



How to End Impunity for Private Security and Other Contractors

Blueprint for the Next Administration

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FOR THE NEXT U.S. ADMINISTRATION

BLUEPRINT

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"This isn't just about broken laws or wasted tax revenues. This is about our claims to moral leadership in the world. We cannot win a fight for hearts and minds when we outsource critical missions to unaccountable contractors."

Then-Senator Barack Obama, October 3, 2007

How to End Impunity for Private Security and Other Contractors

A Three-Stage Plan

Introduction

Since the American Revolution private contractors have provided important support to U.S. military operations. Contractors today support U.S. military and civilian agency missions in Iraq, Afghanistan and elsewhere, providing necessary and often courageous service. Although contractor deaths and injuries are not widely reported, by the middle of 2007, well over one thousand had lost their lives in Iraq and Afghanistan alone.

But the U.S. government has dramatically expanded its use of contractors in military and intelligence operations since September 11, 2001, far beyond levels seen before. The more than 200,000 U.S. government contractors now working in Iraq far outnumber total Coalition military personnel at its peak. This increased reliance on contractors has allowed the Executive Branch to skirt legal requirements and operate without transparency, entrusting private contractors with critical functions heretofore seen and regulated as functions of the uniformed military or civilian public servants—whose duty is owed to the U.S. Constitution rather than to corporate shareholders or company bottom lines. The government's increased use of contractors abroad has been accompanied by broad failures to effectively oversee these contractors and hold them accountable for acts of violence and abuse.

In September 2007, Blackwater private security contractors running an armed convoy through Baghdad's Nisoor Square killed 17 civilians and wounded 24 more. Both Iraqi government and U.S. military officials characterized the shootings as unjustified. In December 2008, 15 months after the event, six Blackwater contractors were charged. However, there has been no apparent progress in connection with numerous other allegations of abuse, unprovoked attacks and unauthorized use of force by contractors. While 11 soldiers from Abu Ghraib were convicted on detainee abuse charges and Army investigations implicated at least five private contractors in similar crimes, no contractor was ever even charged. A series of alleged rapes by contractors abroad have not resulted in any prosecutions.

These incidents are the tip of the iceberg. Over the last several years there have been scores of reports of serious violent crime by private contractors abroad. But there has been almost no accountability.

The culture of impunity that has been fostered by this abdication of responsibility is wrong and inconsistent with American values. The government's failure to provide adequate oversight—although some improvements on this score have been seen since Nisoor Square—or to ensure accountability of contractors has alienated local populations and undermined U.S. military efforts in Iraq and Afghanistan; damaged U.S. counterterrorism efforts throughout the world; and diminished the United States' reputation as a world leader in human rights.

Restoring our nation's commitment to protection of human rights and to accountability for human rights violations by all sent to do the nation's business abroad must be a top priority for the next administration. This is not a partisan issue; during the 2008 presidential campaign, both President-elect Barack Obama and Senator John McCain acknowledged the problems caused by the Bush Administration's inadequate control of contractors and the use of contractors to perform functions that should be undertaken only by public servants.

Establishing a meaningful system of accountability for private contractors will require the vigorous enforcement of laws already in place, and legal reforms to clarify and enhance the criminal and civil accountability of contractors. It also will require the commitment of substantial law enforcement and other resources to more effectively manage and control the contractor force.

This Blueprint offers a three-stage strategy for the United States to ensure the forces it sends abroad—including contractors—live up to American values, ideals, and commitment to human rights, and strengthen rather than undermine U.S. government counterterrorism efforts.

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The problem of contractor impunity will not be solved or even ameliorated by future troop drawdowns in Iraq. To the contrary, in October 2008 the Special Inspector General for Iraq Reconstruction (SIGIR) predicted that reliance on private security contractors in Iraq is likely to actually *increase* in the foreseeable future.¹ To close the contractor accountability gap, we make the following recommendations to the new administration:

Summary

FIRST MONTH IN OFFICE

- Send a clear, unambiguous message that the U.S. government will not send private contractors abroad to do the nation's business without ensuring that adequate accountability mechanisms are in place, by announcing:
 - A firm policy ensuring that contractors fielded abroad by the U.S. government are expected to comply with the highest standards of human rights and will be held accountable for serious crimes
 - A moratorium on the employment by U.S. government civilian agencies of additional private contractors in Iraq and Afghanistan until criminal jurisdiction issues are resolved
- End private contractor involvement in abusive detention, interrogation and rendition practices, including by:

¹ SIGIR, *Agencies Need Improved Financial Data Reporting for Private Security Contractors*, Audit Report No. 09-005, October 31, 2008, p. ii, <http://www.sigir.mil/reports/pdf/audits/09-005-f.pdf>. (“[T]o the extent U.S. forces are withdrawn, and assuming that significant civilian technical assistance missions remain, requirements for private security services for [State Department] and USAID would likely increase to compensate for support previously provided by the military. [Private security contractor] requirements could also increase because the recent reduction in violence enables more frequent personnel movements within Iraq but with private security contractor support still being needed for all trips outside of U.S. secured areas.”).

- Enforcing existing bans on torture and cruel treatment by all U.S. personnel, including contractors
- Directing close scrutiny of contractor roles as part of a larger, comprehensive review of U.S. government rendition practices
- Directing the Secretary of Defense and the Director of National Intelligence to include a comprehensive study of contracted services as part of a larger review and reform of U.S. government human-intelligence gathering
- Direct the Attorney General to:
 - Lead a review of U.S. government diplomatic arrangements with Iraq and Afghanistan regarding jurisdiction over contractors accused of serious crimes there, and, if necessary, develop recommendations for changes to ensure effective and fair contractor accountability mechanisms
 - Formally announce that prosecution of contractor crime abroad is a Justice Department national priority
- Support legislation to clarify and expand criminal jurisdiction over U.S. government contractors

FIRST SIX MONTHS IN OFFICE

- Direct the Attorney General to devote additional Justice Department resources to:
 - Conclude pending investigations of allegations of violent or abusive criminal conduct by contractors
 - Review and, where appropriate, reopen referrals previously declined
 - Take prompt action on new cases, and ensure the commitment of adequate funding for the extraordinary costs of prosecuting these cases
- Announce the new administration's commitment to supporting the Commission on Wartime Contracting, and direct relevant agencies to provide proactive assistance to the Commission

