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

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

Summary

The United States is relying heavily in Iraq on private firms to supply a wide variety of services, including security. From the information available in published sources, this apparently is the first time that the United States has depended on contractors to provide such extensive security in a hostile environment, although it has previously contracted for more limited security services in Afghanistan, Bosnia, and elsewhere. In Iraq, private companies are currently providing security services such as the protection of individuals, non-military transport convoys, buildings and other economic infrastructure, as well as the training of Iraqi police and military personnel. U.S. contracts for these services are issued by, or on behalf of, the Coalition Provisional Authority (CPA), the U.S.-led entity that is currently exercising sovereign authority in Iraq.

In a discussion paper issued recently, the CPA stated that it has direct contracts with eight companies for personal security, non-military site security, and non-military convoy security services that are "defensive in nature" and with a total value of $147 million, but it did not name the firms. Some eight firms have been identified in recent news accounts of firms providing protective services to or on behalf of the CPA, although these may not entirely overlap with the CPA list. These firms are Armor Group, Blackwater Security Consulting, Custer Battles, Erinys Iraq, Diligence LLC, Global Risk Strategies, Special Operations Consulting-Security Management Group, and the Steele Foundation. In addition, a State Department list cites another firm, ISI Iraq, as providing security to coalition facilities. Also, two companies have contracts to train the Iraqi security forces: DynCorp for the police and Vinnell Corporation for the military (although the work reportedly is being done by MPRI under a subcontract).

The use of armed contractors raises several concerns for many Members, including transparency and accountability. Transparency issues include the lack of public information on the terms of their contracts, including their costs and the standards governing their performance, as well as the background and training of those hired under contract. The apparent lack of a practical means to hold contractors accountable under U.S. law for abuses and other transgressions, and the possibility that they could be prosecuted by foreign courts, is also a source of concern.

Contractors working with the U.S. military (or with any of the coalition forces) in Iraq are non-combatants who have no combat immunity under international law if they engage in hostilities, and whose conduct may be attributable to the United States. Contractors are not likely to be subject to military law, but may be prosecuted under criminal statutes that apply extraterritorially or within the special maritime and territorial jurisdiction of the United States, or by means of the Military Extraterritorial Jurisdiction Act (MEJA). However, there is little precedent for trying contractor employees for crimes committed overseas. At least until June 30, 2004, when the CPA is scheduled to transfer sovereignty to Iraq and dissolve, Iraqi courts do not have jurisdiction to prosecute contractors without the permission of the CPA.

Contents

Introduction 1

Background 2
Firms Reportedly Contracted by or on Behalf of the CPA to Provide Security Services 4

Legal Status and Authorities 7
International Law 8
Can Contractors Be "Combatants"? 8
Are They "Mercenaries"? 9
U.S. Law 11
Coalition Provisional Authority Orders 13

Issues for Congress 13
General Issues Regarding the Use of Contractors in Military Operations . . 14
"Force Multiplier" and other Personnel Issues 14
Cost Issues 15
The Use of Armed Security Contractors and Implications for U.S. Foreign Policy 15

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

Introduction

For the past decade, the United States has gradually increased the types of tasks and roles for which it contracts private companies in military operations: in Iraq, the United States is relying heavily, apparently for the first time in an unstable environment, on private firms to supply a wide variety of security services.[1] These services include the protection of individuals, transport convoys, and buildings and other economic infrastructure, as well as the training of Iraqi police and military personnel.[2] U.S. contracts for these services are issued by (or on behalf of) the Coalition Provisional Authority (CPA), the U.S.-led entity that is currently exercising sovereign authority in Iraq.

While Congress has generally accepted the expanding use of unarmed private contractors to carry out support functions in military operations, such as providing food and laundry services, some Members have raised questions regarding the comparative costs and the possible long-terms effects on the military of using such contracts. The use of armed contractors performing security functions raises a whole new set of transparency, accountability, legal and symbolic issues that some Members judge troubling. Practical issues include the lack of public information on the private firms that have been contracted by the U.S. government, the recruitment and training standards for those contracted and the terms of their contracts, the rules

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

[2] Security services can also include police assistance and military training, which the U.S. has provided to other countries for many years and is providing in Iraq, as mentioned at the end of the section discussing private security companies working in Iraq under U.S. contracts, below. For more on the history and uses of police assistance, see CRS Report RL32321, *Policing in Peacekeeping and Related Stability Operations: Problems and Proposed Solutions.*

and laws that apply to their behavior and work, and the means by which they are held accountable. (Apparently in response to a perception that the U.S. government does not adequately supervise and lacks control over such contractors, the Department of Defense (DOD) is developing guidance, in conjunction with other agencies, to govern the use of such contractors. No date has been announced for its completion.)[3] A broader issue includes the desirability of relinquishing a state's monopoly on the use of force to private contractors.

