Contractors on the Battlefield: The US Approach

by

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The American experience with civilian contractors on the battlefield reaches back to the very birth of the nation. During the War of Independence, for instance, Great Britain retained the services of nearly 20,000 Hessians who fought for seven years alongside the British until the ultimate "colonial" victory at Trenton, New Jersey, in 1776. Later, during the various Indian Wars, civilian contractors provided services not resident in the US military, such as foraging and scouting. They were also prominently present in numerous other conflicts, both international, such as the 1846 Mexican-American War, and internal, most notably the 1861-1865 Civil War.

In the next century, the use of civilians on or near the battlefield continued apace. During the Second World War, former American military personnel under contract to the Central Aircraft Manufacturing Company of China comprised the American Volunteer Group (Flying Tigers), which supported US and British forces in Burma and China from 1941 to 1942. Another well-known example of contractors in combat occurred during the 1941 Battle for Wake Island. Many of the civilian construction contractors, who constituted over 2/3 of the US personnel on the island, volunteered to help defend the island against the Japanese invaders. Following the Japanese victory, all surviving civilians, whether they had participated in the hostilities or not, were afforded prisoner of war status by their captors.[2])

Civilian contractors are proving ever more indispensable to military operations in contemporary conflicts. During the Gulf War of 1991, one in fifty deployed Americans was privately employed. By the time of the Operation Joint Endeavour in Bosnia and Herzegovina (Implementation Force -- IFOR) in 1995-6, the figure had grown to one in six.[3])

However, it was the occupation of Iraq following defeat of the Saddam Hussein's military in May 2003 that proved the watershed in military use of contractors in conflict environments. Not only did the United States and its coalition partners require civilian contractors to support their service members, but they also required contractor assistance to meet their obligations as occupiers under the law of occupation. Article 43 of the 1907 Hague Regulations provides: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while re-

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[2]) These examples derive from an excellent report, "Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces," prepared by Mr. Hays Parks for the ICRC/Asser Institute project on direct participation (on-file with author).
[3]) P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca: Cornell University Press, 2003), at ch. 1, fn. 73. Although the mission in Bosnia was dramatically different from that in Iraq because it demanded less combat capability, the extent of the difference in figures nevertheless clearly illustrates a trend in the direction of civilianization.

specting, unless absolutely prevented, the laws in force in the country."[4]) In other words, it is the responsibility of the occupier to fill shortfalls in the civilian population's basic needs until such duties can revert to the government. Further, occupiers shoulder responsibilities for the occupied territory under the terms of the Fourth Geneva Convention of 1949.[5]) For instance, they must, inter alia, ensure the care and education of children,[6]) make sure sufficient food and medicine is available,[7]) and maintain medical services for the population.[8])

The Security Council supplemented these treaty-based obligations by adopting a number of resolutions regarding care of the civilian population and reconstruction of the country. In them, the Council urged States to take actions that well went beyond the requirements of IHL.[9]) Resolution 1483, for instance, called upon "all Member States in a position to do so to … help meet the humanitarian and other needs of the Iraqi people by providing food, medical supplies, and resources necessary for reconstruction and rehabilitation of Iraq's economic infrastructure." [10]) Similarly, Resolution 1511 urged member States to act in the reconstruction of Iraq.[11])

On the ground, the combination of the treaty obligations, Security Council appeals, and policy decisions of the US and its partners resulted in massive effort to rebuild Iraq while simultaneously providing for the well-being of the Iraqi population. Roads needed to be rebuilt, water and electricity had to be restored, schools had to be repaired, medical care had to be provided, the economy needed to be resuscitated, and so forth. The requirements far exceeded the capabilities of the occupation forces and, at least as the occupation began, it was difficult to identify Iraqis with the necessary expertise to quickly and reliably begin the effort. That the United States and its coalition partners turned to private companies to perform many of the tasks should come as little surprise.

They did so comprehensively. In addition to the 126,900 US troops in Iraq by mid-2006,12 the US government also employed 38,305 civilian contractor and subcontractor personnel for logistics purposes,[13]) and there were roughly 60 contract security services firms present with some 25,000 employees.[14]) To place the latter figure in per-

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[4]) Convention (IV) respecting the Laws and Customs of War on Land, Annexed Regulations, Oct. 18, 1907, art. 43, 36 Stat. 2277, 205 Consol. T.S. 277, 1 Bevans 631. The Hague Regulations have been recognized by the Nuremberg Tribunal [Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, at 65] and the International Court of Justice [*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), para. 79; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, July 9, 2004, para. 89] as customary in nature.
[5]) Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 UNTS 287. All four Geneva Conventions of 1949 were deemed customary by the ICJ in the *Nuclear Weapons* Case, *supra*, para. 79.
[6]) GC IV, *supra*, art. 50.
[7]) *Id*. art. 55.
[8]) *Id*. art. 56.
[9]) For a discussion of occupation rights and duties in Iraq, see Michael N. Schmitt & Charles H.B. Garraway, "Occupation Policy in Iraq and International Law," 9 *International Peacekeeping: The Yearbook of International Peacekeeping Operations 27* (2005).
[10]) UNSC Res. 1483 (May 22, 1983).
[11]) UNSC Res 1511 (Oct. 16, 2003).
[12]) Michael E. O'Hanlon & Andrew Kamons, "Iraq Index: Tracking Variables of Reconstruction and Security in Post-Saddam Iraq," The Brookings Institution, Aug. 21, 2006, www.brookings.edu/fp/saban/iraq/index.pdf, at 20.
[13]) *Id*. at 15.
[14]) Government Accountability Office, "Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers," GAO-05-737, July 2005, at 8.

spective, there are presently only 18,000 non-US foreign troops in Iraq.[15]) That these contractors are serving at the heart of the Iraqi "battlespace" is tragically demonstrated by their death toll as of August 2006 -- 348, of whom 135 are Americans.[16])

A number of factors impel reliance on civilians to perform support functions for the military.[17]) In many cases, they posses specialty expertise, such as operating and maintaining equipment on which military personnel are untrained; sometimes maintenance and operation of equipment is actually an integral aspect of the acquisition contract itself. Civilian contractors may also be less costly than uniformed personnel, for whom training and support costs (e.g., pensions, medical care, and family support) can be high (the premise of the "cheap contractor" is under challenge). Perhaps most importantly, although demands on contemporary militaries are increasing, political and fiscal factors have led to a near-universal force structure downsizing. In this environment, the use of civilian contractors for combat support and combat service support functions frees up a greater percentage of uniformed personnel for combat and other operational missions.[18])