- Direct the Secretary of Defense to:
 - Take effective action to substantially enhance military control over U.S. government private security contractors in areas of combat operations, including by:
 - Implementing the clear congressional mandate for robust regulations governing selection, training, equipping and conduct of personnel performing private security functions for all U.S. government agencies in areas of combat operations
 - Devising and implementing a regime for Defense Department certification or licensing of security contractors contracted by any U.S. government agency to perform armed security services abroad
 - Develop consistent, government-wide regulations for private security contractor contracting and acquisition
 - Revise private security contractor rules for the use of force to better ensure that contractors do not directly participate in combat
 - Develop recommendations for legal reform to better safeguard the rights of civilian contractors prosecuted by the U.S. military
- Propose legislation to:
 - Provide substantial new resources to:
 - Augment Justice Department resources for investigating and prosecuting serious contractor crime abroad
 - Bolster federal agency contracting, acquisition, audit and inspector general operations, to ensure effective management and oversight of private security and other contractors
 - Extend Freedom of Information Act mandates to U.S. government contractors performing armed security functions abroad
 - Repeal the Detainee Treatment Act's special trial defense provision that impedes accountability for contractors implicated in detainee abuse
- Support legislative reform of the "state secrets" privilege to ensure that victims of abuse have effective remedies for human rights violations
- Direct the Attorney General to review and develop recommendations for reforming other civil litigation privileges, immunities and exemptions that can impede compensation to victims of contractor misconduct
- Direct the Attorney General, Secretary of Defense and Secretary of State to report regularly to Congress and the public on private contractor utilization, costs and accountability

FIRST YEAR IN OFFICE

- Direct the Secretary of Defense to:
 - Develop force structure options that would allow the U.S. government to reduce reliance on private security and certain other contractors in future conflicts, and to ensure that contractors it does use can be effectively managed and controlled
 - Through the Quadrennial Defense Review, comprehensively assess planned uses and roles of contractors by the Defense Department over the next twenty years, to include making adequate provision for long-range requirements for control, oversight and accountability
- Direct the Secretary of State to lead an interagency effort to implement the Montreux Document's internationally-recognized "good practices" for regulating private security and other contractors, to ensure respect for international humanitarian and human rights law
- Implement human intelligence-collection reform recommendations, including reforms regarding the use of contractors in interrogations, to enhance the effectiveness of intelligence-collection practices and their compliance with legal obligations

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Details

FIRST MONTH IN OFFICE

During the first month in office, the new administration should take decisive steps to end the impunity with which private security and other contractors have operated under the Bush Administration.

We propose that President-elect Obama:

- **Send a clear, unambiguous message that the U.S. government will not send private contractors abroad to do the nation's business without ensuring that adequate accountability mechanisms are in place.** President-elect Obama should announce:
 - **A firm policy ensuring that contractors fielded abroad are expected to comply with the highest standards of human rights and will be held accountable for serious crimes.** The U.S. government, like any government, is responsible for the conduct of its forces, including civilians or private contractors, fielded abroad. When government contractors commit offenses that amount to serious violations of the law of armed conflict or human rights law, the government likewise is responsible to ensure the availability of effective mechanisms for investigating and prosecuting offenders and compensating victims. The Bush Administration has failed to fulfill these responsibilities, or seemingly even to recognize them. President-elect Obama should signal a change from the current policy and announce that contractors fielded abroad by the U.S. government will be held accountable for violations of the law.
 - **A moratorium on the employment by U.S. government civilian agencies of additional private contractors in Iraq and Afghanistan**

until criminal jurisdiction issues are resolved. The U.S. government's increased reliance on contractors in Iraq and Afghanistan has shone a spotlight on a gaping contractor accountability gap that requires real change beyond mere rhetoric. U.S. government military and civilian operations in Iraq, Afghanistan and elsewhere that rely heavily on contractors cannot realistically be shut down pending implementation of these changes. The new administration, however, should not aggravate the situation. President-elect Obama should announce an immediate moratorium on the fielding of more contractors in Iraq or Afghanistan by any agency other than the Defense Department beyond the number authorized under existing contracts, until legislation is enacted ensuring U.S. criminal jurisdiction over at least all government contractors fielded in Iraq and Afghanistan.

- **End private contractor involvement in abusive detention, interrogation and rendition practices.** Since September 11, 2001, private contractors have been increasingly employed to provide critical support to U.S. government detention, interrogation and rendition operations. The next administration must take swift action to ensure that contractors who remain involved in these operations treat all prisoners humanely, and that U.S. government agencies do not use contractors to evade their humane treatment responsibilities. President-elect Obama should:
 - **Enforce existing bans on torture and cruel treatment by all U.S. personnel, including contractors.** All U.S. government agencies should be directed to ensure strict compliance by their contractors with domestic laws and international treaty obligations prohibiting torture and other inhumane treatment, including the Anti-Torture Statute, the Detainee Treatment Act (DTA), the Convention against Torture (CAT), Common Article 3 of the Geneva Conventions, the International Covenant on Civil and Political Rights (ICCPR), and other applicable laws.² All orders and memoranda authorizing or justifying cruel treatment or secret detention should be directed to be rescinded.

² For a summary of these and other legal provisions noted in this Blueprint, see Appendix A.

- **Direct close scrutiny of contractor roles as part of a larger, comprehensive review of U.S. government rendition practices.** The United States has for several years used renditions, involving the extrajudicial transfer of terrorism suspects from U.S. government custody, to “outsource” abusive interrogation and detention to third countries. Private contractors reportedly have provided important logistical and other support to renditions. To protect against future transfers to torture, President-elect Obama should direct the National Security Advisor to undertake a comprehensive 90-day interagency review to assess rendition practices, and to develop new regulations to ensure the United States complies with its obligations under the Convention against Torture. This review (to be conducted in cooperation with the Attorney General, the Secretary of Defense, the Secretary of State, the Secretary of Homeland Security, and the Director of the Central Intelligence Agency) should assess the utilization of contractors in renditions and consider appropriate bans or restrictions on their use.
- **Direct the Secretary of Defense and the Director of National Intelligence to include a comprehensive study of contracted services as part of a larger review and reform of U.S. government human-intelligence gathering.** Intelligence experts agree that abusive interrogation practices—including those reportedly used by private contractor interrogators and interpreters at Abu Ghraib—impede efforts to elicit actionable intelligence, and that non-coercive techniques provide the best opportunity to obtain accurate information. To ensure more effective intelligence-gathering efforts, President-elect Obama should direct the Secretary of Defense and the Director of National Intelligence to undertake a review of military and civilian intelligence programs and provide specific recommendations for improving human-intelligence collection. With as much as seventy percent of intelligence community budgets spent on private contracts,³ this review should examine,

among other things, the impact of increased reliance on contractors by military and civilian intelligence agencies on:

- The effectiveness of intelligence-gathering efforts.
- The compliance of these efforts with domestic and international legal obligations.⁴

■ **Direct the Attorney General to:**

- **Lead a review of U.S. government diplomatic arrangements with Iraq and Afghanistan regarding jurisdiction over contractors accused of serious crimes there, and, if necessary, develop recommendations for changes to ensure effective and fair contractor accountability mechanisms.** In 2004, the U.S. government-led Coalition Provisional Authority (CPA) in Iraq promulgated CPA Order No. 17, conferring presumptive, but waivable, immunity from Iraqi legal jurisdiction upon non-Iraqi private contractors working in Iraq for the U.S and other Coalition governments, and international organizations. At this writing, this immunity remains Iraqi law, and the Bush Administration has never waived it.⁵ The resulting inability of the Iraqi government to prosecute private security contractors—in light of the chronic

⁴ Participation of private contractors in the interrogation of detainees in Defense Department custody is currently regulated in part by Department of Army Field Manual (FM) 2-22.3 (FM 34-52), *Human Intelligence Collector Operations*, September 2006, <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>, and recently-revised Defense Directive No. 3115.09, SUBJECT: *DoD Intelligence Interrogations, Detainee Briefings, and Tactical Questioning*, October 9, 2008, <http://www.dtic.mil/whs/directives/corres/pdf/311509p.pdf>.

⁵ In Afghanistan, the legal status of contractors under Afghan law is addressed in a 2003 exchange of diplomatic notes between the U.S. and Afghan governments. Both U.S. and Afghan government officials have stated that these notes do not confer immunity from Afghan criminal law on non-Afghan U.S. government contractors accused of committing serious crimes in Afghanistan. The Afghanistan experience, however, underlines the importance of ensuring the availability of U.S. jurisdiction, and commitment to prosecute, even where the “territorial” state also has jurisdiction: In November 2008, a DoD contractor accused of second-degree murder in the death of an Afghan civilian near Kandahar was not turned over to Afghan authorities for prosecution, but instead was sent home to the United States to face charges before a federal district court. See *U.S. v. Ayala*, Case No. 1:08mj989 (E.D. Va., Criminal Complaint filed Nov. 19, 2008). Indeed, since U.S. military operations began in Afghanistan in October 2001, no U.S. government contractors are known ever to have been turned over to Afghan authorities for prosecution.

³ See Tim Shorrock, “The Corporate Takeover of U.S. Intelligence,” *Salon*, June 1, 2007, http://www.salon.com/news/feature/2007/06/01/intel_contractors/.

failure of U.S. officials to initiate prosecutions—has fostered great hostility among the Iraqi population toward the United States. This endangers U.S. military personnel and contractors, and undermines the military mission. In November 2008, the Bush Administration and the Iraqi government negotiated a status of forces agreement (SOFA), ending this immunity for U.S. military personnel and Defense Department civilian employees and contractors as of January 1, 2009,⁶ but the status of non-Defense Department civilian employees and contractors under Iraqi law after that date remains uncertain. Whether or not this new legal regime is in place before the next administration takes office, President-elect Obama should direct the Attorney General, in consultation with the Secretary of State and Secretary of Defense, to:

- Review the adequacy of existing or proposed agreements and legal regimes governing the susceptibility of private security and other contractors fielded in Iraq and Afghanistan to effective and fair criminal prosecution.
- Develop recommendations for changes in the status of contractors under Iraqi and Afghan law, and/or under U.S. law or practice, as necessary to ensure effective accountability.⁷

⁶ See Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, signed Nov. 17, 2008, http://graphics8.nytimes.com/packages/pdf/world/20081119_SOFA_FINAL_AGREED_TEXT.pdf.

⁷ Even if the new SOFA is definitively in operation in January 2009, this will not lessen the need to reform U.S. law and practice to close the accountability gap. The SOFA does not cover all personnel or contractors the U.S. government fields or funds in Iraq, and while it is generally agreed that the expiration of the mandate for the Multi-National Force under UN Security Council Resolution 1511, Oct. 15, 2003, <http://daccessdds.un.org/doc/UNDOC/GEN/N03/563/91/PDF/N0356391.pdf?OpenElement>, and Resolution 1546, June 8, 2004, <http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement> U, as extended by subsequent resolutions, ultimately will terminate CPA Order 17, there may not be agreement as to when that termination actually will occur. Moreover, lifting the technical immunity of contractors in Iraq would not ensure that contractors would actually be turned over to the Iraqi authorities. Moreover, at this time there are serious and legitimate concerns whether the Iraqi justice system can be expected to afford effective or fair accountability for U.S. government and other international contractors.

- **Formally announce that prosecution of contractor crime abroad is a Justice Department national priority.** During the Bush Administration, the Justice Department has announced many law enforcement priorities. At no time, however—not after Abu Ghraib, nor after Nisoor Square, even with the Blackwater indictments finally announced in December 2008—has the Justice Department ever made the prosecution of contractor crime abroad a stated departmental priority. The dearth of actual prosecutions also proves it has not been an unstated priority. President-elect Obama should direct the Attorney General to formally announce, and instruct all U.S. Attorneys, that prosecution of contractor crime abroad is a Justice Department national priority, and that U.S. Attorneys and other relevant Justice Departments offices will be expected to implement and support this priority, and to report regularly on their efforts.
- **Support legislation to clarify and expand criminal jurisdiction over U.S. government contractors.** The current Attorney General and other Bush Administration officials have asserted that U.S. law does not provide sufficient jurisdiction over government contractors for violent crimes committed overseas. In October 2007—a few weeks after Blackwater security contractors working for the State Department killed 17 Iraqi civilians in a shooting in Baghdad’s Nisoor Square—the House overwhelmingly passed legislation to clarify and expand contractor jurisdiction under the Military Extraterritorial Jurisdiction Act (MEJA). There is also substantial bipartisan support in the Senate for such legislation. As his top legislative priority for ending contractor impunity, President-elect Obama should urge Congress to clarify and expand the reach of U.S. criminal jurisdiction over contractors abroad, either by amending MEJA or by enacting new legislation specific to U.S. government private contractors abroad.