This report first summarizes available information on the private contractors providing security services to U.S. government personnel, or under U.S. government contracts, in Iraq.[4] It then provides extensive information on relevant U.S., international, and Iraqi law, and legal issues involved in the use of armed contractors. It concludes with a short discussion of cost, military force, and potential foreign policy implications. This report will be updated if warranted by events.

Background[5]

There appear to be many private companies providing some form of security service in Iraq, although there is little publically available official information on which of them work under U.S. government contracts. In a May 4, 2004 letter from the Secretary of Defense to Representative Ike Skelton, DOD released an undated list, provided by the CPA, of 60 private security companies (PSCs) in Iraq.[6]

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[3] *See* the May 4, 2004 letter from the Secretary of Defense to Representative Ike Skelton, posted on Representative Skelton's website under "Press Releases."

[4] This report does not deal with private contractors performing intelligence functions, even though some reports indicate that they may be armed. For more information on such contractors, see CRS Report RL32395, U.S. Treatment of Prisoners in Iraq: Selected Legal Issues.

[5] For more background information on the operation of the CPA in Iraq, see CRS Report RL32370, *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities*.

[6] Rep. Skelton has posted the letter and accompanying documents on his website under "Press Releases." The CPA's list of names appears to contain all 25 companies on the Department of State's annotated list (complete with contact information and websites) of *Security Companies Doing Business in Iraq* at [http://travel.state.gov/iraq_securitycompanies.html], accessed as of May 17, 2004. (Two companies on the State Department list appear to be cited on the CPA list, although only the first word in their company name appears.) The State Department list includes companies from several countries (or entities) in addition to the United States: most prominently the United Kingdom, but also Australia, Hong Kong, India, Korea, South Africa, and Iraq. Each entry on the State Department list includes a description of the services offered which appear to be written by the individual companies. Some cite their precise activities in Iraq, including work for the CPA, while others do not.

The CPA list includes at least one company, Bechtel Corporation, that does not provide security services in Iraq, according to a company spokesperson. (A Bechtel spokesperson says that it has hired ArmorGroup (see below) to provide protective services.)

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According to an accompanying CPA discussion paper also provided by the Secretary of Defense to Representative Skelton, these companies employ some 20,000 Iraqis, U.S. citizens, and third country nationals. The paper states that most of the PSCs are subcontracted by companies "doing work," presumably reconstruction work, for the CPA. One academic analyst believes there are some 30 major, medium to large sized firms, with a stable presence in Iraq, providing the bulk of security services, as well as many smaller firms of a few people; he concurs that much of the PSC presence in Iraq serves the private sector there,[7] including companies which have reconstruction contracts with the CPA.

In its discussion paper, the CPA stated that it has direct contracts with eight PSCs. It did not name the firms. The CPA did state that obligations under those contracts currently total $147 million, of which some $81.4 million was to be paid for from funds appropriated by the U.S. Congress and $65.5 million from the Development Fund for Iraq (DFI).[8] The paper stated that PSC's in Iraq "provide three distinct security services: personnel security details for senior civilian officials, non-military site security (buildings and infrastructure), and non-military convoy security. These services are defensive in nature."

Details of the CPA contracts and related subcontracts are not public information. This has led to questions concerning the cost-effectiveness of the contracts as well as of any obligations of the contractors under the contracts regarding the use of force. According to the CPA, "subcontracted PSCs and their parent companies generally do not make available details concerning the prices of their contracts, salaries, or numbers of employees," because "such information is proprietary and may have privacy implications... ." Some analysts suspect that at least a few of the contracts may detail "rules of engagement" under which contracted personnel are permitted to use their weapons as a means of protecting the personnel and other assets of the companies performing reconstruction work, as there currently is no legal framework governing the use of private weapons in Iraq.[9]

At least some of the U.S. contracts for security in Iraq, including the eight referred to in the CPA discussion paper, may actually be issued by other agencies. The U.S. Department of the Army was named the CPA's "executive agent" with the responsibility of executing contracts on behalf of the CPA; according to one Army

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[6] (...continued)
It appears that a few other companies may have been erroneously listed.

[7] Telephone interview with Patrick Cullen, Doctoral Candidate at the London School of Economics, April 16, 2004, and subsequent e-mail correspondence. Cullen has studied the activities of private security contractors for the last five years; one of his case studies is Iraq. According to Cullen, agencies of the United Kingdom also contract PSCs in Iraq. Others that would contract such companies are humanitarian and other non-governmental organizations, and international organizations.

[8] The Development Fund for Iraq is the account which holds Iraq's oil revenues and other assets. The DFI is currently managed by the CPA and is audited by an International Advisory and Monitoring Board established by U.N. Security Council Resolution 1483 of May 22, 2003. Iraq will take charge of the fund upon the transfer of sovereignty.

