armed conflict areas.”

⁴² Press Release, United Nations, Private Security Companies Engaging In New Forms of Mercenary Activity, Says UN Working Group (November 6, 2007); The Impact of Mercenary Activities on the Right of Peoples to Self-Determination, UNCHR Fact Sheet No. 28 (2002). available at <http://www2.ohchr.org/english/issues/mercenaries/index.htm>.

⁴³ E.g., Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, UN Doc. A/HRC/10/14 (January 21, 2009), available at <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.7.7.Add.3.pdf>.

⁴⁴ The working draft, dated July 13, 2009 is available at <http://mgimo.ru/files/121626/draft.pdf>.

⁴⁵ *Id.* art. 4(4). “Fundamental State functions” are defined in article 2(k) as

functions that a State cannot outsource or delegate to non-State actors. Among such functions, consistent with the principle of State monopoly on the use of force, are waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence and police powers, especially the powers of arrest or detention, including the interrogation of detainees.

The convention does not attempt to establish a binding regulatory framework itself, but would require states parties to adopt their own contracting and licensing procedures for the use, import, or export of private military and security services, in furtherance of the goals set forth in the convention. States parties would undertake also to prohibit, at least partially, the transfer of the right to use force or to carry out special operations to private actors, and to prohibit private military and security companies from directly participating in armed conflicts, military actions or terrorist acts, especially for the purpose of overthrowing a government, changing international boundaries by force, violating the territorial sovereignty of another state, displacing residents of any territory or controlling its natural resources. Further obligations would include measures to prevent private companies from using or trafficking in weapons of mass destruction or illicit weaponry and components, establish jurisdiction and criminalize violations set forth under the convention⁴⁶ and provide redress for victims. Private military and security companies would be prohibited under the convention from arbitrarily or abusively using force, and would be permitted to use force only as a measure of last resort.

The convention would also create a UN Committee on the Regulation, Oversight and Monitoring of Private Military and Security Companies, to be composed of up to fourteen experts nominated by states parties. States would submit periodic reports on the legislative, judicial, administrative or other measures they have taken to implement the Convention, to which the Committee would add its observations or request additional information. The Committee would provide interpretive guidance on international law applicable to the provision of private military and security services and make confidential inquiries into incidents if warranted. States parties would be able to refer complaints about the compliance of other states parties to the Committee for review. In such a case, the Committee would appoint a five-person ad hoc Conciliation Commission to help the parties reach an amicable resolution. Parties could also authorize private victims or victims' groups to bring petitions to the Committee. The Committee would have no authority to enforce sanctions or take any action other than review in case of a breach.

⁴⁶ Article 22 requires criminal sanctions be established to cover:

- (a) War crimes as defined in article 8 of the Statute of the International Criminal Court,
- (b) Crimes against humanity, as defined in article 7 of the Statute of the International Criminal Court,
- (c) Genocide, as defined in article 6 of the Statute of the International Criminal Court,
- (d) Violations of the provisions of the International Covenant on Civil and Political Rights, in particular violations of articles 6 (right to life) 7 (prohibition of torture), 9 (security of person, prohibition of disappearances, arbitrary detention, etc.), 12 (prohibition of forced expulsion and displacement),
- (e) Violations of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,
- (f) Violations of the International Convention for the Protection of All Persons from Enforced Disappearance,
- (g) Grave breaches of the Geneva Conventions of 1949 and Additional Protocols of 1977,
- (h) Reckless endangerment of civilian life, right to privacy and property by private military companies and private security companies,
- (i) Damage to or destruction of cultural heritage,
- (j) Serious harm to the environment,
- (k) Other serious offenses under international human rights law.

These crimes would be deemed to be covered under extradition treaties.

International Best Practices: The Montreux Document

In an effort to clarify the international legal responsibilities with respect to private military and security companies (PMSCs),⁴⁷ the United States and sixteen other countries⁴⁸ signed the Montreux Document,⁴⁹ which sets forth the understanding of participating governments regarding the legal obligations that arise whenever such companies operate during situations of armed conflict, and develops a set of “best practices” to guide their use. According to the document, states that contract with private military and security companies (“contracting states”) retain their obligations under international humanitarian and human rights law, and may not outsource certain functions assigned by treaty to states parties, such as the duties of “responsible officer” over prisoner of war camps in accordance with the Geneva Conventions. Further, contracting states are obligated to

- ensure that contractors are aware of their obligations and trained accordingly;
- take appropriate measures to prevent any violations of international humanitarian law by private military and security company personnel;
- adopt appropriate military regulations, administrative orders or other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate;
- prevent, investigate and provide effective remedies for relevant misconduct of private military and security companies and their personnel; and
- enact any legislation necessary to provide effective penal sanctions for grave breaches of the Geneva Conventions and other crimes in violation of international law, and to pursue prosecutions in case of such a breach or permit the host country or an international tribunal to do so.

If the conduct of private military and security company personnel is attributable to the contracting state, according to the Montreux Document, that state is responsible for providing reparations in accordance with customary international law. Private actions are attributable to the contracting state, according to the Document, if the company’s personnel are

- a) incorporated by the State into its regular armed forces in accordance with its domestic legislation;

⁴⁷ Military and security services are defined to include “armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.”

⁴⁸ The other countries are Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, and Ukraine. Fifteen other countries later announced their support for the Document: Macedonia, Ecuador, Albania, Netherlands, Bosnia and Herzegovina, Greece, Portugal, Chile, Uruguay, Liechtenstein, Qatar, Jordan, Spain, Italy, Uganda. A list of participating countries is maintained by the Swiss government at <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html>.

⁴⁹ Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, UN Document A/63/467-S/2008/636 (October 8, 2009) Annex, available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/\\$FILE/Montreux-Documents-eng.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/$FILE/Montreux-Documents-eng.pdf).

b) members of organised armed forces, groups or units under a command responsible to the State;

c) empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorised by law or regulation to carry out functions normally conducted by organs of the State); or

d) in fact acting on the instructions of the State (i.e. the State has specifically instructed the private actor's conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor's conduct).

The Document also sets forth responsibilities of the state on whose territory the activity takes place ("territorial state") and the state of nationality of the private military and security company ("home state," e.g. state of incorporation). It also lists responsibilities of the private military and security company itself, which include compliance with relevant international humanitarian and human rights law as well as all applicable laws of the territorial and home states. The Document does not take a position on whether such companies and their personnel are "armed forces" or "combatants," but states that such status determinations are made under humanitarian law on the basis of "the nature and circumstances of the functions in which they are involved." It also posits that the superiors of private security personnel, whether military or contractor, may be liable for crimes under international law committed by personnel under their effective authority and control, but that such superior responsibility "is not engaged solely by virtue of a contract."

Part II of the Montreux Document provides detailed lists of "good practices" recommended for adoption by contracting states, territorial states, and home states, as well as by the companies themselves. Contracting states are urged to evaluate whether their legislation and procurement regulations are adequate to ensure accountability, particularly if the companies are to be employed in an area where law enforcement or regulatory capacities are compromised. In particular, contracting states are advised to provide for criminal and civil jurisdiction over the activities of private military and security companies and their personnel abroad, and to cooperate with the territorial state in conducting any investigation that may become necessary.