FIRST SIX MONTHS IN OFFICE

During his first six months in office, President-elect Obama should demonstrate his longer-term commitment to ending contractor impunity by requiring the Attorney General to proceed with meritorious contractor prosecutions, by supporting legislation to further bolster contractor oversight and accountability, and by giving his strong support to the new bipartisan Commission on Wartime Contracting in its mission to comprehensively review and assess the government's increased reliance on private contractors since September 11, 2001.

We propose that President-elect Obama:

- **Direct the Attorney General to allocate enhanced Justice Department resources to the prosecution of contractor crime abroad.** President-elect Obama should direct the Attorney General to allocate additional resources to energize the Justice Department's investigations of allegations of serious violence or abuse by private contractors, including the abuse of prisoners, the unprovoked or unwarranted use of force by security contractors against civilians, and violent offenses by private contractors against U.S. military personnel, other contractors, or others. In particular, the Attorney General should:
 - Proceed with the prosecutions of Blackwater contractors indicted in December 2008 in connection with the September 2007 killing and wounding of approximately three dozen Iraqi civilians in Baghdad's Nisoor Square, and review the scope and findings of that investigation to determine whether additional charges may be warranted.
 - Conclude pending investigations of allegations of sexual assault by private contractors abroad, and proceed with prosecutions where warranted.
 - Re-evaluate for potential prosecution all detainee abuse cases—including contractor cases—referred formally or informally since September 11, 2001, by the Defense Department and the CIA Inspector General that the Justice Department has declined for prosecution, including the 22 cases reported to have been declined by letter, dated February 8, 2008, to Senator Richard Durbin. Provide additional investigative and prosecutorial resources to expedite review of pending detainee abuse cases.
- Augment Justice Department resources devoted to investigation and prosecution of contractor crime abroad, ensuring adequate funding for the extraordinary costs of prosecuting these cases.
- **Announce the new administration's commitment to supporting the Commission on Wartime Contracting, and direct relevant agencies to provide proactive assistance to the Commission.** Through section 841 of the 2008 National Defense Authorization Act (NDAA), Congress required an independent Commission on Wartime Contracting to conduct a two-year study of U.S. government contracting for logistics support, reconstruction and security functions in Iraq and Afghanistan. The Commission is also tasked with assessing (among other things) which functions, including providing security in areas of combat operations, may be "inherently governmental" and thus inappropriate for private contractors. Designed to be staffed substantially by detailees from the Defense and State departments and other U.S. government agencies, the Commission has been slow in forming, although all commissioners have been appointed, offices established, and staff and detailees are being brought on board. The Commission represents a critical opportunity to take a fresh look at key contractor issues on a bipartisan, professional basis. President-elect Obama should declare his support for the Commission, and his administration's intention to look to it for critical policy recommendations. He should also direct the Secretary of Defense, the Secretary of State and other relevant agency heads to be promptly and fully responsive to requests for support, information and documents from the Commission.
- **Direct the Secretary of Defense to take effective action to substantially enhance military control over U.S. government private security contractors in areas of combat operations.** Over the last several years, the Defense Department has taken important steps to more effectively control its own security contractors. However, even in the face of congressional invitations—or mandates—it has failed to assert control over, or accept responsibility for, security contractors engaged by other agencies. In areas of U.S. combat operations, however, it is essential that the Defense Department and U.S. military commanders have more effective control and influence over contractors performing armed security

functions in the military “battlespace.” President-elect Obama should direct the Secretary of Defense to:

- **Implement the clear congressional mandate for robust regulations governing selection, training, equipping and conduct of personnel performing private security functions for all U.S. government agencies in areas of combat operations.** In section 862(a) of the 2008 NDAA, Congress directed the Secretary of Defense, in coordination with the Secretary of State, to prescribe by May 2008, regulations governing the selection, training, equipping and conduct of personnel performing private security functions under covered contracts with any U.S. government agency in “area[s] of combat operations.” Such regulations, if sufficiently rigorous and if enforced, would provide a key foundation for more effective Defense Department control over all U.S. government security contractors abroad, contributing greatly to prevention of many of the sorts of contractor abuses seen over the last several years. The Defense Department reportedly is working on a draft regulation in response to Congress’ mandate, but at this writing—seven months after the 2008 NDAA’s deadline for the regulations—the department has yet to publish either proposed or interim regulations. Depending upon the status of this effort when he takes office, President-elect Obama should direct the Secretary of Defense to comply with the original congressional mandate, and prepare and enforce rigorous regulations that will have government-wide application and impose direct legal responsibilities on both contractors and their contracting agencies.
- **Devise a regime for Defense Department certification or licensing of U.S. government security contractors to perform armed security services abroad.** The congressional mandate discussed above stresses that its specific prescriptions represent the *minimum* the Defense Department is required to do to regulate the “selection, training, equipping, and conduct of personnel performing private security functions[.]” President-elect Obama should direct the Secretary of Defense to take a further step, entirely within the scope of Congress’ 2008 NDAA mandate, to bring U.S. government security

contractors abroad under more effective military control—*i.e.*, by devising, implementing and resourcing a Defense Department-managed licensing regime for security contractors providing armed security services for any U.S. government agency abroad.⁸

- **Direct the Secretary of Defense to develop consistent, government-wide regulations for private security contractor contracting and acquisition.** The Federal Acquisition Regulation (FAR) provides detailed requirements governing U.S. government agency contracts.⁹ However, the regulations lack specificity regarding contractual requirements for training, vetting, treatment and oversight of security and other contractor personnel, and does not ensure sufficient uniformity in U.S. government contracting for such services across agencies. The Defense Federal Acquisition Regulation Supplement (DFARS) provides additional regulations through which the Defense Department has generally developed more rigorous contracting

⁸ Substantive elements of this certification/licensing regime should include rigorous assessment of private security companies’:

- Financial capacity, including for liabilities they may incur.
- Past performance and conduct.
- Internal organization and regulations, including relating to investigations of and sanctions for misconduct, and mandating cooperation with law enforcement agencies.
- Respect for the welfare of their personnel, as protected by labor and other relevant law.
- Accuracy and currency of personnel and property records—in particular, weapons and ammunition.
- Training of personnel, both pre-deployment and ongoing, including to respect relevant national law, international humanitarian and human rights law, and the Voluntary Principles on Security and Human Rights.
- Mission-specific equipment, in particular weapons, ensuring such equipment has been acquired lawfully and that its use is not prohibited by international law.