[9] Telephone conversation with Patrick Cullen, *op.cit.*

source all CPA contracts should have been issued by the Army, which has actually issued most of them. The United States Agency for International Development (USAID) has a contract with Kroll, Inc. to provide security services for that agency's personnel, according to the Center for Public Integrity.[10]

Pay scales for these contractors reportedly vary depending on their experience and perceptions of risk. The news media reported a pay range of $500 to $1,500 per day in April 2004.[11] According to one analyst, the highest amounts are paid to highly experienced former military personnel, such as former U.S. and British special forces, with lower amounts paid to personnel from Third World countries such as Chile and Nepal, and the lowest amounts going to locally-hired Iraqis. Pay reportedly has risen recently as risk has increased.[12]

Firms Reportedly Contracted by or on Behalf of the CPA to Provide Security Services

The news media and other sources have collected some information on what some analysts believe to be the largest private security companies in Iraq and the individuals who work for them.[13] Listed below, in alphabetical order, are the eight companies that are reported to have contracts with the CPA or another U.S. government agency to provide security services or that provide security services that it is reasonable to expect the CPA or a U.S. government agency has contracted. These companies vary in size and several offer a wide variety of security-related and other services. Some were founded decades ago, some within the last few years. (Where available on company websites, dates of their founding are noted below.) Although the CPA has stated that it has contracts with eight security firms, as noted above, it has not disclosed their names, and the following list may not entirely coincide with the CPA's own undisclosed list.

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[10] Information posted October 30, 2003 [http://publicintegrity.org].

[11] David Barstow. Security Companies: Shadow Soldiers in Iraq. *New York Times*, April 19, 2004.

[12] Telephone interview with Patrick Cullen, *op.cit.*

[13] Sources consulted for these profiles include the company's website, where available, and news articles. The news articles are: Borzou Daragahi, "For Profit, Private Firms Train Iraqi Soldiers, Provide Security and Much More: Contractors Lighten Load on Troops," *Pittsburgh Post-Gazette*, September 28, 2003; Nicolas Pelham, "Rival former Exile Groups Clash over Security in Iraq," *Financial Times*, December 12, 2003; Tom Squitieri, "Role of Security Companies Likely to Become More Visible," *USA Today*, April 2, 2004; Dana Priest, "Private Guards Repel Attack on U.S. Headquarters," *Washington Post*, April 6, 2004; Emery P. Dalesio, "Security Firms Coming Under Fire in Iraq," *Associated Press* dispatch, April 11, 2004; Mary Pat Flaherty and Dana Priest. "More Limits Sought for Private Security Teams," *Washington Post*, April 13, 2004; and David Barstow. "Security Companies: Shadow Soldiers in Iraq," *op.cit.* David Lazarus, "Taking the War Private," *San Francisco Chronicle*, January 21, 2004, provided general information, as well as the amounts of three contracts. ISI Iraq is cited in the State Department list (see footnote 6) as providing security services to the CPA, but is not mentioned in any news report.

ArmorGroup, a London-based company founded over 20 years ago, provides security services to the CPA.[14] According to the State Department list cited above, ArmorGroup has offices in Baghdad, Mosul, and Basra, and "on-going operations throughout the country." On the State Department list, the company's services in Iraq are detailed as "risk assessment and management, close protection, manned guarding, technical security systems, and mine action services." [http://www.armorgroup.com] As a member of the International Peace Operations Association (IPOA), a private association of PSCs, ArmorGroup subscribes to a code of conduct that includes human rights, transparency, accountability, control, and ethical standards. The ethical standards call for association members to establish appropriate rules of engagement with their clients before deployment.[15]

Blackwater Security Consulting, founded in 1996 and headquartered in Moyock, North Carolina, provides a variety of protective services in Iraq. Its staff includes former military, intelligence, and law enforcement personnel. According to news reports, Blackwater was founded by three former Navy SEALs and has 450 armed personnel in Iraq, most of whom are former U.S. special operations or members of police SWAT teams. The four Blackwater guards killed in Fallujah on March 31, 2004, whose bodies were then dragged through the streets, were three former Army Rangers and a former Navy SEAL. They were killed while escorting trucks carrying supplies for a private company that provides food services to U.S. military dining facilities in Iraq. Blackwater personnel also protect U.S. government installations: several reportedly fought a prolonged gun battle in Najaf on April 4, 2004, defending the U.S. government headquarters there. They also protect CPA chief Paul Bremer, as well as other CPA employees and visiting dignitaries.