In a nutshell, contracting states should:

- Determine which services may or may not be contracted out to private military and security companies (PMSC), taking into account factors such as the likelihood of PMSC personnel becoming involved in direct participation in hostilities.
- Assess the capacity of the particular PMSC to carry out its activities in conformity with relevant law, perhaps by considering the company's work history, employer references, ownership structure, and results of employees' background checks.
- Provide adequate resources and expertise for selecting and overseeing PMSCs. Consider terms of contracts necessary to ensure compliance with legal responsibilities and accountability.
- Ensure transparency and supervision in the selection and contracting of PMSCs through legislative oversight and public disclosure of PMSC contracting regulations and practices, information about specific contracts, and incident reports or complaints involving such contractors, including measures taken to address any proven misconduct.

Territorial states are likewise advised to evaluate their domestic legal framework applicable to the conduct of PMSCs. The authors acknowledge that territorial states in armed conflict face particular challenges and consider it may be appropriate for them to rely on information provided by the contracting state concerning a particular PMSC. Nevertheless, the territorial state is advised to enact licensing requirements to be enforced by an adequately resourced central authority. The territorial state is counseled to establish requirements regarding the carrying and use of weapons and reporting of incidents, among other regulations.

Home states, in evaluating their domestic legal frameworks, are advised to consider licensing or regulatory regimes to control and monitor exports of security services that do not unnecessarily duplicate the regimes of contracting or territorial states, and to focus instead on areas of specific concern for them. The Document recognizes the PMSCs as are not per se bound to respect international law, which is binding only on parties to a conflict and individuals, not corporate entities. Statement 22 explains that the bodies of law applicable to armed conflict are integrated into national law and made applicable to companies, and that PMSCs are nonetheless obliged to uphold them.

Iraqi Law and Status of U.S. Forces

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. During the time covered by the UN Security Council mandate, such law included orders issued by the Coalition Provisional Authority (CPA) prior to the hand-over of sovereignty to the Iraqi Interim Government that had not been rescinded or superseded.⁵⁰ CPA Order Number 17 exempted contractors from Iraqi laws for acts related to their contracts.⁵¹ As of January 1, 2009, however, jurisdiction over U.S. defense contractors is governed by the Withdrawal Agreement⁵² negotiated between the United States and Iraq as part of

⁵⁰ The Coalition Provisional Authority (CPA) 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* Law of Administration for the State of Iraq during the Transitional Period Article 26(C) (CPA orders remain in effect until Iraqi legislation rescinds or amends them), *available at* <http://www.law.case.edu/saddamtrial/documents/TAL.pdf>.

⁵¹ 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 was in power. CPA Order 17 was modified in 2004 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_Rev_with_Annex_A.pdf. CPA Order 17 remained in force for the duration of the UN mandate, which expired in December, 2008. By its terms, CPA Order 17 was to expire only after the last elements of the MNF-I have departed from Iraq. However, it appears to have been effectively superseded by the set of executive agreements concluded between Iraq and the United States just prior to the expiration of the UN mandate. CPA Order 17 provided 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)).

⁵² Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, Article 12, November 17, 2008 [hereinafter *Withdrawal Agreement*], *available at* http://graphics8.nytimes.com/packages/pdf/world/20081119_SOFA_FINAL_AGREED_TEXT.pdf. For a more comprehensive overview of the Withdrawal Agreement, see CRS Report R40011, *U.S.-Iraq Withdrawal/Status of Forces Agreement: Issues for Congressional Oversight*, by R. Chuck Mason.

the legal framework meant to take the place of the UN mandate upon its expiry on December 31, 2008. The Withdrawal Agreement provides that Iraq has “primary jurisdiction” over U.S. Defense contractors and their employees who are not citizens of Iraq or who habitually reside there.⁵³ Presumably, Iraq has exclusive jurisdiction over State Department and other non-Defense Department contractors, who do not appear to be covered by the Withdrawal Agreement, as well as contractors who are citizens of or habitually reside in Iraq. The United States could continue to exercise jurisdiction over U.S. contractors in cases over which U.S. courts have jurisdiction, but Iraq is under no obligation under the Withdrawal Agreement to negotiate with the United States according to its provisions for determining how cases involving U.S. servicemembers and DOD civilians will be handled, nor even to inform U.S. officials that a contract employee has been arrested.⁵⁴ The Agreement does not authorize the United States to arrest or detain contractor personnel without a warrant issued by an Iraqi court,⁵⁵ unless perhaps such persons are caught in the act of committing a serious crime⁵⁶ or if the arrest takes place on base.⁵⁷ However, such arrests must be reported and the detainee turned over to Iraqi authorities within 24 hours.⁵⁸

Afghan Law and Status of U.S. Forces

The United States is participating in two military operations in Afghanistan, with separate mandates and status of forces arrangements. Operation Enduring Freedom (OEF) refers to the U.S.-led coalition that initiated military action in Afghanistan in 2001. OEF personnel are covered by an exchange of notes between the United States and the Afghan government. The International Security Assistance Force (ISAF) is a NATO-led coalition deployed to Afghanistan under UN

⁵³ *Id.* art. 12. Article 2 defines “United States contractors” and “United States contractor employees” to mean non-Iraqi persons or legal entities, and their employees, who are citizens of the United States or a third country and who are in Iraq to supply goods, services, and security in Iraq to or on behalf of the United States Forces under a contract or subcontract with or for the United States Forces. However, the terms do not include persons or legal entities normally resident in the territory of Iraq.

A “member of the civilian component” of the United States Forces is defined to mean “any civilian employed by the United States Department of Defense” who is “not normally resident in Iraq.” *Id.* It might be possible for the Parties to adopt an interpretation of the Agreement under which certain contractors are considered to be members of the “civilian component” for purposes of the Agreement, in which case they would be treated the same as servicemembers for jurisdictional purposes.

⁵⁴ Under art. 12 of the Withdrawal Agreement, the United States is permitted to request Iraq to waive its primary jurisdiction in a particular case, but the obligation to first notify the United States within writing within 21 days of the discovery of an alleged offense applies only with respect to DOD personnel. Iraq has primary jurisdiction of DOD personnel (servicemembers and civilians) accused of committing certain “grave premeditated felonies” off base and off duty. For more information about the Withdrawal Agreement as it applies to servicemembers and DOD civilians, see CRS Report R40011, *U.S.-Iraq Withdrawal/Status of Forces Agreement: Issues for Congressional Oversight*, by R. Chuck Mason.

⁵⁵ Withdrawal Agreement, *supra* note 52, art. 22.

⁵⁶ See Trevor Rush, *Don't Call It a SOFA! An Overview of the U.S.-Iraq Security Agreement*, 2009-MAY Army Law. 34, 43 & n. 100 (2009) (describing Iraqi law regarding arrests, which generally permits any person who witnesses a serious crime to make a citizen's arrest).

⁵⁷ Withdrawal Agreement, *supra* note 52, art. 6. Article 6 permits “United States Forces to exercise within the agreed facilities and areas all rights and powers that may be necessary to establish, use, maintain, and secure such agreed facilities and areas.” This may be construed to include making arrests of persons whose activities threaten the security, maintenance or use of the area. See Rush, *supra* note 56, at 59.

⁵⁸ *Id.* art. 22.

mandate after the fall of the Taliban government. ISAF personnel are covered by a Military Technical Agreement concluded between ISAF and Afghanistan.

The UN mandate for ISAF is related to “peace enforcement,” for the purpose of assisting the Afghan government in extending its authority throughout its territory and creating a secure environment for reconstruction and humanitarian efforts. ISAF negotiated a “Military Technical Agreement” with the Afghan Interim Authority, which gives ISAF the authority to use military force to accomplish its mission.⁵⁹ This Agreement also contains arrangements regarding the status of ISAF forces, which provides that all ISAF and supporting personnel are subject to the exclusive jurisdiction of their own governments. ISAF personnel are immune from arrest or detention by Afghan authorities, and may not be turned over to any international tribunal or any other entity or State without the express consent of the contributing nation.