To ensure the effectiveness of such a certification/licensing regime, the Defense Department should be required to build an adequate capacity for effective compliance monitoring, for investigation of non-compliance, and for imposition of sanctions, to include de-certification (or license revocation) which would disqualify companies from contracting with any U.S. government agency to provide armed security services abroad.

⁹ FAR Subpart 52.225-19 (*Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States*), March 2008, http://www.acquisition.gov/far/current/html/52_223_226.html, has particular significance for security contractors supporting civilian U.S. government agencies.

and acquisition standards for its security contracts.¹⁰ In light of the increasing trend for many U.S. government agencies to employ security contractors abroad, and for U.S. intelligence agencies also to rely increasingly on contractors, President-elect Obama should direct the Secretary of Defense to develop regulations that will:

- Set out in the FAR consistent, government-wide standards for contracting, acquisition and management of private security and other contractors that will ensure that more detailed standards developed by the Defense Department will provide a regulatory floor for *all* U.S. government agencies.
 - Prescribe provisions applicable to all U.S. government private security contracts abroad mandating contract requirements for appropriate contract sanctions and for compensation of victims in the event of serious contractor crime.
- **Direct the Secretary of Defense to revise private security contractor rules for the use of force to better ensure that contractors do not directly participate in combat.** Although U.S. government policy bars security contractors from engaging in “combat” or in “offensive” military operations, various guiding U.S. government documents setting out rules for the use of force by security contractors conflict with this guiding principle. While the government claims that security contractors in conflict zones are primarily needed to protect *civilian* personnel and missions, both the substance and structure of current U.S. government rules for the use of force by security contractors inappropriately track military rules of engagement. Under these rules, contractors are authorized to use deadly force under a “hostile act/hostile threat” framework that is a hallmark to U.S. military rules of engagement but sets an unacceptably low threshold for civilian (even security contractor) use of deadly force. Moreover, under these rules Defense Department contractors are authorized to

use deadly force to protect lawful *military* targets, including military facilities, property and personnel, from even non-imminent threats. By tasking contractors to protect military targets in environments such as Iraq, the U.S. government renders them targetable under the laws of war, makes security contractor operations more likely to result in innocent civilian casualties, and virtually ensures that they will engage in combat—without the protections under the law of war to which uniformed military personnel are entitled as combatants. Because contractors are civilians and (unlike combatants) do not have a legal privilege to participate in hostilities in armed conflict, critical distinctions between civilians and combatants under the law of war are eroded, thus jeopardizing other civilians performing important roles in theater. President-elect Obama should direct the Secretary of Defense—where necessary in coordination with the Secretary of State—to prescribe binding rules for the use of force modeled on appropriate civilian principles of self-defense and defense of others, rather than on military rules of engagement. The rules should be specifically crafted to minimize the risk that private security contractors will be drawn into direct participation in combat. Among current directives requiring revision are:

- **December 2007 Memorandum of Agreement (MoA) between the Defense and State Departments regarding private security contractors in Iraq.** On December 5, 2007—ten weeks after Nisoor Square—the State Department and Defense Department signed an MoA¹¹ that increases the Defense Department’s role in coordinating non-Defense Department U.S. government security contractors in Iraq. However, the MoA has significant gaps and flaws: It does little to address the issue of contractor impunity and through its flawed rules for the use of force perpetuates consistent and dangerous conflation of civilian security contractor missions with core military missions and civilian rules for the use of force with military rules of engagement. The MoA’s rules for the use of force should be

¹⁰ DFARS Subparts 225.74 (*Defense Contractors Outside the United States*), March 31, 2008, http://www.acq.osd.mil/dpap/dars/dfars/html/current/225_74.htm, and 237.171 (*Training for Contractor Personnel Interacting with Detainees*), September 15, 2008, http://www.acq.osd.mil/dpap/dars/dfars/html/current/237_1.htm, are particularly significant for Defense Department security and other contractors.

¹¹ Memorandum of Agreement between the Department of Defense and the Department of State on USG Private Security Contractors December 5, 2007, www.defenselink.mil/pubs/pdfs/Signed%20MOA%20Dec%2005%202007.pdf.

revised—in this instance by the Defense Department in concert with the State Department—to better ensure that security contractors are not employed to perform core military missions, to include “direct participation in hostilities” in areas of combat operations that may be defensive in nature.

- **Department of Defense Instruction No. 3020.41 (*Contractor Personnel Authorized to Accompany the U.S. Armed Forces*).** Instruction No. 3020.41 prescribes policies and procedures concerning Defense Department contractors authorized to accompany the U.S. military. Among other things, the instruction authorizes private security contractors to use deadly force beyond self-defense when necessary to execute their contract security missions to protect assets and/or persons. The instruction prohibits security contractors from performing “inherently governmental military functions,” but defines this term far too narrowly, limiting the restriction to “offensive” military operations such as conducting preemptive or other types of “attacks.” The instruction thereby dangerously invites direct security contractor participation in many types of non-offensive combat operations.
- **DFARS and FAR.** In 2006, the DFARS was amended to require Defense Department private security and other contracts to incorporate substantive requirements of Instruction No. 3020.41. As this instruction is modified, so also must corresponding DFARS provisions be revised, and incorporated into the FAR in order to apply to all government agencies.