In February 2004, according to one source, Blackwater started training former Chilean commandos - some of whom served during the Pinochet years in Chile - for duty in Iraq.[16] The Washington Post also reported that the company has applied to establish a counterterrorism training facility near Baghdad for Iraqi forces. (It is not clear from the report whether the facility will be used to train Iraqis employed by Blackwater, or Iraq's military forces.)[17] [http://www.blackwatersecurity.com]

Custer Battles, with headquarters in McLean, Virginia, was contracted last year for $16 million to provide security at Baghdad Airport. Five of the six members of its management team have considerable military experience; four of them have experience in special operations. Established in 2001, Custer Battles opened a representative office in Baghdad in June 2003 in order to expand support and services to government organizations, humanitarian organizations, and private

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[14] News articles and Doug Brooks, President, International Peace Operations Association (IPOA). Telephone interview of April 16, 2004.

[15] The IPOA Code of Conduct is accessible through the IPOA website [http://www.ipoaonline.org/code.htm].

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

[17] Washington Post, April 6, 2004. *op.cit.*

businesses, according to its website. [http://www.custerbattles.com/press/news_061703.html]

Diligence LLC, based in Washington, D.C., reportedly provides security for government and private operations in Iraq, perhaps through its subsidiary based in Iraq, Diligence Middle East. According to its website, Diligence LLC was founded by former U.S. and British intelligence officers. Its chairman is Richard Burt, a U.S. Ambassador to Germany in the 1980s, and its advisory board is headed by William H. Webster, former head of the CIA and FBI. [http://www.diligencellc.com]

Erinys Iraq holds a major contract to protect Iraq's oil fields. The contract reportedly is worth $39 million over two years. Also, according to its website, Erinys Iraq has a contract with the U.S. Army Corps of Engineers to provide "nationwide personal security details and protective services." According to one news account, the company is a joint venture between Erinys International, (founded in 2001 and cited by some sources as a South African company, by another as British) and associates of Ahmad Chalabi.[18] The company employs a small number of former British special operations personnel as managers and trainers, according to one source,[19] and some 14,000 Iraqis to guard the wells, according to a variety of reports. According to a recent news report, four guards killed in January while working for an Erinys subcontractor had served in South Africa's security forces during the apartheid era, one of whom had applied for amnesty for crimes that he had committed.[20] (Erinys does not appear to have a website with substantive content. A list of its offices are found at [http://www.erinysinternational.com]).

Global Risk Strategies, with 1,500 private guards, is a British company founded in 1998 that provides security for the CPA. According to its website and the description of services detailed on the State Department list of private security companies (see page 4), Global Risk Strategies works with the U.S. government, the United Nations, and commercial clients "to provide significant security, logistics and facilitation services in post-conflict Iraq." In addition, Global Close Protection Teams were "working in support of the Ministries of the Coalition Provisional Authority" according to the State Department list's description of services. [http://www.globalrsl.com]

ISI Iraq is, according its description of services on the State Department list of private security companies operating in Iraq, "the only security company to provide 24 hour Iraqi security guards to the CPA 'Green Zone'." The company lists itself as part of the ISI Group, offering both security and commercial services in Iraq. No news report was found that refers to this company. [No website was found for either ISI Iraq or ISI Group.}

Special Operations Consulting-Security Management Group (SOC-SMG), based in Reno, Nevada, provides force protection and convoy protection in Iraq, according to its website. The company website states that SOC-SMG operates "from

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[18] Financial Times, December 12, 2003. *op.cit.*

[19] Telephone interview with Patrick Cullen, April 16, 2004.

[20] New York Times, April 19, 2004. *op.cit.*

a Special Operations tactical and management approach" and recruits its personnel from special operations, intelligence, and state and local law enforcement agencies. According to one news report, the company "has recruited Iraqi informants who provide intelligence that helps the company assess threats."[21] [http://www.soc-smg.com].

The Steele Foundation, of San Francisco, CA, was founded in 1989. With 500 guards in Iraq, it provides security to contractors working on reconstruction efforts and force protection for DOD and other U.S. government agencies, as well as for the CPA, according to its website. [http://www.steelefoundation.com].

Two companies are reported to provide another form of security service: the training of Iraqi security forces. (1) *DynCorp, a CSC Company,* of Reston, Virginia, has a State Department contract, reportedly worth $50 million, to provide police assistance, including the training of Iraqi police. *Vinnell Corporation*, a subsidiary of Northrop Grumman, reportedly has subcontracted MPRI of Alexandria, Virginia to train Iraqi soldiers at Kirkush, a training site near the Iranian border. The value of the Vinnell contract is said to be $48 million. The Vinnell website cites extensive experience in training international military forces, including the training of the Saudi Arabian National Guard beginning in 1975, but neither the Vinnell nor the MPRI websites refer to training of the Iraqi military, nor any other Iraq work. MPRI, founded in 1988, is an IPOA member. [http://www.vinnell.com] and [http://www.mpri.com].