The growing reliance of the US military on civilians in operations ranging from peace enforcement to warfighting and occupation has focused the attention of both the armed forces and civilian decision-makers on the acceptable parameters of their activities. This article describes current US policies regarding the use, and conduct, of civilian contractors on or near the battlefield. Hopefully, it will offer a helpful comparative perspective for non-US militaries, most of which are also resorting to civilian contractors to accomplish necessary taskings. Additionally, foreign militaries engaged in coalition operations with the United States regularly rely on the heavily civilianized US support structure. It behooves such militaries to understand that system and its constraints and limitations.[19])

The US Contracting System

Four types of contractors provide support to combat forces. They are distinguished by both the nature of the support they provide and the entity which exercises authority over them.[20])

Theater support contractors (also known as internal support contractors) are typically local commercial entities that provide goods, services, or minor construction to meet the

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[15]) Department of State, "Iraq Weekly Status Report," Aug. 23, 2006, at 27, www.state.gov/documents/organization/71613.pdf.

[16]) "Iraq Coalition Casualty Count," icasualties.org/oif/default.aspx.

[17]) See generally discussions in Michael N. Schmitt, "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees," 5 *Chicago Journal of International Law* 511 (2005); Michael N. Schmitt, "'Direct Participation' in Hostilities" and 21st Century Armed Conflict," in *Crisis Management and Humanitarian Protection: Festschrift fur Dieter Fleck* (Berlin: BWV, Horst Fischer et al eds., 2004), at 505.

[18]) Combat support includes "fire support and operational assistance provided to combat elements." Combat service support encompasses "the essential capabilities, functions, activities, and tasks necessary to sustain all elements of operating forces in theater at all levels of war. Within the national and theater logistic systems, it includes but is not limited to that support rendered by service forces in ensuring the aspects of supply, maintenance, transportation, health services, and other services required by aviation and ground combat troops to permit those units to accomplish their missions in combat." Department of Defense, *Dictionary of Military and Associated Terms* (Joint Publication 1-02), as amended throug14 April 2006, www.dtic.mil/doctrine/jel/doddict/.

[19]) The description is current as of 1 July 2006. Note that the US military continues to refine its policies on the use of civilian contractors.

[20]) The basic US system is described in Department of the Army, *Contractors on the Battlefield*, Field Manual 3-100.21, Jan. 2003, at ch. 1. See also, Air Force General Counsel, Guidance Document, "Deploying with Contractors: Contracting Considerations," Nov. 2003.

immediate needs of deployed forces. They act under the contracting authority of a chief of contracting responsible for a specified geographical area, for instance Iraq.[21]) By contrast, *external support contractors* perform services for deployed forces on a much larger scale. Contracting officers from organizations that exist for support purposes control them. External support contractors are usually US companies, with employees who may be US citizens, citizens of third countries, or citizens of the country in which US forces are operating. As an example, the US Transportation Command (USTRANSCOM) manages commercial sealift contracts. The third category, *systems contractors*, provides support for equipment used by the US military or operated on its behalf, such as weapons systems, aircraft, and command and control nets. Although not always the case, they often support new or partially fielded systems, both during training and deployment.[22]) US citizens make up most systems contractor employees, while program managers for a specific system generally oversee contract performance. Finally, in addition to supporting deployed US forces, the US military may contract with civilians and civilian firms to provide *other services*. This is the case with reconstruction contracts for Iraq, as well as contracts with private security firms to guard those performing them.

The key actor in the contracting system is the "contracting officer." Most significantly, only contracting officers may enter into or terminate contracts. They also administer contract performance. Legal authority to perform these functions lies in a "warrant," which authorizes contracting officers to obligate US government funds. Contracting officers may, in turn, appoint "contracting officer's representatives" (often from the unit or organization receiving the contracted-for services or items) to monitor the day to day performance of the contractor. A "statement of work," which delineates the specifications of the material purchased or the nature of the services to be provided, sets forth the various contractual obligations of the parties.

In a broad, non-legal sense, oversight of US military contractors is the responsibility of the regional Combatant Commander, i.e., the senior US commander for the "area of responsibility" (AOR). In Iraq and Afghanistan, for instance, the Commander of Central Command (CENTCOM) shoulders overall responsibility for mission accomplishment. That responsibility flows down through the chain of command to subordinate commanders in the field.

Yet, as a matter of law, the contractor's relationship with the military is purely contractual in character. Thus, the scope of control over contractor employees and their activities is limited by the terms of the statement of work, as well as other provisions of the contract and federal law, such as the Federal Acquisition Regulation (FAR).[23]) The contracting officer (or designated representative) oversees compliance therewith, not the commander receiving the material or services. Moreover, contractor personnel are in no way government employees subject to federal civil service regulations. Rather, they work for the contractor, who is solely responsible for their actions.[24])

In addition to monitoring by the contracting officer, numerous external oversight mechanisms exist. As a general matter, and because Congress controls the "purse strings" of the

[21]) The "chief of contracting" is the senior US government contracting officer responsible for the area.

[22]) Examples of military systems receiving such support are the Predator and Global Hawk unmanned aerial vehicle systems.

[23]) "The FAR is the primary regulation for use by all Federal Executive agencies in their acquisition of supplies and services with appropriated funds." *Federal Acquisition Regulation*, at foreword, farsite.hill.af.mil/VFFARa.HTM.

[24]) See discussion in FM 3-100.21, supra note 19, paras. 4-20 – 4.24.

Department of Defense (DoD), Congressional committees often hold hearings to address matters involving government contracts. On a more direct level, the US Congress' Government Accountability Office (GAO) monitors the efficiency and propriety of expenditure of federal monies by government agencies. It is authorized to audit or investigate potentially problematic contract performance and issue decisions and opinions thereon. GAO has audited numerous contracts regarding security in Iraq.[25])

A number of Department of Defense organizations provide further oversight of the DoD contract system. The Office of the Inspector General (IG) is the Department's equivalent of the GAO. Pursuant to federal legislation,[26]) the IG provides independent inspections, audits, and investigations of DoD activities, including civilian contract functions, in order to prevent or identify fraud, waste, abuse, and mismanagement. More narrowly focused is the Defense Contract Audit Agency. Operating under control of the Under Secretary of Defense (Comptroller), the Agency conducts audits throughout the DoD. It also provides advisory services regarding procurement and contract administration for other DoD entities. Finally, the Defense Contract Management Agency performs certain contract administration services, including a number bearing on activities in Iraq.[27]) It is less a watchdog than a DoD organization providing specialized contract administration services.