Operation Enduring Freedom is the U.S.-led coalition formed to combat terrorism after 9/11. The United States and the transitional government of Afghanistan concluded an agreement in 2002 regarding the status of U.S. military and DOD civilian personnel in Afghanistan.⁶⁰ Such personnel are to be accorded “a status equivalent to that accorded to the administrative and technical staff” of the U.S. Embassy under the Vienna Convention on Diplomatic Relations of 1961.⁶¹ Accordingly, covered U.S. personnel are immune from criminal prosecution by Afghan authorities, and are immune from civil and administrative jurisdiction except with respect to acts performed outside the course of their duties.⁶² In the agreement, the Islamic Transitional Government of Afghanistan (ITGA)⁶³ explicitly authorized the U.S. government to exercise criminal jurisdiction over such U.S. personnel, and the Government of Afghanistan is not permitted to surrender U.S. personnel to the custody of another state, international tribunal, or any other entity without consent of the U.S. government. Although the agreement was signed by the ITGA, the subsequently elected Government of the Islamic Republic of Afghanistan assumed responsibility for ITGA’s legal obligations and the agreement remains in force. The agreement, however, does not appear to provide immunity for contractor personnel.

U.S. Law

The following sections describe U.S. law applicable to determining the types of functions related to contingency operations that may be outsourced by the Department of Defense to contractors and the possible avenues for prosecuting any contractor personnel who commit offenses in connection with such operations.

⁵⁹ The Military Technical Agreement is available at <http://www.operations.mod.uk/isafmta.pdf>.

⁶⁰ T.I.A.S. Exchange of notes September 26 and December 12, 2002 and May 28, 2003. Entered into force May 28, 2003.

⁶¹ *Id.*

⁶² Vienna Convention on Diplomatic Relations of April 18, 1961, T.I.A.S. 7502; 23 U.S.T. 3227.

⁶³ The transitional government has since been replaced by the fully elected Government of the Islamic Republic of Afghanistan. For information about the political development of Afghanistan since 2001, see CRS Report RS21922, *Afghanistan: Politics, Elections, and Government Performance*, by Kenneth Katzman.

“Inherently Governmental Functions” and Other Restrictions on Government Contracts

There has been debate about the extent to which private security functions are “inherently governmental” in nature and therefore ought to be performed by public officials.⁶⁴ Congress defined “inherently governmental function” in the Federal Activities Inventory Reform (FAIR) Act of 1998⁶⁵ to mean a function that is “so intimately related to the public interest as to require performance by Federal Government employees.”⁶⁶ Under the FAIR Act, the term “includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government...” It involves functions that can “determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal justice proceedings,” contract management, and functions that can “significantly affect the life, liberty, or property of private persons...”⁶⁷ Infrequently, Congress has provided by statute that a function is “inherently governmental.”⁶⁸ Congress may also directly forbid or limit the use of contractors for certain functions⁶⁹ or forbid the contracting of certain kinds of employees,⁷⁰ where the functions or employment may be considered inherently unsuitable for association with the government. In the case of defense contractors in areas of combat operations, Congress expressed its sense in the FY2009 NDAA that private security contractors should not perform certain functions, such as security protection of resources, in high-threat operational environments, and that DOD regulations “should ensure that private security contractors are not authorized to perform inherently governmental functions in an area of combat operations.”⁷¹

The Federal Acquisition Regulations (FAR) list examples of inherently governmental functions.⁷² The Office of Management and Budget sets forth in Circular A-76 the guidelines and procedures that executive agencies should take into account when determining whether an activity should be

⁶⁴ For a discussion on inherently governmental functions, see CRS Report R40641, *Inherently Governmental Functions and Department of Defense Operations: Background, Issues, and Options for Congress*, by John R. Luckey, Valerie Bailey Grasso, and Kate M. Manuel.

⁶⁵ P.L. 105-270, codified at 31 U.S.C. § 501 note (requiring agencies to inventory civil service functions and to identify jobs as commercial or inherently governmental). The definition is consistent with longstanding executive branch practice.

⁶⁶ *Id.* § 5(2)(A).

⁶⁷ *Id.* § 5(2)(B)(i),(ii),and (iii).

⁶⁸ *E.g.* 5 U.S.C. § 306 (drafting of strategic plans); 31 U.S.C. § 1115 (drafting of agency performance plans); 33 U.S.C. § 2321 (certain functions involving the operation and maintenance of hydroelectric power generating facilities at U.S. Army Corps of Engineers water resources projects); 39 U.S.C. §§ 2801-05 (strategic planning and performance management functions for the U.S. Postal Service); *see also* 10 U.S.C. § 2461 (requirements for privatizing civilian positions in the Department of Defense).

⁶⁹ *E.g.* 10 U.S.C. § 2465 (limiting DOD ability to enter into a contract “for the performance of firefighting or security-guard functions at any military installation or facility”).

⁷⁰ *E.g.* 5 U.S.C. § 3107 (“Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose.”); 5 U.S.C. § 3108 (prohibiting government agencies from hiring employees of the “Pinkerton Detective Agency, or similar organization,” which has been interpreted to prohibit the hiring of “quasi-military armed forces” (*see infra* notes 83 - 88)).

⁷¹ P.L. 110-417 § 832.

⁷² 48 C.F.R. 7.503 (listing as “inherently governmental,” among other things, the command of military forces, the conduct of foreign relations and the determination of foreign policy, and the direction and control of intelligence and counter-intelligence operations).

performed by government personnel or can be performed by the private sector. Executive agencies may also take into account legislation when making such a determination.

Circular A-76, as revised in 2003, states that using contractors to provide certain types of protective services—guard services, convoy protection services, plant protection services, pass and identification services, and the operation of prison or detention facilities, all whether performed by unarmed or armed personnel—is not prohibited. Nevertheless, Circular A-76 also stipulates that executive agencies should take into account whether circumstances exist where

the provider’s authority to take action ... will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of the provider’s need to resort to force in support of a police or judicial activity; whether the provider is more likely to use force, especially deadly force, and the degree to which force may have to be exercised in public or relatively uncontrolled areas.

DOD implementation of the FAR, known as the Defense Federal Acquisition Regulation Supplement (DFARS),⁷³ does not prohibit the use of contract personnel for security, but it limits the extent to which contract personnel may be hired to guard military installations⁷⁴ and provides mandatory contractual provisions for contractors who are accompanying U.S. Armed Forces deployed overseas.⁷⁵ Such contractors are considered civilians accompanying the U.S. Armed Forces during contingency operations and are not authorized to use deadly force against enemy armed forces other than in self-defense. However, in June, 2006, DOD published a rule amending the DFARS to create an exception for private security contractors, who are authorized to use deadly force “only when necessary to execute their security mission to protect assets/persons, consistent with the mission statement contained in their contract.”⁷⁶ The rule explained that

it is the responsibility of the combatant commander to ensure that the private security contract mission statements do not authorize the performance of any inherently Governmental military functions, such as preemptive attacks, or any other types of attacks. Otherwise, civilians who accompany the U.S. Armed Forces lose their law of war protections from direct attack if and for such time as they take a direct part in hostilities.⁷⁷

While DOD considers combat functions to be inherently governmental in nature,⁷⁸ security functions may sometimes be commercial.⁷⁹ The distinction between governmental and

⁷³ 48 C.F.R. Parts 201-299.