Nine of the thirteen companies cited above are named on the CPA list of private security companies operating in Iraq. The four firms that are not on the CPA list are The Steele Foundation, Vinnell Corporation, Northrup Grumman, and MPRI. The list also does not include two other companies whose names have been reported in the press: Pilgrims, based in the Seychelles Islands, which provides security for Western news organizations (no website was found), and Securicor. [http://www.securicor.com].

Legal Status and Authorities

Contractors to the CPA or to any of the coalition forces in Iraq operate under three levels of legal authority: 1) the international order of the laws and usages of war and resolutions of the United Nations Security Council; 2) U.S. law; and 3) Iraqi law as amended by orders of the CPA. Under the authority of international law, contractors working with the military are civilian non-combatants whose conduct may be attributable to the United States,[22] but may be held accountable under laws

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[21] New York Times, April 19, 2004, *op.cit.*

[22] Conduct that violates international obligations is attributable to a State if it is committed by the government of the State or any of its political subdivisions, or by any official, employee, or agent operating within the scope of authority of any of these governments, or under color of such authority. AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Vol II (1987), § 207. Principles of State

(continued...)

that apply extraterritorially or within the special maritime and territorial jurisdiction of the United States. Iraqi laws that continue to apply during the occupation of Iraq, as well as regulations issued by the CPA, apply to civilian contractors, but at least until June 30, 2004, when the CPA is scheduled to transfer sovereignty to Iraq and dissolve, Iraqi courts do not have jurisdiction to prosecute them without the permission of the CPA.[23]

International Law

The international law of armed conflict, particularly those parts relating to belligerent occupation, apply in Iraq.[24] The status of armed contract personnel in such circumstances falls into a grey area.[25] While civilians accompanying the armed forces in the field are generally entitled to treatment as prisoners of war (POW)[26] if captured by an enemy State, they are considered civilians (non-combatants) who are not authorized to take part in hostilities.[27]

Can Contractors Be "Combatants"? The critical question appears to be whether the duties of contractors amount to "taking an active part in hostilities." Only members of regular armed forces and paramilitary groups that come under military command and meet certain criteria (carry their weapons openly, distinguish

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[22] (...continued)
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.

[23] Under CPA Order 17, Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors, June 23, 2003, Coalition forces are immune from Iraqi legal processes for their conduct during the period the CPA is in power. *See* CRS Report RS21820, *Iraq: June 30, 2004, Transition to Sovereignty.*

[24] For a description of law currently applicable in Iraq, *See* CRS Report RS21820, *Iraq: June 30, 2004, Transition to Sovereignty.*

[25] *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).

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

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

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

themselves from civilians, and generally obey the laws of war) qualify as combatants.[28] Because contract employees fall outside the military chain of command,[29] even those who appear to meet the criteria as combatants could be at risk of losing their right to be treated as POWs if captured by the enemy.

The Geneva Conventions and other laws of war do not appear to forbid the use of civilian contractors in a civil police role in occupied territory, in which case they might be authorized to use force when absolutely necessary to defend persons or property.[30] Given the fluid nature of the current security situation in Iraq, it may sometimes be difficult to discern whether civilian security guards are performing law-enforcement duties or are engaged in combat. If their activity amounts to combat, they would become lawful targets for lawful enemy forces during the fighting, and, if captured by such forces or an enemy government (if one should emerge), could potentially be prosecuted as criminals for their hostile acts.[31]

Are They "Mercenaries"? Mercenaries are persons who are not members of the armed forces of a party to the conflict but participate in combat for personal gain. They may be authorized to fight by a party to the conflict, but their allegiance to that party is conditioned on monetary payment rather than obedience and loyalty.[32]

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[28] GPW, *supra* note 26, art. 4; Department of the Army Field Manual (FM) No. 3-100.21, Contractors on the Battlefield para. 2-33, Chapter 2, Section on Status of Contractor Employees, January 3, 2003 [hereinafter "FM 3-100.21"].

[29] *See* FM 3-100.21, *ibid.*, paragraph 1-22 (Chapter 1, Section on Military and Contractor Distinctions):

> 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.

[30] Army doctrine does not allow civilians to be used in a "force protection" role. *See* FM 3-100.21 *op.cit.* at para. 6-3, Chapter 6, Introduction ("Contractor employees cannot be required to perform force protection functions described [in para. 6-2, Chapter 6, Introduction] 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* at para. 6-1, Chapter 6, Introduction. An Army combatant commander may issue military-specification sidearms to contractor employees for self-defense purposes, if the contractor's company policy permits employees to use weapons and the employee agrees to carry the weapon. *Id.* at para. 6-29, Chapter 6, Section on Weapons.

[31] 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) para. 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.")