US Policy Guidance on Contractor Activities

Policy guidance and general guidelines on the use of contractors by the US armed forces is set forth in Department of Defense Instruction (DoDI) 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces.[28]) The Instruction applies to "defense contractors and employees of defense contractors and their subcontractors at all tiers under DoD contracts, including third country nationals and host nation personnel, who are authorized to accompany the U.S. Armed Forces under such contracts." [29])

Of particular note is the express requirement that DoD entities abide by applicable domestic policy and law, as well as international agreements, regarding contractors.[30]) With regard to international law, the Instruction states that contractors may support military operations as "civilians accompanying the force, so long as such personnel have been designated as such by the force they accompany and are so provided with an appropriate identification card under the provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War." [31]) Pursuant to that convention, civilians accompanying the force are entitled to prisoner of war status in the event of capture.[32])

[25]) Secretary of the Army, "Public Law 108-375, Section 1206 Report," undated, at 8. This report provides an excellent summary of contractor activities in Iraq, as well as Operation Iraqi Freedom-specific oversight mechanisms.

[26]) Inspector General Act, Public Laws (PL) 95-452 & 97-252.

[27]) Designated by Department of Defense, *Defense Contract Management Agency*, DoD Directive 5105.57, Sept. 27, 2000.

[28]) Department of Defense, Contractor Personnel Authorized to Accompany the U.S. Armed Forces, DoD Instruction 3020.41, Oct. 3, 2005 [Issued by USD(AT&L)]. Individual services may also issue regulations governing the use of *contractors*. In particular, see Army Regulation 715-9, Contractors Accompanying the Force (imminent publication pending; previous edition dated 1999). For an excellent description of the US system overall, with particular emphasis on law, see Judge Advocate General's Legal Center & School, Operational Law Handbook (2006), at ch. 6 & 7.

[29]) *Id.,* para. 1.

[30]) *Id.,* para. 6.1.

[31]) *Id.,* para. 6.1.1.

[32]) GC IV, *supra* note IV, art. 4A(4).

Equally important is the proviso that "[c]ontingency contractor personnel may support contingency operations through their *indirect participation* in military operations, such as by providing communications support, transporting munitions and other supplies, performing maintenance functions for military equipment, providing [certain defined] security services, …and providing logistics services such as billeting, messing, etc." [33]) When performing such functions, contractors are generally prohibited from wearing "military or military look-alike" clothing or carrying arms, although they may exercise the "inherent right of individual self-defense." [34]) The prohibitions are designed to prevent them from appearing to be combatants.

Inclusion of "indirect participation" is telling in light of an on-going debate in international humanitarian law circles regarding the scope of the term "direct participation in hostilities." Article 51.3 of Additional Protocol I to the Geneva Conventions provides that civilians enjoy immunity from attack "unless and for such time as they take a direct part in hostilities." [35]) Reduced to basics, this provision, which is accepted as customary international law,[36]) means that civilian contractors who become "too involved" in the conduct of hostilities become lawfully targetable.

The International Committee of the Red Cross and the TMC Asser Institute are spearheading a multiyear effort by IHL experts to explore the notion of direct participation, especially the activities that qualify (and when they qualify).[37]) Inclusion of the illustrative activities in the DoD Instruction unambiguously indicates that the United States deems them not to cross the line into direct participation in hostilities. This step is significant for the ICRC/Asser project, for whereas some activities, such as providing messing services, are uncontroversial (self-evidently not direct participation), agreement had not been reached on, for instance, performing maintenance on military equipment (at least not for that immediately preceding attack). The US policy guidance is certain to influence further discussions of the subject. Given the sensitivity of the matter, the Instruction's mandate that "[e]ach service…performed by contingency contractor personnel…shall be reviewed on a case-by-case basis in consultation with the servicing legal office to ensure compliance with relevant laws and international agreements" is sage.[38])

Beyond the activities specifically cited, the Instruction also references various sources

[33]) Id. A "contingency is defined in US law as 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 this title [10 USCS § 688, 12301(a), 12302, 12304, 12305, or 12406, chapter 15 of this title [10 USCS §§ 331 et seq.], or any other provision of law during a war or during a national emergency declared by the President or Congress.
10 USC 101(a)(13).

[34]) DoDI 3020.41, *supra* note 27, paras. 6.2.7.7 & 6.2.7.8. In certain circumstances when adequate military or host nation protection is unavailable for contractor employees, they may be authorized to carry weapons. Such weapons may only be used for self-defense. *Id.,* para. 6.3.4.

[35]) Protocol Additional (I) to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 51.3, Dec. 12, 1977, 1125 UNTS 3, 16 *International Law Materials* 1391 (1977).

[36]) Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law* (3 vols.) (Cambridge: Cambridge U.P., 2005), at discussion accompanying Rule 6.

[37]) See description and interim reports on the ICRC website, www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205?opendocument.

[38]) DoDI 3020.41, *supra* note 27, para. 61.1.

that limit the types of activities that contractors may perform.[39]) They are of significance in light of the direct participation issue highlighted above. Of particular importance are the standards set forth in the "Manpower Mix Criteria" issued by the Under Secretary of Defense for Personnel and Readiness.[40]) Mix criteria designate specified functions for performance by military personnel, civilian employees, or contractors based on factors such as "vulnerability to hostile fire" (since such vulnerability impacts issues such as command and control, discipline, UCMJ authority, and required combat training). For instance, under the criteria, combat and operational command and control of military forces are "military essential" duties in which civilians may not engage.[41]) Similarly, civilians may not perform support functions in situations where "the continued, proper, and timely execution of the function under hostile conditions has to be assured or safeguarded through UCMJ authority and discipline and military training." [42]) And because they may provide services for prisoners of war pursuant to the Geneva Conventions, only military, not civilian, medical and chaplaincy personnel are permitted to operate where there is a "high likelihood of hostile fire, collateral damage or capture." [43]) The most prevalent thread running through the criteria is the extent to which UCMJ authority over those involved allows commanders to effectively conduct of military operations.