- **Direct the Secretary of Defense to develop recommendations for legal reform to better safeguard the rights of civilian contractors prosecuted by the U.S. military.** In 2006, Congress amended the Uniform Code of Military Justice (UCMJ) to extend the U.S. military’s already-existing authority to prosecute crimes committed by civilians “serving with or accompanying” the armed forces.¹² In March

2008, the Defense Department issued internal implementing guidance for its expanded criminal jurisdiction over certain private contractors and other civilians. Weeks later, Alaa Mohammed Ali, a dual Canadian-Iraqi citizen employed in Iraq as a Defense Department contractor interpreter, became the first civilian contractor court-martialed since the Vietnam War.¹³ While courts-martial can promote contractor accountability, the prosecution of civilians in military courts raises constitutional and human rights concerns.¹⁴ President-elect Obama should direct the Secretary of Defense to develop recommendations for revisions to the UCMJ and/or the Manual for Courts-Martial to safeguard the rights of civilian contractors prosecuted by the U.S. military—including, for example, by requiring clear notice to contractors covered by the UCMJ, as well as further delimiting the punitive articles chargeable against contractors—including to better ensure that this court-martial authority can be defended on appeal.

- **Propose legislation to enhance the commitment of resources to contractor accountability and to promote contractor transparency and accountability.** Through the 1990s, the federal government’s contracting and acquisition force was substantially reduced, and the Bush Administration has done little to ensure that adequate resources are in place to effectively manage and control the growing contractor force in order to check and deter misconduct, or to be able to investigate and prosecute misconduct when serious crimes are committed. President-elect Obama should propose legislation to:
 - **Augment the Justice Department’s institutional support for investigating and prosecuting serious contractor crime abroad.** The Domestic Security Section (DSS) of the Justice Department’s Criminal Division is described by the Department as its “central point of contact” regarding MEJA investigations and prosecutions. DSS, however, is under-resourced

¹² Prior to this amendment, such jurisdiction existed only “in time of war.” The 2006 UCMJ amendment extended jurisdiction to civilians serving in a “contingency operation,” the current doctrinal term for U.S. military operations such as those in which the United States is currently engaged in Iraq and Afghanistan.

¹³ Charged with stabbing a fellow contractor at a remote U.S. military base in Iraq, Ali pled guilty in June 2008 and was sentenced to five months in prison.

¹⁴ See, e.g., Kara M. Sacilotto, *Jumping the (Un)Constitutional Gun?: Constitutional Questions in the Application of the UCMJ to Contractors*, 37 J. PUB. CONTRACT L. 179, 192-94 (2008); Jonathan Finer, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT’L L. 259, 262 (2008).

and has other substantial responsibilities that compete for its limited resources. With respect to crimes committed by contractors abroad, it has a limited mandate, operating primarily as a technical assistance office providing support in MEJA cases to U.S. Attorney's offices. It is these U.S. Attorney's offices that must take lead responsibility for MEJA prosecutions, committing their own limited resources to these invariably very expensive prosecutions. Thus, in addition to directing the Attorney General to allocate additional Justice Department resources to investigating and prosecuting contractor crime, President-elect Obama should urge Congress to appropriate additional resources to investigating and prosecuting contractor crime.

- **Provide substantial new resources to federal agency contracting, acquisition, audit and inspector general operations to ensure effective management and oversight of private security and other contractors.** In October 2007, the Gansler Commission¹⁵ found that the U.S. Army, during a period in which it had substantially increased its contracting, actually had a reduced capability to effectively manage contracts for materiel, supplies and services in support of expeditionary operations. The experience of other U.S. government agencies since September 11, 2001, has been similar. Close and rigorous management of private security and other contractors fielded abroad by the U.S. government is essential to ending contractor impunity. While some interim half-measures have been taken to increase the U.S. government's contracting and acquisition workforce,¹⁶ many private security and other

contractors still are managed only ineffectively, or by other contractors. Building the U.S. government's uniformed and civilian contracting, acquisition, audit and inspector general forces to levels necessary to effectively manage, control and oversee these contractors undoubtedly will require substantial additional resources to be appropriated by Congress.

- **Extend Freedom of Information Act (FOIA) mandates to U.S. government contractors performing armed security functions abroad.** FOIA provides a mechanism for the public to seek disclosure of unclassified U.S. government documents and information. Private companies are not subject to FOIA, and private security companies often try to persuade their contracting agencies to classify company documents in their possession to shield them from disclosure, or to not disclose them on grounds that they reflect "trade secrets and commercial or financial information" exempt from FOIA disclosure. Transparency, however, is a critical foundation for accountability, and extending FOIA to private security contractors would give the American public access to the same sort of critical information FOIA reaches in the possession of the military: training programs; incident reports; and internal regulations, including regarding investigations and disciplinary procedures, and safety and health policies. FOIA thus should be amended to directly subject private security companies that contract with the U.S. government to perform armed security functions abroad—thus employing force abroad at the behest of the U.S. government—to the same FOIA requirements regarding such work that govern federal agencies.
- **Repeal the DTA's special trial defense provisions.** Section 1004 of the DTA (amended by the Military Commissions Act of 2006) makes it easier for defendants—including private contractors involved in detainee interrogations—to claim reliance on legal authority like the notorious "torture memos"¹⁷ to justify detainee abuse. These

¹⁵ See Commission on Army Acquisition and Program Management in Expeditionary Operations ("Gansler Commission"), *Urgent Reform Required: Army Expeditionary Contracting*, October 31, 2007, http://www.army.mil/docs/Gansler_Commission_Report_Final_071031.pdf.

¹⁶ The General Accounting Office (GAO), for example, has questioned whether recent, short-term Defense Department increases in contracting staff in Iraq are sustainable, and concluded that the Secretary of Defense needs to develop and implement a long-term strategy to fill authorized positions for both the Joint Contracting Command-Iraq/Afghanistan and the Defense Contract Management Agency. GAO, *Rebuilding Iraq: DoD and State Department Have Improved Oversight and Coordination of Private Security Contractors in Iraq, but Further Actions Are Needed to Sustain Improvements*, Report No. 08-966, July 2008, <http://www.gao.gov/new.items/d08966.pdf>.

¹⁷ "Torture memos" is a term commonly applied to a series of memoranda—some released, many not—written by various Bush Administration lawyers in the White House, the Justice Department and the Defense Department, setting out arguments calculated to avoid legal constraints against torture and mistreatment of detainees.

special defense provisions, enacted by Congress in 2005, make it more difficult both for victims to obtain relief for torture and cruelty committed by U.S. government private contractors, and for prosecutors to hold contractor abusers criminally accountable. Section 1004 of the DTA should be repealed.