⁷⁴ 48 C.F.R. Part 237.102-70 (implementing 10 U.S.C. § 2465 limitation on private security guards and firefighters, including temporary exceptions pursuant to P.L. 107-56 § 1010 and P.L. 107-314 § 332).

⁷⁵ 48 C.F.R. Part 252.225-7040.

⁷⁶ *Id.* para. (b).

⁷⁷ 71 Fed. Reg. 34,826-27 (June 16, 2006).

⁷⁸ See DoDI No. 1100.22, “Guidance for Determining Workforce Mix” E2.1.3 (September 7, 2006), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf>. Combat operations appear to include planning, preparation and execution of “operations to actively seek out, close with and destroy enemy forces, including employment of firepower and other destructive and disruptive capabilities on the battlefield.” *Id.* Positions that involve taking direct part in hostilities are inherently governmental “if the planned use of disruptive and/or destructive combat capabilities (including offensive cyber operations, electronic attack, missile defense, and air defense) is an inherent part of the mission. *Id.* E2.1.3.3.

⁷⁹ *Id.* at E2.1.4 (describing “Security provided for the protection of resources (people, information, equipment, supplies, etc.)”). Such functions are inherently governmental if they involve “unpredictable international or uncontrolled, high threat situations where success depends on how operations are handled....” *Id.* Security operations are inherently governmental if they “could entail defense against a military or paramilitary organization whose capabilities are so (continued...)”

commercial security functions appears to turn on the level of discretion required to be exercised and the likelihood of engagement with enemy fighters.⁸⁰ The Combatant Commander has the authority to decide whether to classify security functions as commercial.

Further, the DFARS-mandated clause for contractors accompanying the armed forces limits the provision of military security for other DOD contractors providing services in the theater of operations to cases where, as determined by the Combatant Commander, the contractor cannot obtain effective security services at a reasonable cost or “threat conditions necessitate security through military means.”⁸¹ In the event a contractor hires a subcontractor to provide security services for its workers and property, that contract must incorporate the substance of the required clause.⁸²

A decision by the Comptroller General may shed additional light on the current thinking regarding the nature of private security services. A contractor protested the terms of a pair of solicitations for contracts involving cargo transportation in Iraq on the basis that they included requirements for armed security escorts.⁸³ The prospective bidder challenged the security requirements as running afoul of the Anti-Pinkerton Act⁸⁴ as well as relevant DOD instructions regarding contractors accompanying the U.S. Armed Forces overseas.⁸⁵ Specifically, the protestor contended that the statements of work (SOW) required performance of security services that would constitute the provision of “quasi-military armed forces for hire” and require civilian contractors to engage in combat. The Comptroller General denied the protest, relying on an earlier interpretation that “a company which provides guard or protective services does not thereby become a ‘quasi-military armed force,’ even if the individual guards are armed....”⁸⁶ With respect to the charge that the work involved the “uniquely governmental” function of engaging in combat, the decision noted DOD regulations and DFARS provisions that would permit the contracting of armed security services but prohibit such contractors from engaging in direct

(...continued)

sophisticated that only military forces could provide an adequate defense,” *id.* at E2.1.4.1.3, or they “could require deadly force that is more likely to be initiated by U.S. forces than occur in self defense” or require on-the-spot judgments about the level of force or whether the target is “friend or foe,” among other things, *id.* at E2.1.4.1.4

⁸⁰ *Id.* at E2.1.4 (defining as “commercial function” the provision of “security services that do not involve substantial discretion (e.g., decisions are limited or guided by existing policies, procedures, directions, orders, or other guidance that identify specific ranges of acceptable decisions or conduct and subject the discretionary authority to final approval or regular oversight by governmental officials)).

⁸¹ *Id.* para. (c).

⁸² *Id.* para. (q).

⁸³ Brian X. Scott, Comp. Gen. B-298370, August 18, 2006, 2006 CPD ¶ 125, available online at 2006 WL 2390513 (Comp. Gen.).

⁸⁴ 5 U.S.C. § 3108; 48 C.F.R. 37.109 (interpreting Anti-Pinkerton Act in accordance with United States *ex rel.* Weinberger v. Equifax, 557 F.2d 456 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978)) to prohibit “contracts with organizations that offer quasi-military armed forces for hire, or with their employees, regardless of the contract’s character”). The Anti-Pinkerton Act was enacted in 1892 in response to reports that businesses had employed armed individuals and groups, including the Pinkerton Detective Agency, as strikebreakers during labor disputes in the 1880s and early 1890s. See Letter to John C. Stennis, United States Senate, B-139965, March 6, 1980, available online at 1980 WL 16981 (Comp. Gen.).

⁸⁵ DoD Instruction (DoDI) No. 3020.41, “Contractor Personnel Authorized to Accompany the U.S. Armed Forces” (October 3, 2005).

⁸⁶ Brian X. Scott at 3 (citing Letter To The Heads Of Federal Departments and Agencies, B-139965, June 7, 1978, 57 Comp. Gen. 524).

combat or offensive operations.⁸⁷ It appears that neither the Department of Defense nor the Government Accountability Office (GAO) regards the government use of armed security escorts in Iraq as violating any restrictions on government contracting. However, the Anti-Pinkerton Act might be construed to bar the hiring of any particular contractor who is found to operate as a “quasi-military armed force.”⁸⁸

Neither the State Department acquisition regulations⁸⁹ nor the U.S. Agency for International Development regulations⁹⁰ specifically addresses contractors overseas during war or contingency operations. However, a 2008 amendment to the FAR imposes new requirements for government contracts that entail contractor personnel working in designated operation areas or at certain diplomatic or consular missions outside the United States for agencies other than the Department of Defense.⁹¹

Prosecution of Contractor Personnel in U.S. Federal or Military Courts

Apart from the functions contractor personnel may be assigned to perform overseas is the issue of their accountability for conduct, whether duty-related or not, that could cause harm or otherwise undermine mission objectives. In addition to contract oversight and enforcement measures, criminal prosecution may sometimes be warranted for individual misconduct. U.S. contractor personnel and other U.S. civilian employees in Iraq and Afghanistan 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 of the United States.⁹² Additionally, persons who are “employed by or accompanying the armed forces” overseas may be prosecuted for certain crimes under the Military Extraterritorial Jurisdiction Act of 2000 (MEJA)⁹³ or, in some cases, the Uniform Code of Military Justice (UCMJ).⁹⁴ 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.⁹⁵ There may also be institutional disincentives or

⁸⁷ *Id.* at 4-6.

⁸⁸ *Id.* at 3 (“The plain meaning and legislative history of the [Anti-Pinkerton] Act, as interpreted by the courts and [the Government Accountability Office (GAO)], point to a strict reading of the statutory language to prohibit contracts with the Pinkerton Detective Agency and other entities offering quasi-military forces as strikebreakers.”). Earlier in the opinion, however, the Comptroller General suggested a broader interpretation. *Id.* at 3 (“The purpose of the Act and the legislative history reveal that an organization was ‘similar’ to the Pinkerton Detective Agency only if it offered for hire mercenary, quasi-military forces as strikebreakers and armed guards.”). The FAR does not limit the prohibition to companies involved in strike-breaking. 48 C.F.R. Part 37.109 (2006).

⁸⁹ Department of State Acquisition Regulation (DOSAR), 48 C.F.R. Parts 601-653.

⁹⁰ 48 C.F.R. Parts 700-753.