[32] *See* Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War*

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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 GPW (see footnote 26), and those meeting the definition of "mercenary" under the 1977 Protocol I to the Geneva Conventions[34] 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 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 Iraqi nationals, and who were hired

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[32] (...continued)
II, 47 NAVAL L. REV. 176, 187 (2000) (recounting origin of prohibition on mercenaries after the Middle Ages).

[33] *See* Singer, *supra* note 25, 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] Protocol I, *supra* note 34, *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).

to — and in fact do — take part in hostilities might be considered to be mercenaries. On the other hand, it is not altogether clear what constitutes "direct participation in an armed conflict," and some of the other requirements are inherently difficult to prove, particularly the element of motivation.[38]

U.S. Law

U.S. contractor personnel and other U.S. civilian employees in Iraq are subject to prosecution in U.S. courts under a number of circumstances. Jurisdiction of federal statutes extends to U.S. nationals at U.S. facilities overseas.[39] Also, many federal statutes prescribe criminal sanctions for offenses committed overseas, including crimes defined as "war crimes" under the War Crimes Act of 1996.[40] Additionally, persons who are "employed by or accompanying the armed forces" overseas may be prosecuted under the Military Extraterritorial Jurisdiction Act of 2000 (MEJA)[41] for any offense that would be punishable by imprisonment for more than one year if committed within the special maritime and territorial jurisdiction of the United States.

Under MEJA, persons "[e]mployed by the armed forces" is defined to include civilian employees of the DOD as well as DOD contractors and their employees (including subcontractors at any tier).[42] Thus, whether contract employees are subject to federal court jurisdiction depends on the crime alleged to have been committed and the contractual relationship with the DOD. Because the U.S. Army was designated as the "DOD Executive Agent to support the rebuilding mission in Iraq and assigned responsibility to provide administrative, logistics, and contracting support to the Coalition Provisional Authority (CPA),"[43] most defense contractors

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[38] *See* Singer, *supra* note 25, 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] 18 U.S.C. § 7 (as amended by the § 804 of the USA PATRIOT Act, P.L. 107-56, title VIII, Oct. 26, 2001, 115 Stat. 377) defines "special maritime and territorial jurisdiction of the United States" to include:

> (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.

18 U.S.C. § 7(9) (excluding persons covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261 (see below)).

[40] P.L. 104-192, 110 Stat. 2104 (1996), *codified at* 18 U.S.C. § 2441.

[41] P.L. 106-523, 114 Stat. 2488 (2000), *codified at* 18 U.S.C. § 3261 *et seq.*

[42] 18 U.S.C. § 3267 (1)(A).

[43] See Paul Wolfowitz, Deputy Secretary for Defense, "Assignment of Responsibility for Acquisition and Program Management Support for the Coalition Provisional Authority,"

(continued...)

appear to be covered. However, personnel under contracts managed by other agencies, including the CIA and USAID, would not be covered under MEJA. Additionally, it is unclear whether contracts managed by the CPA directly, including contracts paid for using "Iraqi funds" (the Development Fund for Iraq and Iraqi seized assets)[44] would qualify as defense contracts under MEJA. Contract personnel working directly for the Iraqi interim government would not be covered.

It is less clear whether contract personnel are subject to military prosecution under the Uniform Code of Military Justice (UCMJ) for conduct that took place in Iraq. Article 2(a)(10), UCMJ, extends military jurisdiction, in "time of war," to "persons serving with or accompanying an armed force in the field." As a reflection of the constitutional issues that arise whenever civilians are tried in military tribunals, recognized by the Supreme Court in *Reid v. Covert*,[45] courts later interpreted the term "war" to mean only wars declared by Congress.[46] However, the *Reid* Court distinguished the case at issue from *Madsen v. Kinsella*,[47] in which a military spouse was tried by military commission in occupied Europe, on the basis that

> [that case] concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with Army or not.[48]

If *Madsen* remains valid, if and for so long as the United States is considered an "occupying power" in Iraq, it may be acceptable under the Constitution to subject DOD contractors there to military jurisdiction. Additionally, if offenses by contract personnel can be characterized as violations of the law of war, the UCMJ may extend jurisdiction to try suspects by court-martial[49] or by military commission.[50] However,

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[43] (...continued)
memorandum, January 14, 2004, *available at* [http://www.acq.osd.mil/sadbu/news/iraq.htm] (visited February 23, 2004).

[44] CPA Memorandum #4, Contract and Grant Procedures Applicable to Vested and Seized Assets and the Development Fund for Iraq, August 19, 2003.

[45] See Reid v. Covert, 354 U.S. 1 (1957) (overturning two cases involving civilian spouses convicted at courts-martial, pursuant UCMJ Art. 2(10) as "persons accompanying the armed forces," for the murders of their military spouses at overseas bases); McElroy v. Guagliardo, 361 U.S. 281 (1960) (civilian employee could not be tried by court-martial for conduct overseas).