Of special concern vis-à-vis the activities contractor perform are security services. As should be apparent from the plethora of private military firms operating in Iraq, at times the US government turns to civilians to provide personal, facility, and activity security. Indeed, security for senior US officials in-country, like Coalition Provisional Authority (CPA) Administrator Ambassador Bremer, was often provided by contract employees. The DoD Instruction on contractors specifically makes provision for such activities, permitting them when they do not involve security for "uniquely military functions." [44]) However, it correctly notes that the security functions are legally complex. Relevant factors include the nature of the operation and of the conflict in which it is taking place, the type of entity being protected, the existence of a status of forces agreement, and the content of host nation laws. In light of the complexity, a requirement for review by the Combatant Commander's Staff Judge Advocate is imposed, and the Instruction cautions that contractor employees "who exceed the limits imposed by applicable law may be subject to prosecution." [45])

Beyond matters relevant to international law, the Instruction specifically notes that contingency contractor personnel must comply with the domestic law of the host nation, as well as relevant third country national laws. Since the host nation exercises sovereignty over the territory on which the contractor operations occur, its law governs contract operations and contractor personnel. As the Instruction acknowledges, however, status of forces agreements or other international agreements with the host nation may, as discussed below, affect the jurisdictional reach of host nation courts.[46])

DoDI 3020.41 further highlights the fact contractor employees can be subject to US crimi-

[39]) They also address civilian government employees.

[40]) Under Secretary of Defense (Personnel and Readiness) Memorandum, "Use of the Manpower Mix Criteria," Dec. 15, 2003, www.dod.mil/prhome/docs/manmix.pdf.

[41]) Guidance for Determining Military Manpower Mix, www.dod.mil/prhome/docs/criteria_mix_04.doc.

[42]) *Id.,* enclosure 1, para.1.1.3.

[43]) *Id.,* enclosure 1, para.1.1.4. See, *inter alia,* Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, ch. IV, 75 UNTS 135.

[44]) DoDI 3020.41, *supra* note 27, para. 6.3.5.

[45]) *Id.*

[46]) *Id.,* paras. 6.1.6 & 6.1.7.

nal prosecution for unlawful actions. Relevant US statutes include the Military Extraterritorial Jurisdiction Act (MEJA), the War Crimes Act, the Patriot Act, and the Uniform Code of Military Justice (UCMJ). Each is discussed in greater depth in the following section.

Lest the Instructions provisions be deemed merely hortatory government policy, the Defense Federal Acquisition Regulation Supplement (DFARS) provides for inclusion of analogous clauses in government contracts involving civilian personnel who accompany the US armed forces abroad.[47]) Specifically, the DFARS contractually requires the contractor and its personnel authorized to accompany US Armed Forces deployed outside the United States to be familiar with and comply with, all applicable:

(1) United States, host country, and third country national laws;
(2) Treaties and international agreements;
(3) United States regulations, directives, instructions, policies, and procedures; and
(4) Orders, directives, and instructions issued by the Combatant Commander, including those relating to force protection, security, health, safety, or relations and interaction with local nationals.[48])

The DFARS also requires inclusion of a clause requiring contractors to notify their employees who are not host nation nationals or ordinarily resident in the host nation that certain misconduct may render them prosecutable pursuant to the MEJA, the War Crimes Act, the Special Maritime and Territorial jurisdiction of US courts, and the Uniform Code of Military Justice.[49])

Control over contractors, or lack thereof, is understandably a determinative factor in what they are entitled to do on or near the battlefield. It is the contractor, not the armed forces, who is responsible for ensuring their employees perform in accordance with the terms of the contract, comply with the relevant theatre orders and regulations (e.g., ban on consumption of alcohol), and maintain discipline. And it is not the commander who monitors the contractor's compliance with such obligations; rather, as noted, it is the government "contracting officer" or her designee who do so, imposing pecuniary penalties for "non-performance" or poor performance of contractual obligations.[50])

Should a contract employee engage in misconduct, it is the contractor, not the military, which is responsible for disciplining him. Military commanders may simply take administrative actions: denying access to classified information, revoking privileges to use facilities (e.g., exchange stores or commissaries), or barring entrance to the military installation, etc. If the misconduct is criminal in nature, the Department of Justice is typically responsible for prosecution pursuant to the legislation discussed below.

Responses to Contractor Misconduct

One of the most contentious issues regarding the use of contractors on or near the battlefield is the accountability, or the relative lack thereof, of contractor employees who engage in criminal activity. In Iraq, contracts with the US government contain a clause to the effect that contractors bear responsibility for ensuring their employees adhere to the orders and directives of the responsible military command and otherwise comply with all applicable

[47]) The DFARS contains federal regulatory guidance concerning DoD contracting. It supplements the Federal Acquisition Regulation (FAR) (*supra* note 22) which sets out that regulatory guidance which applies to all federal agencies (including the DoD).
[48]) Defense Federal Acquisition Regulation Supplement, clause 252.225-7040, para. (d), June 2006.
[49]) *Id*., para. (e)(2). Each is discussed below.
[50]) DoDI 3020.41, *supra* note 27, para. 6.3.3. A commander may direct contractors in emergency situations so long as the activities involved are not "inherently governmental" (e.g., engaging in combat).

laws and regulations. Contractors which do not comply with their contractual obligations render themselves subject to contractual penalties, usually pecuniary in nature, set forth in the contract. In egregious cases, failure can result in "termination for cause" of the contract or temporary/permanent debarment (possibly rendering him ineligible from further contracting with the government).

Individual criminal accountability for misconduct is much more problematic.51) While certain US federal criminal laws are either expressly or implicitly extraterritorial in nature, the vast majority apply only within the "special maritime and territorial jurisdiction" of the United States, a term discussed below. In effect, this means that most federal criminal law applies only to offences committed within the US territory. Similarly, the criminal law of individual States – which constitutes the bulk of criminal law in the United States – generally only applies within State borders.