⁹¹ Federal Acquisition Regulation 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States (March 2008). Such personnel are authorized to use deadly force in self defense or, where applicable, “when use of such force reasonably appears necessary to execute their security mission to protect assets/persons, consistent with the terms and conditions contained in the contract or with their job description and terms of employment.” *Id.*

⁹² 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).

⁹³ P.L. 106-523, 114 Stat. 2488 (2000), *codified at* 18 U.S.C. §§ 3261 -67.

⁹⁴ Chapter 47 of title 10, U.S. Code.

⁹⁵ *See supra* note 10.

procedural complications at play that might result in a failure to prosecute offenders even where jurisdiction exists.⁹⁶ There may also be uncertainty with respect to the courts' interpretation of the statutes and willingness to apply them to particular facts, which may effectively discourage prosecution.

In addition to amendments expanding special maritime and territorial jurisdiction, MEJA, and the UCMJ to provide broader jurisdictional coverage over contractor personnel, Congress included a provision in the National Defense Authorization Acts for FY2008 and FY2009 instruction for certain agencies with responsibilities for contracts in Afghanistan and Iraq. In section 861 of the 2008 NDAA, P.L. 110-181, Congress required the Secretaries of Defense and State and the Administrator of the United States Agency for International Development to enter into a memorandum of understanding regarding matters relating to contracts in Iraq or Afghanistan, including delineating responsibility for investigating and referring possible violations of the UCMJ or MEJA. Section 854 of the FY2009 NDAA, P.L. 110-417, expands the MOU requirements to include reporting requirements for contractors of allegations of offenses in violation of the UCMJ or MEJA committed by or against contractor personnel, a delineation of responsibility for victim and witness protection and other assistance to contractor personnel in connection with such crimes, and provisions for ensuring contractor personnel are aware of their responsibility to report such crimes and where to turn to for assistance. These provisions do not apply to CIA contracts, although CIA contractor personnel may be covered by MEJA, as described below. The MOU requirements do not cover responsibilities for crimes under the special maritime and territorial jurisdiction of the United States or crimes with general extraterritorial jurisdiction.

Special Maritime and Territorial Jurisdiction Act

For crimes involving a U.S. national⁹⁷ as a perpetrator or a victim, the special maritime and territorial jurisdiction 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.

Persons who are covered by MEJA or the UCMJ, however, are not within the special maritime and territorial jurisdiction at these places if they commit an offense there, at least if the offense is a felony.⁹⁸

⁹⁶ For a discussion of some of these, see Steven Paul Cullen, *Out of Reach: Improving the System to Deter and Address Criminal Acts Committed by Contractor Employees Accompanying Armed Forces Overseas*, 38 PUB. CONT. L.J. 509 (2009).

⁹⁷ "U.S. national" is defined by section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101(22)) to mean a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States. U.S. servicemembers who are foreign nationals are generally considered U.S. nationals, but foreign nationals employed by the U.S. government abroad are not.

⁹⁸ 18 U.S.C. § 7(9). Apparently such persons must be charged for a violation of MEJA or the UCMJ. *See infra* note 140 (continued...)

Criminal statutes that apply within the special maritime and territorial jurisdiction include maiming,⁹⁹ assault,¹⁰⁰ kidnapping,¹⁰¹ sexual abuse, assault or contact,¹⁰² murder,¹⁰³ and manslaughter.¹⁰⁴ The Department of Justice (DOJ) is responsible for prosecuting crimes in this category, although criminal investigations and arrests may in some cases be conducted by other federal agencies.¹⁰⁵

A CIA contractor was convicted under this provision in 2007 for the assault of a detainee in Afghanistan.¹⁰⁶ He appealed his conviction based in part on the argument that a temporary base used by U.S. military forces during operations in Afghanistan as a firebase did not constitute the “premises” of a “military mission” within the meaning of 18 U.S.C. § 7(9). The appellate court disagreed and upheld the conviction.¹⁰⁷ The court did not adopt the interpretation used by the district court and urged by the government, which would have included any land or building where a military mission takes place (interpreting “mission” to mean “a team of military specialists”).¹⁰⁸ Instead, the court found that a “mission” in 18 U.S.C. § 7(9) refers to a place possessing sufficient qualities of a permanent base, and suggested some relevant factors, including

the size of a given military mission’s premises, the length of United States control over those premises, the substantiality of its improvements, actual use of the premises, the occupation of the premises by a significant number of United States personnel, and the host nation’s consent (whether formal or informal) to the presence of the United States.¹⁰⁹

(...continued)

and accompanying text (example of complications that could arise).

⁹⁹ 18 U.S.C. § 114 punishes any individual who, within the special maritime and territorial jurisdiction 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....”

¹⁰⁰ 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).

¹⁰¹ 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 ...”).

¹⁰² 18 U.S.C. §§ 2241-45, 2248. 18 U.S.C. § 2241 criminalizes aggravated sexual abuse, which includes the use of force or threat of death, serious bodily injury, or kidnapping, or the rendering of a victim unconscious or impaired, to induce another person to engage in a sexual act. 18 U.S.C. § 2242 prohibits sexual abuse using less serious threats or taking advantage of an impairment not of the aggressor’s making. 18 U.S.C. § 2243 applies where the victim is a minor or ward. 18 U.S.C. § 2244 criminalizes sexual contact (other than sexual acts as defined in § 2246) under like conditions. 18 U.S.C. § 2245 provides for increased punishment if any of these acts results in death. All of these crimes are felonies. Offenders may also be required to pay restitution to victims under 18 U.S.C. § 2248.

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

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

¹⁰⁵ For example, the State Department has authority under 22 U.S.C. § 2709 to appoint special agents with authority to undertake certain investigations and make arrests of persons suspected of having committed a felony, generally in accordance with an agreement between the Secretary of State and the Attorney General. The Secretary of State has additional security responsibilities under 22 U.S.C. § 4802, including conducting investigations as authorized by law.

¹⁰⁶ 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>.

¹⁰⁷ *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009).

¹⁰⁸ *Id.* at 213.

¹⁰⁹ *Id.* at 214.

Applying these factors, the court concluded the firebase qualified as a military installation and that Congress had intended to extend federal criminal jurisdiction to assaults committed there.

Extraterritorial Jurisdiction

In addition to crimes punishable if they occur only in certain places overseas, many federal statutes prescribe criminal sanctions for offenses committed by or against U.S. nationals wherever they are committed, which may expressly or implicitly cover crimes that occur abroad.¹¹⁰ The War Crimes Act of 1996 covers conduct “whether inside or outside the United States,” so long as the victim or perpetrator is a U.S. national or member of the Armed Forces.¹¹¹ 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).¹¹²

The War Crimes Act, as amended by the Military Commissions Act of 2006,¹¹³ prohibits “grave breaches” of Common Article 3,¹¹⁴ 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. Although federal jurisdiction is established for these crimes when they are committed by or against U.S. nationals or U.S. servicemembers, the statute does not appear to cover foreign nationals who commit war crimes in connection with U.S. contingency operations overseas, even if they are employed by the U.S. government or U.S. government contractors.

Other criminal proscriptions with extraterritorial reach include assaulting, killing or kidnapping an internationally protected person, or threatening to do so.¹¹⁵ Jurisdiction exists over these offenses if the victim or offender is a U.S. national, or if the offender is afterwards found in the United States. 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).¹¹⁶ There is extraterritorial jurisdiction over murder where both the perpetrator and victim are U.S. nationals, but prosecution requires that the Attorney General or his designee give approval, which requires that the foreign country where the murder took place has not prosecuted the suspect for the same conduct and that the suspect is no longer present in that country and the country lacks the ability to lawfully secure the person’s return.¹¹⁷

¹¹⁰ See CRS Report 94-166, *Extraterritorial Application of American Criminal Law*, by Charles Doyle.