- **Support legislative reform of the “state secrets” privilege to ensure that victims of abuse have effective remedies for human rights violations.** Over the last several years, the U.S. government has invoked the state secrets privilege in cases challenging torture and rendition to torture, and courts have accepted government claims of risk to national security without independently reviewing the information. This practice has impinged upon the right of individuals to seek and obtain redress for human rights violations, including those resulting from misconduct by U.S. government contractors.¹⁸ President-elect Obama should support legislative reform of the state secrets privilege to better ensure that victims of abuse have effective remedies for human rights violations.
- **Direct the Attorney General to review and develop recommendations for reforming other civil litigation privileges, immunities and exemptions that can impede compensation to victims of contractor misconduct.** Other defenses to civil liability typically advanced by private security and other contractors when sued for alleged violence or abuse include derivative immunity under the “combatant activities” exception to the Federal Tort Claims Act,¹⁹ the “political question” doctrine,²⁰ the

“government contractor” defense,²¹ and (in suits by contractor personnel or their survivors against their own companies for injury or death) the “liability as exclusive” provision of the workmen’s compensation-type program provided in the Defense Base Act for U.S. government contractors fielded abroad.

President-elect Obama should direct the Attorney General to undertake a review of the impact of these defenses in contractor litigation, and develop reform recommendations to ensure they do not interfere with the United States’ legal obligations under the Geneva Conventions, the International Covenant on Civil and Political Rights or other international legal obligations to provide effective remedies to victims of serious crimes committed by contractors fielded abroad.

- **Direct the Attorney General, Secretary of Defense and Secretary of State to report regularly to Congress and the public on private contractor utilization, costs and accountability.** U.S. military and civilian agencies are subject to intensive congressional oversight and—even though involved in sensitive activities requiring confidential treatment of much information—are required to operate with substantial openness and transparency. In contrast, private security and other contractors the U.S. government increasingly utilizes to perform many of the same functions the military used to perform—or may still perform—operate without transparency. During the last two years, Congress has imposed some additional reporting responsibilities regarding contractor activities on Executive Branch agencies.²²

¹⁸ See, e.g., *El-Masri v. United States*, 479 F.3d 296 (4th Cir.), cert. denied, ___ U.S. ___, 128 S. Ct. 373, 169 L. Ed. 2d 258 (2007) (affirming dismissal—on state secrets privilege grounds, after intervention in the case by the U.S. government and its assertion of the privilege—of a civil action against former Director of Central Intelligence George Tenet and unnamed CIA employees, several former U.S. diplomats, and three contractor defendants and unnamed employees, for their roles in El-Masri’s arbitrary detention and torture, and cruel, inhuman, or degrading treatment, in violation of federal and international law).

¹⁹ See, e.g., *Ibrahim v. Titan Corp.*, Civil Action No. 04-1248 (JR), and *Saleh v. Titan Corp.*, Civil Action No. 05-1165 (JR), Memorandum Order (D.D.C. Nov. 6, 2007) (applying by analogy to state law tort claims the FTCA’s combatant activities exception to dismiss suit against private contractor interpreters and their corporate employer implicated in detainee abuse at Abu Ghraib, on grounds that the interpreters were under the “direct command” and “exclusive operational control” of a U.S. military chain of command).

²⁰ See, e.g., *Whittaker v. Kellogg Brown & Root*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006) (granting KBR’s motion to dismiss a suit by parents of a U.S. Army soldier who died after a KBR convoy struck his vehicle traversing a Tigris River bridge in Iraq, on grounds that a soldier injured at the hands of a contractor performing military functions under military orders “raises the same political questions” as soldiers injured by other soldiers).

²¹ See, e.g., *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1436 (C.D. Cal. 1993) (granting motion to dismiss a suit by parents of six Marines killed during Operation Desert Storm by friendly fire, by a missile manufactured by defendant Hughes Aircraft the plaintiffs claimed to be defective; the court found plaintiffs’ state law tort claims to be preempted by a federal common law defense for government contractors).

²² For example, through the 2008 NDAA, Congress directed the Defense Department, State Department and USAID to develop a common database of contracts and contractors in Iraq and Afghanistan, and to make it available to relevant congressional committees and the Comptroller General. Defense Department officials report that such information will indeed be made available to Congress by January 1,

But other proposed reporting requirements have not been enacted. As recently as October 2008, the Special Inspector General for Iraq Reconstruction found that even at this late date no major U.S. government agency utilizing private security contractors in Iraq even *has* a financial management system that routinely captures data showing how much has been obligated and spent for these services.²³ The unavailability of such data impedes federal agencies' ability to perform basic cost-benefit analyses of proposed reconstruction projects, and Congress' ability to perform its oversight function. Rather than waiting for additional reporting mandates to be imposed by Congress, President-elect Obama should direct the Attorney General, Secretary of Defense and Secretary of State to regularly disclose detailed and comprehensive data and documents relating to the use of private security and other contractors; public expenditures on these contractors; and accountability for violence and abuse by contractors abroad.²⁴

FIRST YEAR IN OFFICE

By the end of his first year in office, President-elect Obama should have substantial long-range efforts well underway to strengthen the nation's commitment to contractor accountability and humane treatment, and to invest in strengthening the U.S. government's intelligence-gathering capabilities, thus developing a more effective counterterrorism strategy.

2009, through the Defense Department's Synchronized Pre-Deployment And Operational Tracker (SPOT) database.

²³ SIGIR, *Agencies Need Improved Financial Data Reporting for Private Security Contractors*, p. i. The Congressional Research Service (CRS) recently reported that, "As oversight hearings have demonstrated, the executive branch either has not kept sufficient records to produce or has been unwilling to present basic, accurate information on the companies employed under U.S. government contracts and subcontracts in Iraq." CRS, *Private Security Contractors in Iraq: Background, Legal Status and Other Issues*, updated August 25, 2008, p. 42, <http://www.fas.org/sqp/crs/natsec/RL32419.pdf>.

²⁴ For a table detailing recommended data and information the Justice, State and Defense departments and the Central Intelligence Agency should be directed to report, see Appendix B.