Typically, US civilians abroad are subject to the criminal laws of the nation in which they are located. However, "host" States are often uninterested in or incapable of prosecution.[52]) Sometimes the crime generates little interest because it is "inter se," that is among Americans as victim(s) and criminal. For instance, a member of a US military family or a civilian government employee may commit an offense against another American on a US military installation overseas, an act thereby having little bearing on law and order in the local community. More relevant in this inquiry is the case of the less-than-fully functioning government, as is typically is the case in conflict and post-conflict zones.

The specter of contractor misconduct, and the absence of accountability, achieved particular prominence when employees of DynCorp, a US firm based in Virginia, were accused of sexual trafficking of women and children in Bosnia in 2000.[53]) Although the employees were transferred out of the country, none were prosecuted. With regard to Iraq and Afghanistan, some 20 cases involving CIA personnel or military contractors have been referred to the Department of Justice, but only one, that of a CIA contractor (see below), has resulted in prosecution.[54]) Indeed, as will be discussed, in some cases civilian contractors enjoy criminal immunity from prosecution by virtue of an agreement between the United States and the host government.

In an effort to fill this *de facto*, if not *de jure*, void, in 2000 Congress passed the Military Extraterritorial Jurisdiction Act (MEJA).[55]) The act rendered members of the Armed Forces[56]) and civilians "employed by or accompanying the Armed Forces outside the United States" subject to prosecution for violations of federal felonies (imprisonment of

[51]) For a survey of the topic, see Robin Donnelly, "Civilian Control of the Military: Accountability for Military Contractors Supporting the U.S. Armed Forces Overseas," 4 *Georgetown Journal of Law and Public Policy* 237 (2006).

[52]) For a discussion of this topic, see Report to Accompany H.R. 3380, House of Representatives Report 106-778, July 20, 2000.

[53]) Leslie Wayne, "America's For-Profit Secret Army," *The New York Times*, Oct. 13, 2002, at 1.

[54]) Scott Shane, "C.I.A. Contractor Guilty in Beating of Afghan Who Later Died," *The New York Times*, Aug. 18, 2006, at 8.

[55]) 18 United States Code (USC) 3261. Interestingly, the prime concern motivating passage of MEJA was commission of misconduct abroad by spouses of military personnel. On the genesis of MEJA, see Glenn R. Schmitt, "The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad - Problem Solved?," *Army Lawyer*, Dec. 2000, at 1.

[56]) Although the act was primarily directed at civilians, the inclusion of service members was designed to address the case of the military member who committed a crime while on active duty abroad, but who had since left the military and, thus, was no longer subject to military prosecution under the Uniform Code of Military Justice.

a year or more[57]) which occur outside the United States. The term, "employed by" refers to civilians directly employed by the armed forces, Department of Defense contractors and subcontractors, and employees of the contractors or subcontractors.[58]) Prosecution under the Act is not permitted if a foreign government has prosecuted or is prosecuting the individual for the acts involved unless approved by either the United States Attorney General or his Deputy.

There was a shortcoming in the legislation that became apparent as soon as reports of prisoner abuse at the hands of contractors and civilian intelligence personnel in Iraq and Afghanistan surfaced – the act did not extend to employees or contractors of US government agencies other than the Department of Defense. Certainly, some of those accused of mistreatment, such as the Titan employees under contract to the military identified in the Army's investigations, were chargeable pursuant to MEJA.[59]) In fact, referral to the Department of Justice was one of the recommendations contained in the report, although none of those implicated has been indicted to date.60 However, some of those involved operated under contract to non-DoD government agencies. For instance, one of the civilians implicated in the Abu Ghraib affair worked for CACI, which was under contract to the Department of Interior.[61]) Others accused of abuse were under contract to the CIA. Such individuals fell beyond the reach of the statute.

In response, Congress began crafting legislation that would extend the personal jurisdiction of MEJA. After several false starts, in late 2004 an amendment to MEJA passed that extended jurisdiction over contractors (and their employees) of "any other Federal agency, or of any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas." [62]) In other words, there must be a nexus to military operations, but there need not be a contractual relationship with the armed forces.[63]) How courts will interpret the phrase "relates to supporting the mission" remains to be seen.[64])

In March 2005, the DoD issued implementing instructions for the MEJA in the form

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[57]) Thus, it would not apply, for instance, to simple assault (a likely offence in the handling of detainees), for which the maximum criminal federal criminal punishment is six months imprisonment. 18 USC 113(a)(5).

[58]) The term "accompanying the Armed Forces" refers to dependents who reside with military personnel, civilian government employees or DOD contractors abroad.

[59]) For identification of the civilian contractor's involved and an expression of concern regarding insufficient supervision of civilian contractors, see the "Taguba Report." Article 15-6 Investigation of the 800th Military Police Brigade, www.npr.org/iraq/2004/prison_abuse_report.pdf#search=%22taguba%20report%22.

[60]) LTG Anthony Jones & MG George R. Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (2004), www.defenselink.mil/news/Aug2004/d20040825fay.pdf. On the problems associated with the use of contractors, see Martha Minow, "Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy," 46 *Boston College Law Review* 989 (2005).

[61]) Ellen McCarthy & Renee Merle, "Contractors and the Law," *Washington Post*, April 27, 2004, at E1..

[62]) 18 USC 3267(1)(A).

[63]) The legislation also extended jurisdiction over direct employees of all Federal agencies (or provisional authorities) "to the extent such employment relates to supporting the mission of the Department of Defense overseas." By "provisional authority," the drafters clearly had in mind the "Coalition Provisional Authority" (CPA) in Iraq.

[64]) On interpretive dilemmas associated with MEJA, see Glenn R. Schmitt, "Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole," *The Army Lawyer*, June 2005, at 41, 43-47.

of Instruction 5525.11.[65]) DoD law enforcement personnel, whether military or civilian, are authorized to arrest suspects pursuant to a Federal arrest warrant or based on probable cause to believe the individual concerned has committed an offence under the act.[66]) They face prosecution for a violation of the MEJA itself, not the underlying felony, although the elements of the offense and maximum punishment depend on the latter. Combatant Commanders, or their senior designees, may order temporary detention of those arrested in their area of responsibility when there is a concern that the individual may not appear for law enforcement or judicial proceedings or will engage in "serious criminal misconduct." [67]) Detainees must be delivered "as soon as practicable" to civilian law enforcement authorities.[68])

Federal criminal jurisdiction may also be exercised over contractor personnel (*inter alia*) in accordance with the War Crimes Act.[69]) It extends US jurisdiction to war crimes committed inside or outside the US against or by US nationals. Should one of the enumerated war crimes result in death of the victim, the Act authorizes imposition of the death penalty. War crimes include any conduct:

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or
(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

Note that the War Crimes Act would also include jurisdiction over grave breaches set forth in Protocol Additional I (international armed conflict) and violations of Protocol Additional II (non-international armed conflict) to the 1949 Geneva Conventions, should the United States become Party to them,70 a highly-charged issue in case of the former. Moreover, the Supreme Court's 2006 decision in *Hamdan* (curiously) held that Common Article 3 to all four 1949 Geneva Conventions applies to the so-called "global war on terror" [71]) Thus, it is at least arguable that the Act will apply to certain terrorist actions and/or counter-terrorist operations.