¹¹¹ P.L. 104-192, § 2(a), 110 Stat. 2104 (August 21, 1996), codified as amended at 18 U.S.C. § 2441.

¹¹² 18 U.S.C. § 2340-40B.

¹¹³ P.L. 109-366 § 6, 120 Stat. 2632 (October 17, 2006).

¹¹⁴ 18 U.S.C. § 2441(d).

¹¹⁵ 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).

¹¹⁶ 18 U.S.C. § 2340-40B. Prior to 2004, acts that occurred within the special maritime and territorial jurisdiction were “outside the United States” for the purpose of the statute, precluding prosecution for torture occurring on a U.S. military base overseas. P.L. 108-375, § 1089, 118 Stat. 1811, 2067 (2004).

¹¹⁷ 18 U.S.C. § 1119.

Extraterritorial jurisdiction may be found to be implied in statute,¹¹⁸ especially where the statute's main purpose is to protect federal officers, employees and property, or to prevent the obstruction or corruption of the overseas activities of federal departments and agencies.¹¹⁹ Some statutes apply to conduct where foreign commerce is affected, although that jurisdictional basis alone may be insufficient to demonstrate that Congress meant to reach conduct overseas.¹²⁰ Crimes involving only foreign nationals as perpetrators or victims, even where one or more are employed by the U.S. government or a government contractor, may fall outside the jurisdiction of U.S. courts.

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 2000¹²¹ for any offense that would be punishable by imprisonment for more than one year (a felony offense) if committed within the special maritime and territorial jurisdiction of the United States.¹²² The definition of persons “[e]mployed by the armed forces” includes civilian employees of the Department of Defense (DOD) as well as DOD contractors and their employees (including subcontractors at any tier), and, after October 8, 2004, civilian contractors and employees from other federal agencies and “any provisional authority,”¹²³ to the extent that their employment is related to the support of the DOD mission overseas.¹²⁴ Depending on how broadly DOD's mission is construed, MEJA does not appear to cover civilian and contract employees of agencies engaged in their own operations

¹¹⁸ See *United States v. Bowman*, 260 U.S. 94 (1922)(courts examine the nature and purpose of a statute to determine whether Congress intended it to apply outside of the United States); *Ford v. United States*, 273 U.S. 593, 623 (1927)(implied jurisdiction for conduct overseas having domestic effects).

¹¹⁹ Statutes prohibiting murder or kidnapping of federal officers have been found to apply overseas. *United States v. Felix-Guiterrez*, 940 F.2d 1200, 1204-206 (9th Cir. 1991); *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984). A statute prohibiting the murder of Members of Congress was found to apply abroad. *United States v. Layton*, 855 F.2d 1388, 1395-397 (9th Cir. 1988) (interpreting 18 U.S.C. 351(i), which was later amended expressly to apply extraterritorially); *United States v. Walczak*, 783 F.2d 852, 854-55 (9th Cir. 1986) (punishing false statement made by U.S. national abroad); *United States v. Cotten*, 471 F.2d. 744, 749 (9th Cir. 1973) (theft of federal property).

¹²⁰ See *Equal Opportunity Employment Commission v. Arabian American Oil Co.*, 499 U.S. 244, 251 (1991)(“[W]e have repeatedly held that even statutes that contain broad language in their definitions of “commerce” that expressly refer to “foreign commerce” do not apply abroad”). Statutes that apply in circumstances involving foreign commerce include domestic violence and stalking (18 U.S.C. §§ 2261 and 2261(A)); sex trafficking (18 U.S.C. §§ 2241-48); kidnapping (18 U.S.C. § 1201).

¹²¹ Military Extraterritorial Jurisdiction Act of 2000 (MEJA), P.L. 106-523, 114 Stat. 2488 (2000), *codified at* 18 U.S.C. § 3261-67. For information about the legislative history MEJA, see Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—a First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55 (2001).

¹²² 18 U.S.C. § 3261. Crimes that are felonies within the special maritime and territorial jurisdiction of the United States include assault, 18 U.S.C. § 113 (but not assault “by striking, beating, or wounding,” or “simple assault,” which is not defined; these are not punishable by imprisonment for more than one year, § 113(3) and (4)); 18 U.S.C. § 114 (torture and maiming); 18 U.S.C. §§ 2241-45 (sexual assault and contact); 18 U.S.C. § 1111 (murder); 18 U.S.C. § 1112 (manslaughter); 18 U.S.C. § 1113 (attempted murder or manslaughter).

¹²³ “Provisional authority” is not defined. Presumably, “any provisional authority” is meant to cover entities like the CPA; however, because the status of the CPA was never clearly defined, it may prove difficult in future conflicts to determine whether an interim governing body or occupational authority qualifies as a “provisional authority” within the meaning of MEJA. See Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole*, 2005-JUN ARMY LAW. 41, at 45-46.

¹²⁴ 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).

overseas. It also does not cover nationals of or persons ordinarily residing in the host nation. While it appears to cover other foreign nationals working under covered contracts, it does not appear to extend federal jurisdiction over crimes not expressly defined as covering conduct occurring within the special maritime and territorial jurisdiction. For example, it might not be available as a jurisdictional basis to prosecute non-U.S. national contractors for war crimes under 18 U.S.C. § 2441. However, under DOD's interpretation of the statute, MEJA is available to prosecute federal crimes that are prohibited everywhere within the United States, including areas that are not part of the special maritime and territorial jurisdiction.¹²⁵

DOD issued regulations for implementing MEJA in 2005.¹²⁶ 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.¹²⁷ 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.

The Department of Justice reported in April 2008 that 12 persons had been charged under MEJA since its passage in 2000, with several investigations underway.¹²⁸ Since that time, three contractors employed by Special Operations Consulting Security Management Group, Inc., were indicted for allegedly kidnapping a foreign national at gunpoint while working at Camp Al-Asad Air Base, Iraq.¹²⁹ In December, 2008, in the first case implementing the MEJA amendment to permit prosecution of non-DOD contractors, five Blackwater Worldwide employees under contract with the State Department were charged with manslaughter in connection with the 2007 incident at Nisoor Square in Baghdad, while a sixth pleaded guilty.¹³⁰ The defendants sought a

¹²⁵ 32 C.F.R. § 153.3 (defining "felony offense" with reference to legislative history). According to the report accompanying H.R. 3380 (106th Cong.), the Military Extraterritorial Jurisdiction Act of 2000,

Although the bill uses the conditional phrase "if committed within the special maritime and territorial jurisdiction of the United States," acts that would be a Federal crime regardless of where they are committed in the United States, such as the drug crimes in title 21, also fall within the scope of subsection [18 U.S.C. § 3261(a)].

H.Rept. 106-778, at 14 -15 (2000). The special maritime and territorial jurisdiction of the United States, however, includes some areas that are outside the territory of the United States, and federal criminal statutes that apply generally within U.S. territory do not necessarily apply to such areas.

¹²⁶ 71 Fed. Reg. 8,946 (February 22, 2006).

¹²⁷ DoD Instruction 5525.11 § 5.