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

[47] 343 U.S. 341 (1952).

[48] 354 U.S. at 35, & n 10.

[49] See 10 U.S.C. § 818 (providing jurisdiction over "any person who by the law of war is subject to trial by military tribunal").

[50] See 10 U.S.C. § 821 (preserving "concurrent jurisdiction with respect to offenders or (continued...)

the validity of *Madsen* may have been undermined for the purposes of operations in Iraq by later case law requiring a congressional declaration of war and otherwise limiting military jurisdiction over civilians.

Coalition Provisional Authority Orders

Contractors to the CPA or any of the coalition forces in Iraq operate under two orders issued by the Coalition Provisional Authority. Order Number 3, as revised on December 31, 2003, governs the use of weapons and Order No. 17 provides a special status for Iraqi contractors vis-a-vis Iraqi law. (These orders can be accessed through [http://www.cpa-iraq.org].)

Under Order Number 17, issued June 27, 2003, contractors are exempt from Iraqi laws for acts related to their contracts as long as the CPA continues to exercise sovereignty in Iraq. That order provides that such contractors and their subcontractors and employees who do not normally reside in Iraq are "not subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts in relation to the Coalition Forces or the CPA" or "with respect to licensing and registration of employees, businesses and corporations in relation to such contracts" (section 3.1). Furthermore, contractors "shall be immune from Iraqi legal processes for acts performed under the contracts" (section 3.2). Iraqi legal processes could commence for acts or omissions outside the scope of a contract only with the written permission of the Administrator of the CPA (section 3.3). The immunity to Iraqi legal processes is valid only with respect to activity that occurs during the period the CPA remains in authority (section 4). Unless arrangements are made prior to the handover of sovereignty on June 30, 2004, contract personnel will become subject to prosecution or lawsuit in Iraqi courts.

Issues for Congress

The use of private contractors in military operations raises many questions regarding the appropriateness and practicality of entrusting private companies with duties that have been traditionally reserved for military personnel. Several issues are particularly sensitive when the private contractors are used in potentially hostile situations. These are even more sensitive when they are hired to use arms, even on a strictly defensive basis. These issues are briefly discussed below.

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[50] (...continued)
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).

General Issues Regarding the Use of Contractors in Military Operations[51]

"Force Multiplier" and other Personnel Issues. Contractors have been used extensively over the past decade in many tasks, a great number of which do not require military expertise, in an attempt to ease the strain on a downsizing military as it carried out extensive contingency operations. The contractors were viewed by many as a "force multiplier." By supplementing overstretched active duty personnel with contractors in such jobs as feeding, housing, and otherwise caring for soldiers' basic needs, policymakers hoped to meet the demands on the force while minimizing the call-up of reserve units to provide support services. In some cases, according to the GAO, limits on the number of U.S. military personnel that could be used in an area also "lead DOD to use contractors to provide support to its deployed forces."[52]

Those dubious of the wisdom of the extensive use of private contractors in military operations have raised potential downsides to the "force multiplier argument." For one, two analysts for the 1995 Commission on Roles and Missions (CORM) found that reliance on contractors could prove detrimental to military capabilities in three ways. It could, they argued, (1) keep the United States "from building and maintaining capacity needed for strategic or other important missions;" (2) limit training opportunities in some military specialties,[53] and (3) result in inadequate stocks of equipment needed to perform certain tasks.[54] Although some have argued that private contractors can be deployed more quickly than military forces, others have argued that military commanders can respond more quickly to changing situations when military forces rather than contractors are used. Commanders do not have the authority to amend contracts in the midst of an operation to reallocate contract employees to perform necessary tasks that fall outside the terms of the contract.

Questions are also raised as to whether private contractors are reliable and provide as high a quality service as military personnel, particularly in risky situations. Although proponents of private contractor services argue that security personnel, because many are former soldiers or equally dedicated to the national mission, are as responsible as serving military personnel, contract personnel cannot be tried by court-

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[51] This section draws heavily on the section on commercial contractors in CRS Report 97-454 F, *Peacekeeping Options: Considerations for U.S. Policymakers and the Congress*, April 10, 1997.

[52] According to the GAO, this included cases where such limits (or caps) were set by law, executive direction, or agreements with host countries or other allies. GAO Report GAO-03-695, p. 8.

[53] *See* GAO Report GAO-03-695, *op.cit*, p. 9.