An additional basis of jurisdiction was provided by the 2001 USA Patriot Act's extension of the "special maritime and territorial jurisdiction" of federal courts. That jurisdiction

[65]) Department of Defense 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.
[66]) *Id.,* para. 6.2.4.
[67]) *Id.,* para. 6.2.5.
[68]) *Id.,* para. 6.2.6.
[69]) 18 USC 2241
[70]) Protocol Additional I, *supra* note 34; Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 16 *International Legal Materials* 1442 (1977).
[71]) *Hamdan v. Rumsfeld et al.,* No. 05-184, slip op. at 6 (US Sup. Ct. June 29, 2006), www.supremecourtus.gov/opinions/05pdf/05-184.pdf.

addressed offenses committed beyond the territory of the United States, such as on a US vessel or aircraft. The Patriot Act amended it to include:

> With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act [8 USCS § 1101]--
> (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.[72])

Although the legislation was designed to address terrorist acts, it provided the jurisdiction basis for the prosecution of David Passaro, a CIA contractor who was charged in the Federal District Court of Eastern North Carolina in connection with the June 2003 death of Abdul Wali, who died as a result of interrogation at a US military installation in Afghanistan. He was convicted in August 2006 of felony assault and several misdemeanors.[73]) The use of the Patriot Act reflected the jurisdictional shortcomings of the MEJA prior to its amendment in 2004. In similar future cases, prosecution would more likely occur pursuant to MEJA. That said, the fact remains that, based on the "special maritime and territorial jurisdiction" legislation, civilian contractors working on US military bases overseas are susceptible to federal prosecution in the event they violate US criminal law while on those facilities.

Finally, and particularly relevant in light of contractor involvement in the interrogation of detainees in Afghanistan and Iraq, the Torture Act enables prosecution of US nationals who engage, or attempt to engage in torture.[74]) Under the Act:

> (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from--
>> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>> (C) the threat of imminent death; or
>> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

The death penalty is authorized when the torture results in death; otherwise, the maximum sentence is 20 years imprisonment.

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[72]) 18 USC 7(9)(A).
[73]) At the time of writing, the sentence is pending; Passaro faces 11 ½ years imprisonment. Shane, *supra* note 53.
[74]) 18 USC 2340

Technically, contractors may also be subject to military jurisdiction pursuant to the Uniform Code of Military Justice.[75]) UCMJ jurisdiction encompasses "persons serving with or accompanying an armed force in the field," albeit only "in time of war." Although the Supreme Court has issued multiple decisions limiting extension of military jurisdiction over civilians,[76]) it has not opined on the subject in decades. That said, absent an express declaration of war by Congress, any such exercise of jurisdiction would be questionable.[77]) Some military courts, acting in cases involving armed conflicts, have taken the approach that "in time of war" is to be interpreted factually, i.e., on the basis of whether a major conflict is underway.[78]) However, there is also precedent for requiring a formal declaration of war.[79]) In an abundance of caution, this is the policy position taken by the Department of Defense in its guidance on the use of contractors.[80])

Of course, as noted, contractor personnel are subject to the criminal laws of the host nation. Such jurisdiction may be limited by agreement or other appropriate act under international law, such as a directive issued by occupation authorities. For instance, the NATO Status of Forces Agreement provides that, "the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State." [81]) However, it then limits said jurisdiction by providing that where an act violates the law of both the sending and receiving State (concurrent jurisdiction), "[t]he military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of …a civilian component in relation to…offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent [and] offences arising out of any act or omission done in the performance of official duty." [82]) The

[75]) 10 USC 802(a)(10) (UCMJ art. 2a(10)). For a historical survey of military jurisdiction over civilians, see David A. Melson, "Military Jurisdiction over Civilian Contractors: A Historical Overview," 52 *Naval Law Review* 277 (2005).
[76]) *Reid v. Covert*, 354 US 1 (1957); *McElroy v. US ex rel Guargliardo*, 361 US (1960); *Kinsella v. Singleton*, 361 US 234 (1960); *Grisham v. Hagan*, 361 US 278 (1960).
[77]) On this issue, see Joseph Romero, "Of War and Punishment: 'Time of War' in Military Jurisprudence and a Call for Congress to Define its Meaning," 51 *Naval Law Review* 1 (2005).
[78]) The lead case adopting this approach is *US v. Bancroft*, 3 CMA 3 (Court of Military Appeals, 1953), where the Court took a factual approach to the existence of "war" in the context of the Korean conflict. See also *US v. Ayers*, 4 CMA 220 (1953); *US v. Taylor*, 4 CMA 232 (1954); *US v. Christensen*, 4 CMA 22 (1954); and *US v. Shell*, 7 CMA 646 (1957); *US v. Greco*, 36 CMR 559 (Army Court of Military Review, 1965); *US v. Anderson*, 17 CMA 588 (1968); and *US v. Castillo*, 34 MJ 1160 (Navy-Marine Corps Court of Military Review, 1992).
[79]) That was exactly the holding of the US Court of Military Appeals in *US v. Averette*, 19 C.M.A. 363 (1970). The case involved an employee of an Army contractor in Vietnam. The appellant, Averette, challenged his conviction by court-martial of conspiracy to commit larceny and attempted larceny. The Court of Military Appeals dismissed the charges, holding that military jurisdiction over civilians applies only "in time of war," which it understood as a congressionally declared war.
[80]) DODI 3020.41, *supra* note 27, para. 6.1.3. For an article arguing that military commanders can and should charge civilian contractors at courts-martial under specified circumstances, see William C. Peters, "On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq," *Brigham Young University Law Review* 367 (2006).
[81]) Agreement Between the Parties to the North Atlantic Treaty Organization Regarding the Status of Their Forces (NATO SOFA), June 19, 1951, 4 UST 1792, 199 UNTS 67. "Civilian component is defined by the treaty as: "'civilian component' means the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located." *Id.,* art. I.1b.
[82]) *Id.,* art. VII.3a

juridical quandary is that set forth above – it is not clear that the military authorities of the host State enjoy any criminal jurisdiction over civilians.