¹²⁸ *Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment*, Hearing Before the Senate Committee on Foreign Relations, 110th Cong. (April 9, 2008) (Statement of Sigal P. Mandelker, Deputy Assistant Attorney General, Criminal Division, Department of Justice). As of January 2009, DOJ reports a total of eight convictions under MEJA. See Department of Justice, The Accomplishments of the U.S. Department of Justice 2001-2009, January 16, 2009, available at <http://www.usdoj.gov/opa/documents/doj-accomplishments.pdf>.

¹²⁹ Press Release, U.S. Attorney for the Western District of Louisiana, Military Contractors Indicted by Federal Grand Jury, December 15, 2008, available at <http://www.usdoj.gov/usao/law/news/wdl20081215.pdf>.

¹³⁰ Press Release, Department of Justice, Five Blackwater Employees Indicted on Manslaughter and Weapons Charges for Fatal Nisur Square Shooting in Iraq, December 8, 2008, available at <http://www.usdoj.gov/opa/pr/2008/December/08-nsd-1068.html>.

dismissal of charges, arguing that MEJA doesn't apply to them as contractors working for the State Department in support of its mission.¹³¹ The judge declined to dismiss the prosecution on that basis, but indicated that he would consider evidence at trial related to how the contractors' employment supported the Department of Defense's mission overseas.¹³² Before the case reached trial stage, however, the judge dismissed all of the indictments because the prosecution had built its case on compelled statements that are entitled to immunity under the Fifth Amendment.¹³³

A few successful prosecutions involving DOD contractors in Iraq and Afghanistan under MEJA have been reported. A contractor working in Baghdad pleaded guilty to possession of child pornography in February 2007.¹³⁴ Another contractor pleaded guilty to the same crime in 2009 for downloading images at an Army base in Afghanistan.¹³⁵ Another contractor employee was prosecuted for abusive sexual contact involving a female soldier that occurred at Talil Air Force Base, Iraq, in 2004.¹³⁶ A contractor employee was indicted for assaulting another contractor with a knife in 2007.¹³⁷ A contractor employee pleaded guilty to manslaughter for the shooting of an Afghan civilian detainee who had set fire to another U.S. employee.¹³⁸ In addition, a former U.S. soldier was prosecuted under MEJA for the rape and murder of an Iraqi girl and the murder of her family while the defendant served on active duty in Iraq.¹³⁹

The applicability of MEJA may be an issue in prosecutions brought by other means. In a prosecution brought for violation of a statute within the special maritime and extraterritorial jurisdiction of the United States, a contract for training Afghan police forces was held to be "in support of [DOD's] mission overseas," despite the fact that it was administered by the State Department, and the contractor employee was covered by MEJA. Since the relevant definition of special maritime and territorial jurisdiction excludes persons covered by MEJA, the judge dismissed one count of child pornography possession for conduct occurring at an Afghan police training facility because the facility was outside the special maritime and territorial jurisdiction of the United States as to that contractor.¹⁴⁰

¹³¹ United States v. Slough, No. 1:08-cr-00360-RMU (D.D.C.).

¹³² See Del Quentin Weber, *Judge Refuses to Dismiss Charges Against Blackwater Guards*, WASH. POST, February 18, 2009, at A05.

¹³³ United States v. Slough, Crim. Action No. 08-0360 (RMU), slip op. (D.D.C., Dec. 31, 2009).

¹³⁴ Press Release, U.S. 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/usao/vae/Pressreleases/05-MayPDFArchive/07/20070525khanr.html>.

¹³⁵ Press Release, U.S. Attorney for the Western District of Texas, Former Military Contractor from Andrews, Texas, Pleads Guilty to Possessing Child Pornography While in Afghanistan (January 20, 2009), available at http://www.usdoj.gov/usao/txw/press_releases/2009/thames_plea.pdf.

¹³⁶ United States v. Maldonado, 215 Fed. Appx. 938 (11th Cir. 2007) (unpublished). The opinion does not explain the jurisdictional basis for the prosecution.

¹³⁷ Press Release, U.S. Attorney for the District of Arizona, Military Man Charged with Assaulting Woman on U.S. Military Base in Iraq, March 1, 2007.

¹³⁸ Press Release, U.S. Attorney for the Eastern District of Virginia, Civilian Contractor Pleads Guilty to Voluntary Manslaughter of Afghan Detainee (February 3, 2009).

¹³⁹ Press Release, Department of Justice, Former Ft. Campbell Soldier Sentenced to Life in Prison After Conviction on Charges Related to Deaths of Iraqi Civilians (September 4, 2009), available at <http://louisville.fbi.gov/dojpressrel/pressrel09/10090409.htm>. The defendant motion challenging the court's jurisdiction under MEJA on the basis that he was never properly discharged from the military and should instead be subject to court-martial was denied. United States v. Green, Crim. Action No. 5:06CR-19-R (W.D. Ken. 2008) (not reported). The case is on appeal.

¹⁴⁰ United States v. Gleason, Criminal No. 07-349-KI, slip op. (D. Or. March 24, 2009). 18 U.S.C. § 7(9) excepts persons described by MEJA.

Uniform Code of Military Justice (UCMJ)

Contractor personnel may be subject to military prosecution under the Uniform Code of Military Justice (UCMJ) for conduct that takes place during hostilities 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,¹⁴¹ 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,”¹⁴² to “persons serving with or accompanying an armed force in the field.”¹⁴³ There is one reported use of the amendment; an interpreter with dual Canadian-Iraqi citizenship pleaded guilty in connection with the stabbing of another contractor,¹⁴⁴ although several civilian contractors have been detained for possible UCMJ charges that were never referred for trial.¹⁴⁵ Additionally, if offenses by contractor personnel can be characterized as violations of the law of war, the UCMJ may extend jurisdiction to try suspects by court-martial¹⁴⁶ or by military commission.¹⁴⁷

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,¹⁴⁸ as reaffirmed by a series of Supreme Court cases beginning in 1957 with *Reid v. Covert*,¹⁴⁹ courts interpreted the phrase “in time of war” to mean

¹⁴¹ 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).

¹⁴² “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.

¹⁴³ For a comparison of procedural protections available in federal court to those applicable at general courts-martial, see CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, by Jennifer K. Elsea.

¹⁴⁴ See Press Release, Multi-National Corps—Iraq PAO *Civilian contractor convicted at a court-martial*, June 23, 2008, available online at http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=20671&Itemid=128. The defendant was sentenced to five months’ confinement (time served) for wrongful appropriation of a knife, obstruction of justice, and making a false official statement to military investigators. Because his term of imprisonment was for a period of less than one year, he was unable to appeal the jurisdictional finding to the Court of Criminal Appeals under 10 U.S.C. § 866. The Court of Appeals of the Armed Forces denied relief. *Ali v. Austin*, 67 M.J. 186, Misc. No. 09-8001/AR (C.A.A.F. November 5, 2008) (summary disposition).

¹⁴⁵ See <http://www.caaflog.com/category/art-2a10/>.

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

¹⁴⁷ 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).

¹⁴⁸ See, e.g., *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1945).

¹⁴⁹ *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion overturning two cases involving civilian spouses convicted of capital crimes by courts-martial, pursuant to 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 (continued...)

only wars declared by Congress.¹⁵⁰ 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.¹⁵¹

The trial of any civilian contractor by court-martial would 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"¹⁵² 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.¹⁵³ Statutes relating to courts-martial have withstood objections based on due process.¹⁵⁴ While the UCMJ offers soldiers procedural protections similar to and sometimes arguably superior to those in civilian courts,¹⁵⁵ courts have been reluctant to extend military jurisdiction to civilians.¹⁵⁶

On the other hand, the *Covert* Court distinguished the peacetime courts-martial of civilian spouses at issue from *Madsen v. Kinsella*,¹⁵⁷ in which a military spouse was tried by military commission in occupied Europe, on the basis that

(...continued)

(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 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."