[54] Christine Cervenak and George T. Raach. "Contracting and Privatization in Peace Operations," in *Peace Operations: Developing An American Strategy*, edited by Antonia Handler Chayes and George T. Raach. Washington, D.C.: National Defense University Press, 1995, pp. 137-151.

martial for desertion, for example. The DOD has recognized the risk that contractors may not be available in crisis or hostile situations.[55]

A related issue is whether private companies with reputations for supplying high quality personnel can maintain that standard as demand increases. While U.S. companies have generally hired U.S. professional military personnel with established careers, who may still possess the discipline, professionalism, and *espirit de corps* that the U.S. armed forces seeks to instill in its soldiers, the increasing use of private personnel may reduce the quality of contractor recruits in periods of high demand unless the private companies were willing to invest in continued training. Periods of high demand may also result in a drain on highly-qualified military personnel, as reports indicate that private companies are recruiting active-duty U.S. special operations and other forces by offering substantially more money than they earn as soldiers. The fact that contractor employees are not subject to military law and fall outside of the military chain of command may make it more difficult for private companies to maintain discipline among their employees.

Cost Issues. While many proponents of the use of military contractors have argued that it is more cost effective than employing military forces, some analysts argue that the relative cost advantage of contractors can vary according to the circumstances, and may disappear altogether. Private contractors can incur much lower costs by using local hires extensively, as they do not have to transport them, house or feed them, and can pay them wages that are relatively low compared to the cost of activating reservists. However, the military could also significantly reduce the costs of deploying soldiers in several ways: cutting transportation costs (by extending the length of deployments or by using resources and supplies from areas closer to the operation, for instance) and by reducing the standard of living of troops in the field in peacekeeping operations (by cutting back on exercise facilities and other amenities, for example).

Not only are relative costs highly dependent on circumstances, the types of troops and personnel deployed, and the terms negotiated in a contract, but calculations of such costs can differ depending on what expenses they include. Some analysts have argued that the costs of contractors have been underestimated because such cost calculations do not generally factor in the cost of security provided by military forces. Others believe that calculations of the cost of military forces should include prorated costs of military training, pensions, and other benefits. On the other hand, some argue that private contractors can profit from a taxpayer investment in military training when they hire away career soldiers.

The Use of Armed Security Contractors and Implications for U.S. Foreign Policy

The use of private security contractors who are hired to carry weapons, albeit just for defensive purposes, may well affect U.S. foreign policy goals in ways that the

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

use of contractors for routine tasks might not, some policymakers fear. U.S. and foreign publics may well expect personnel who are legally permitted to use deadly force to be highly trustworthy. Thus, accountability issues, such as the U.S. government's inability to discipline errant contract employees and the perceived difficulties of holding U.S. and third-country national employees legally accountable for abuses or criminal acts may become more salient when contractors are armed. A lack of strict accountability in case of an abuse by a contractor could severely undermine goodwill towards the United States or incur liability on the part of the United States for a breach of its international obligations.

Of immediate concern to some policymakers is whether the United States' commitment to observe and promote human rights and humanitarian law is undermined by the types of personnel hired by some contractors. For some policymakers, the reported employment of South Africans who served in the military during the years of apartheid, one of whom reportedly has confessed to human rights abuse, and of Chileans, who reportedly served during the period of military rule, is problematic.[56] Employment of such personnel indicates not only a lack of transparency in the U.S. contracting system, as the names of those contracted is kept confidential, but also a lack of adherence by contractors to U.S. foreign policy interests and goals. At best, some argue, it sends dubious signals about U.S. seriousness about human rights and, at worst, raises the possibility that such contractors may commit abuses in Iraq, for which the United States may be responsible under international law. Some analysts counter, however, that the most important consideration in hiring such personnel is their degree of military professionalism and training in the disciplined use of weapons, as former soldiers with good records in such areas would be much less likely to commit abuses and fire their weapons without good cause than less qualified personnel.

A third issue with foreign policy implications is the desirability of entrusting the capability to legally use force on behalf of the United States to private, including non-U.S., citizens. Although many analysts perceive the officially-sanctioned private use of force as significantly eroding the modern state's monopoly on the use of force, whether this erosion is beneficial or detrimental to U.S. foreign policy and to the international order is a matter of dispute.[57] To the extent that private companies are perceived as participating in combat operations, it may be difficult for the United States to persuade other states to recognize contractors' rights to protection under the Geneva Conventions. On a symbolic level, the use of private companies instead of

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

[57] Although this debate encompasses uses of private security contractors for tasks that are more extensive than those currently carried out by such contractors in Iraq, the general considerations apply. For an examination of a variety of related issues and perspectives, see, among others: Deborah Avant, *The Privatization of Security and Change in the Control of Force*, International Studies Perspectives, Vol. 5, Issue 2, May 2004; David Shearer, *Outsourcing War*, Foreign Policy Magazine, Fall 1998; and P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Ithaca and London: Cornell University Press, 2003.

national military forces may be perceived by some observers as signaling a lesser U.S. commitment.