The most recent noteworthy exemption from criminal jurisdiction of the host State came in June 2003, when the Coalition Provisional Authority (CPA) exempted contractors from Iraqi criminal jurisdiction for activities performed in the course of their duties.[83]) That step was rather unexceptional given that it occurred during an occupation.

What followed was more controversial. The occupation ended in June of the following year pursuant to a November 2003 agreement between the Iraqi Governing Council and the CPA.[84]) The international community acknowledged the changed status in the form of Security Council Resolution 1546, recognizing the end of occupation and the reassertion of full sovereignty by Iraq.[85]) In anticipation of that occurrence, the Iraqi Governing Council adopted the Transitional Administration Law (TAL) in March 2004, which was to come into effect upon the end of occupation and remain in force until adoption of a permanent constitution.[86]) Article 26(c) provided that: "The laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law."

On the very day before sovereignty was formally transferred to the new Iraqi government, CPA Administrator Bremer revised one such order, that extending immunity to contractors, CPA Order 17. Section 4(3) provided:

> Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto. Nothing in this provision shall prohibit MNF Personnel from preventing acts of serious misconduct by Contractors, or otherwise temporarily detaining any Contractors who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Sending State. In all such circumstances, the appropriate senior representative of the Contractor's Sending State in Iraq shall be notified.[87])

Pursuant to the TAL, this order bound the Iraqi judicial system (and will continue to do so until contrary legislation passes). Thus, US contractors committing offences with a colourable nexus to their duties (e.g., mistreatment of detainees) were effectively shielded from Iraqi prosecution.

Although accountability is typically perceived of in terms of criminal liability, civilian contractors may arguably be subject to civil suit under US law for their actions during a conflict. The most likely avenue for victims of abuse is suit under the Alien Tort Statute,[88]) which grants federal district courts jurisdiction over civil action by aliens for torts committed "in violation of the law of nations or a treaty of the United States." In other words, it permits suit for tortuous violations of international law.

Recent cases arguably provide support for the premise that the ATS might be available.

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[83]) CPA Order 17, Status of the Coalition, Foreign Liaison Missions, their Personnel and Contractors (June 27, 2003).The CPA, Coalition forces, and foreign missions were absolutely immune from Iraqi criminal process, i.e., there was no requirement of nexus to their duties.
[84]) Agreement on Political Process (Nov. 15, 2003).
[85]) UNSC Res. 1546 (June 8, 2004).
[86]) Law of Administration for the State of Iraq for the Transitional Period, March 8, 2004, www.cpa-iraq.org/government/TAL.html.
[87]) CPA Order 17 (revised), Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq (June 27, 2004).
[88]) 28 USC 1350.

In a 1995 opinion, *Kadic v. Karadzic*, the Second Circuit Court overturned a lower court decision in which an ATS suit had been dismissed because the defendant was a private individual, not a State or person acting under colour of law.[89]) The court held that violations of the law of nations could be committed by private individuals, citing as examples genocide and war crimes. War crimes included, according to the court, murder, rape, torture, and arbitrary detention.[90]) The decision understandably raised concern among the business community, which feared that the next step was to hold corporations liable under the statute for their employee's actions.

In 2004, the Supreme Court addressed the scope of the ATS in Sosa v. *Alvarez-Machain*.[91]) The case involved claims that Dr. Alvarez-Machain had participated in the torture and murder of a Drug Enforcement Agency (DEA) agent. When Mexico refused to extradite him, the DEA hired several Mexicans, including Francisco Sosa, to deliver Alvarez-Machain to the United States for trial. The Mexicans abducted him forcibly. In the ensuing trial, Alvarez-Machain was acquitted. He then sued Sosa under the ATS, prevailing at both the trial level and on appeal. The case proceeded to the Supreme Court.

The Supreme Court, in a highly complex and cautious opinion, reversed the award to Alvarez-Machain. It held, *inter alia*, that "We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity." [92]) However, it went on to note that the Alien Tort Statute provided a basis for suit when the Congress mandates jurisdiction over an offence[93]) or when there is a clear "specific, universal, and obligatory" norm of international law.[94]) The court did not identify those norms, although *jus cogens* norms of customary international law would surely suffice.

Despite the limited holdings, *Kadic* and *Sosa* suggest that in certain circumstances involving violations of well-accepted international law norms (e.g., torture), a cause of action is likely to lie against private individuals such as contract employees. Further, in the aftermath of events such as the detainee abuse by contractors at Abu Ghraib, many in the human rights community are hopeful that subsequent decisions will extend into finding vicarious liability on the part of employers for cases of abuse.[95]) Indeed, the Center for Constitutional Rights has filed a class action suit in California against Titan and CACI, the two contractors

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[89]) *Kadic v. Karadzic,* 70 F. 3d 232 (2d. Cir. 1995).
[90]) *Id*., at 242.
[91]) *Sosa v. Alvarez-Machain* , 542 US 692 (2004). For an excellent discussion of the case, see Virginia Gomez, "The Sosa Standard: What does it Mean for Future ATS Litigation?," 33 *Pepperdine Law Review* 469 (2006). See also Scott J. Borrowman, "Sosa v. Alvarez-Machain and Abu Ghraib – Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors," *Brigham Young University Law Review* 371 (2005).
[92]) Sosa, *supra,* at 727.
[93]) As it did for murder and extrajudicial killings in the Torture Victim Protection Act of 1991.The act deals with torture committed under authority, or apparent authority, of a foreign nation, and thus does not apply, generally, to the case of contractors working for the US government. 105 PL 256
[94]) Sosa, *supra* note 90, at 732, citing with approval *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994). This was the standard adopted by the circuit court in Sosa [331 F.3d 604, 612 (9th Cir. 2003)]. Justice Breyer's concurring opinion cited "torture, genocide, crimes against humanity, and war crimes as examples of offences meeting the standard. Sosa, *supra*, at 762.
[95]) For a pre-Sosa case finding the Unocal Corporation liable under ATS for acts of murder, rape, and forced labor committed by Myanmar military personnel guarding a Unocal pipeline project, see *Doe I v. Unocal Corp*., 395 F. 3d 932 (9th Cir. 2002). The court found the torts to be *jus cogens* violations and, therefore, violations of the laws of nations as that term applies in the ATS. Note that Unocal was found to have "aided and abetted" commission of the acts, not to have committed them itself. Eventually, Unocal settled and the case was dismissed before it could reach the Supreme Court.