¹⁵⁰ See *Robb v. United States*, 456 F.2d 768 (Ct. Cl. 1972); *United States 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).

¹⁵¹ *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

¹⁵² U.S. CONST., art. I, § 8, cl. 14.

¹⁵³ 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").

¹⁵⁴ See AM. JUR. 2D Military and Civil Defense § 221.

¹⁵⁵ For a comparison of due process rights, see CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*, by Jennifer K. Elsea.

¹⁵⁶ *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."); *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).

¹⁵⁷ 343 U.S. 341 (1952).

[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.¹⁵⁸

If *Madsen* remains valid, if and for so long as the United States is considered an “occupying power” in non-U.S. territory overseas, 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.¹⁵⁹ While the Court has suggested in dicta that courts-martial are never proper for the trial of civilians,¹⁶⁰ 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.¹⁶¹ Lower courts addressed the issue during World War II, and upheld courts-martial of civilian employees of the U.S. Army in Eritrea.¹⁶² 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.¹⁶³ However, another court upheld the conviction of a merchant seaman for the military charge of desertion.¹⁶⁴

Assuming the Constitution permits the trial of civilians accompanying the Armed Forces in wartime, a particular case will also have to satisfy the statutory 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.”¹⁶⁵ Courts have found that military jurisdiction over a

¹⁵⁸ 354 U.S. at 35, & n.10.

¹⁵⁹ *Id.* at 33-36.

¹⁶⁰ *O’Callahan v. Parker*, 395 U.S. 258 (1969).

¹⁶¹ *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”).

¹⁶² *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).

¹⁶³ *Hammond v. Squire*, 51 F. Supp. 227 (D. D.C. 1943).

¹⁶⁴ *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943).

¹⁶⁵ *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.

civilian “cannot be claimed merely on the basis of convenience, necessity, or the non-availability of civil courts.”¹⁶⁶

The phrase “in the field” means serving “in an area of actual fighting” at or near the “battlefront” where “actual hostilities are under way.”¹⁶⁷ 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.”¹⁶⁸ Therefore, it appears that contractors will not be subject to military jurisdiction merely because of their employment in Iraq or Afghanistan. They might, however, be subject to jurisdiction even if the conduct occurs outside of those countries, so long as it occurs away from a permanent garrison and there is sufficient connection to military operations ongoing in Iraq, Afghanistan or elsewhere.¹⁶⁹

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, or whether non-judicial punishment will be available to discipline contract employees.¹⁷⁰ Some of the standard punishments courts-martials ordinarily adjudge would not be available in the case of civilians, such as a dishonorable discharge or reduction in rank, and possibly forfeiture of pay. Appellate review over civilian cases may be effectively restricted by these sentencing considerations. For example, the government may appeal an adverse ruling (not amounting to a finding of not guilty) on an interlocutory basis only in cases in which a punitive discharge may be adjudged,¹⁷¹ and defendants are entitled to appeal only if the sentence “extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more.”¹⁷² Appeal to the Court of Appeals of the Armed Forces is limited, which in turn limits access to the Supreme Court.¹⁷³ On the other hand, there does not appear to be a means of compelling continued employment in order for a civilian to undergo court-martial proceedings; if misconduct by a contract employee results in his or her immediate dismissal by the contractor, military jurisdiction may also cease.¹⁷⁴

¹⁶⁶ *In re diBartolo*, 50 F. Supp. 929, 930 (S.D.N.Y. 1943).

¹⁶⁷ *Reid v. Covert*, 354 U.S. 1, 35 (1957). It is unclear how this formula can be applied in conflicts where there is no discernible “battlefront.”

¹⁶⁸ *Burney*, 21 C.M.R. at 109.

¹⁶⁹ *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’”).

¹⁷⁰ Under 10 U.S.C. § 815, commanding officers may discipline “other personnel” (other than officers) without convening a court-martial, but only members of the armed services are entitled to demand court-martial in lieu of non-judicial punishment.

¹⁷¹ 10 U.S.C. § 862.

¹⁷² 10 U.S.C. § 866 (appeal to Court of Criminal Appeals of the respective service).

¹⁷³ 10 U.S.C. § 867. For a review of appellate jurisdiction of courts-martial, see CRS Report RL34697, *Supreme Court Appellate Jurisdiction Over Military Court Cases*, by Anna C. Henning.

¹⁷⁴ 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.

DOD issued guidance in March 2008 for implementing the law.¹⁷⁵ Secretary Gates, citing “a particular need for clarity regarding the legal framework that should govern a command response to any illegal activities by Department of Defense civilian employees and DOD contractor personnel overseas with our Armed Forces,” instructed the Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, and the commanders of the regional combatant commands that the exercise of jurisdiction over civilians must be based on military necessity and supported by circumstances that meet the interests of justice.¹⁷⁶ Such circumstances include those where U.S. federal criminal jurisdiction does not otherwise apply or is not being pursued, or where the conduct in question is adverse to a significant military interest of the United States. For conduct that occurs within the United States, or in cases where the offender was not at all pertinent times outside the United States, the Secretary of Defense is the sole authority for convening a court-martial or initiating non-judicial punishment.¹⁷⁷

For covered civilians outside the United States, commanders of geographic combatant commands may initiate disciplinary proceedings or delegate such authority to subordinate commanders who possess general court-martial convening authority. These convening authorities are required, prior to initiating court-martial or non-judicial proceedings, to follow the notification procedures outlined in DOD Instruction 5525.11 (MEJA implementation) to give the Department of Justice the opportunity to take action. The memorandum gives the Justice Department fourteen calendar days (or longer, if DOJ determines that extraordinary circumstances warrant more time to complete its determination) to advise DOD as to whether it intends to exercise jurisdiction. If the period of review passes without an indication that DOJ intends to exercise jurisdiction, DOD may notify DOJ that it intends to authorize the appropriate commander to initiate disciplinary action at his or her command discretion. If DOJ elects to exercise jurisdiction, the commanders are not authorized to initiate disciplinary action, unless U.S. federal criminal jurisdiction of the case is later terminated. Military commanders are authorized to investigate and exercise other law enforcement authorities with respect to violations by civilians while DOJ makes its determination in order to be prepared to take appropriate action if DOJ declines jurisdiction.

Conclusion

According to many analysts and policymakers, private security contractors, by providing security for reconstruction and stabilization efforts, contribute an essential service to U.S. and international efforts to bring peace to Iraq and Afghanistan. Nonetheless, the use of armed contractors has raised concerns related to whether the role they play is suitable for outsourcing and whether the legal framework is adequate to hold contractors accountable under U.S. law for any abuses or other transgressions they may commit. Despite the amendment to the UCMJ to subject military contractors supporting the Armed Forces during contingency operations to court-martial jurisdiction, and despite the extension of MEJA to cover certain non-DOD contractors working with the military overseas, some private security contractors may remain outside the jurisdiction of U.S. courts, civil or military, for improper conduct in Iraq or Afghanistan. As the courts begin to interpret and apply these statutes, and as the effects of the new contractual

¹⁷⁵ Secretary of Defense Memorandum, UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations, March 10, 2008, available at <http://www.nimj.com/documents/2a10.pdf>.

¹⁷⁶ *Id.* attachment 3.

¹⁷⁷ *Id.* attachment 2.

requirements are implemented, Congress may be called on to review and amend the existing statutory framework.

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