involved in the detainee abuse at Abu Ghraib.[96]) Although litigation is pending, the matter certainly appears to raise the stakes for contractors operating on or near the battlefield.[97])

Concluding Thoughts

Operations in Iraq, especially the occupation and post-occupation phases, impelled the United States military into a use of contractors dwarfing that in previous conflicts. It soon became apparent that neither the US defence contracting system, nor the law governing contractors on the battlefield, was sufficiently mature to deal with the quantitative and qualitative revolution that had occurred. In response, the Department of Defense has issued comprehensive guidance on contractor operations, the US Congress has adopted new legislation to address voids in the law governing contractors, and the armed forces are placing renewed emphasis on understanding the costs and benefits of outsourcing tasks to civilians. Much progress has been made.

However, it would be premature to declare victory. For instance, although the legal mechanisms exist for prosecuting contractor employees for criminal misconduct, such prosecutions are still effectively theoretical. Further, the issue of what constitutes direct participation remains unsettled; whether the international community will accept the approach that appears to be gingerly emerging in US policy remains uncertain. And, perhaps most troubling is the continued dilemma commanders in the field face -- not having full control over the assets they depend upon to accomplish their assigned mission. In the end, therefore, it is equally fair to say there is much work to be done.

Postscript

In October 2006, the US Congress passed the National Defense Authorization Act for Fiscal Year 2007.[98]) Tucked away in the massive bill lay a tiny revision to the Uniform Code of Military Justice (UCMJ) that significantly changes the situation of contractors and others accompanying US forces during military operations. Section 802a(10) of the UCMJ (Article 2) had provided for courts-martial jurisdiction "in time of war, [over] persons serving with or accompanying the armed forces." Recall in the discussion above that the Defense Department has interpreted the reference to "war" narrowly, specifically to cases of declared war.[99]) So too

[96]) *Saleh v. Titan*, Case No. 04 CV 1143 R (NLS) (Southern District of California 2004). The case presents an interesting issue of the relationship between ATS and the Federal Tort Claims Act [28 USC 1346(b)]. Under the FTCA, which provides for a cause of action regarding certain torts committed by government agents, claims may not derive from combatant activities. Titan has argued that a similar approach should be taken vis-à-vis the ATS. In support, it cites the 9th Circuit Court decision in *Koohi*, which involved the 1988 USS Vincennes shoot down of an Iranian airliner. In the suit against the government and Aegis (maker of the air defense system), the court held that during periods of conflict, defense contractors owed no duty of care to enemy civilians. *Koohi v. United States*, 976 F.2d 1328, 1336 (9th Cir. 1992). On this issue, see Atif Rehman, "The Court of Last Resort: Seeking Redress for Victims of Abu Ghraib Torture through the Alien Tort Claims Act," 16 *Indiana International and Comparative Law Review* 493, 515-520 (2006).

[97]) For background and documents regarding the on-going litigation, see the Center for Constitutional Rights website, www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=8tzsXQmAh2&Content=423.

[98]) John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2007).

[99]) Department of Defense, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, DoD Instruction 3020.41, Oct. 3, 2005, at para. 6.1.3.

has some US case law.[100]

The new legislation, sponsored by Senator Lindsey Graham, a reserve US Air Force judge advocate, amends 802a(10) by striking the word "war" and replacing it with the phrase "declared war or a contingency operation." Although the legislation characterizes the modification as a "clarification," and although the accompanying legislative history fails to explain the new language, it clearly represents a major extension of military jurisdiction over civilians. The official Department of Defense definition of a contingency operation demonstrates the extent to which this is so:

> *[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 force; or b. is created by operation of law. Under [US law], a contingency operations exists if a military operation results in the (1) call-up to (or retention on) active duty of members of the uniformed Services under certain enumerated statues ...; and (2) the call-up to (or retention on) active duty of members of the uniformed Services under other (non-enumerated) statutes during war or national emergency declared by the President or Congress.*[101]

The change, which applies to situations such as Iraq and Afghanistan, will ease prosecution of deployed contractors. Recall that the MEJA allowed for their prosecution, but said prosecution was to take place in federal civilian court, in other words in the United States. Distance from the location of the alleged crime and the imposition of responsibility for processing cases on overburdened federal law enforcement and judicial authorities augured against widespread and regular resort to the MEJA. Court-martials, which typically sit near the battlefield, offer a more convenient forum. The military justice system also possesses greater expertise in prosecuting crimes committed in a conflict zone and the military command affected by contractor crime has a greater interest in prosecuting offenders and a greater stake in the outcome.

Many unanswered questions and issues remain regarding implementation of this UCMJ revision. Does it apply to all contractors of the US government or only those of the Department of Defense? Will it be used for the prosecution of any UCMJ violations or only those of particular gravity, as is the case with the MEJA? How will the new provision be implemented in the field? May contractors be prosecuted in military courts for traditional military offences such as disobeying a lawful order?[102] *Will the expansion of military jurisdiction over civilians survive judicial review? Answers will hopefully be forthcoming in the near future.*

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[100]) See case cited *supra.* On the subject, see generally Mark J. Yost & Douglas S. Anderson, *Current Development: The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap,* 95 American Journal of International Law 446 (2001).

[101]) Department of Defense, Dictionary of Military Terms, as of 22 March 2007, at http://www.dtic.mil/doctrine/jel/doddict/.

[102]) Articles 90-92 of the UCMJ. As discussed *supra,* under the Defense Federal Acquisition Regulation Supplement contractor personnel authorized to accompany the Armed Forces deployed outside the United States must comply with "[o]rders, directives, and instructions issued by the Combatant Commander, including those relating to force protection, security, health, safety, or relations and interaction with local nationals." Such orders would presumably meet the "lawful" criterion of the offense.