We propose that President-elect Obama:

■ **Direct the Secretary of Defense to:**

- **Develop force structure options that would allow the U.S. government to reduce its reliance on private security and other contractors in future conflicts, and to ensure that contractors it does use can be effectively managed and controlled.** The U.S. government's extraordinary reliance on private contractors in Afghanistan and especially Iraq since September 11, 2001, has been driven in large part by necessity, because of U.S. military force structure decisions made and implemented during the 1990s. Concern also has been expressed in many quarters—including by Secretary Gates and other senior Defense Department officials²⁵—that the U.S. government's use of private security contractors has itself undermined retention of highly skilled U.S. military personnel, as well as military morale. President-elect Obama should direct the Secretary of Defense to assess, by the end of his first year in office, the impact on military retention and morale of the U.S. government's increased reliance on private security and other contractors, and to develop viable military force structure options that would:
 - Allow the United States to avoid or at least substantially reduce its dependence on private contractors in future conflicts, in areas including the performance of security missions by armed private contractors in areas of combat operations; in circumstances creating an unwarranted risk of drawing them into direct participation in combat; and in the direct participation of private contractors in the interrogation of detainees.

²⁵ On September 26, 2007, in testimony before the Senate Appropriations Committee, Secretary of Defense Robert Gates stated, "My personal concern about some of these security contracts is that I worry that sometimes the salaries they are able to pay in fact lures some of our soldiers out of the service to go to work for them." Senate Appropriations Committee, *Hearing on the Fiscal 2008 War Supplemental*, 110th Cong., 1st sess., September 26, 2007. See also "Army Chief Notes 'Problematic' Potential of Armed Contractors on the Battlefield," *Defense Daily*, August 26, 2005, http://findarticles.com/p/articles/mi_6712/is_2005_August_26/ai_n29207485 (quoting then-Army Chief of Staff General Peter Schoomaker).

- Ensure the Defense Department has an adequate uniformed and civilian workforce to perform contracting, acquisition, audit and inspector general functions to the level necessary to exercise effective control and oversight of contractors that continue to be used.
- **Through the Quadrennial Defense Review (QDR), comprehensively assess planned uses and roles of contractors by the Defense Department over the next twenty years, to include making adequate provision for long-range requirements for control, oversight and accountability of contractors.** By congressional mandate, the Secretary of Defense must conduct during 2009, a “comprehensive examination . . . of the national defense strategy, force structure, force modernization plans, infrastructure, budget plan, and other elements of the defense program and policies of the United States[,]”²⁶ to be published early in 2010. President-elect Obama should direct the Secretary of Defense to ensure that the 2010 QDR is built upon a comprehensive, rigorous assessment of the contractor component of the “Total Force,” to minimize chances that contractors will be needed to perform functions that should be performed by uniformed personnel or Defense Department civilians, and to make adequate provision for long-range requirements for control, oversight and accountability of contractors that are used.
- **Direct the Secretary of State to lead an interagency effort to implement the Montreux Document’s internationally-recognized “good practices” for regulating private security and other contractors, to ensure respect for international humanitarian and human rights law.** In September 2008, the United States was one of seventeen nations—Iraq and Afghanistan were two others—agreeing to the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict. The Montreux Document reaffirms the obligation of nations to ensure that private security and other contractors operating in armed conflicts

comply with international humanitarian and human rights law. It also details more than seventy good practices for improving regulation and control of contractors, including taking concrete steps to ensure prosecution when serious crimes occur. President-elect Obama should direct the Secretary of State, in consultation with the Secretary of Defense and the Attorney General, to:

- By the end of the first year of the new administration, complete a comprehensive comparative analysis of current U.S. law, and U.S. government policy and practice, against the Montreux Document, and develop recommendations for reform to more thoroughly incorporate Montreux Document good practices into U.S. law, policy and practice.
- Through the State Department’s Bureau of International Narcotics and Law Enforcement Affairs (INL),²⁷ provide technical assistance to Iraq and Afghanistan to assist those governments to develop reforms—appropriate to their respective legal systems and levels of legal development—to implement Montreux Document good practices into their own law, policy and practice.
- With the United States thus demonstrating its own commitment to Montreux Document principles, vigorously promote endorsement of the Montreux Document by other nations and incorporation of its good practices into their own national legal frameworks, including in order to advance the development of positive, consistent and predictable legal regulation of the private military and security company industry.
- **Implement human intelligence-collection reform recommendations, including reforms regarding the use of contractors in interrogations.** President-elect Obama should implement recommended reforms emerging from the interagency review led by the Secretary of Defense and the Director of National Intelligence to enhance both the effectiveness of U.S. human intelligence-collection activities, including interrogations, as well as their compliance with domestic and international legal obligations. The

²⁶ 10 U.S.C. § 118.

²⁷ INL has lead responsibility for coordinating U.S. government assistance and support to rule of law development and reform in Iraq and Afghanistan.

interagency review should carefully study the use of contractors in interrogations and consider all options, including banning contractor use in interrogations or alternatively developing additional measures to strengthen contractor oversight and accountability.

Conclusion

The challenge of ensuring the accountability of private security and other contractors employed by the U.S. government in military and intelligence operations abroad now lies largely with the next administration, and President-elect Obama has said that he recognizes this challenge. The objective is clear: the U.S. government must take just as seriously its responsibility to effectively control, investigate and prosecute private contractors it fields abroad as it does the military forces it deploys abroad.

Human Rights First's three-stage plan for ending contractor impunity will support the missions of the U.S. military in Iraq and Afghanistan, strengthen U.S. government counterterrorism efforts, and help re-establish the United States' moral authority as a nation devoted to human rights.

Appendix A

Sources: Key Contractor-Related Laws and Other Authority²⁸

U.S. Statutes

Federal Tort Claims Act (FTCA) (28 U.S.C. § 1346(b)): First enacted in 1946, the FTCA permits private parties to sue the United States in federal court for torts committed by persons acting on behalf of the U.S. government.

Uniform Code of Military Justice (UCMJ) (10 U.S.C. §§ 801-946): In 2006, Congress amended the UCMJ (first enacted in 1950) to extend U.S. military authority to court-martial contractors and other civilians “serving with or accompanying” the armed forces to apply in “contingency operations,” such as those in Iraq and Afghanistan.

Defense Base Act (DBA) (42 U.S.C. § 1651): First enacted in 1941, the DBA extends federal workers’ compensation and medical treatment coverage to persons employed (including as contractors) at U.S. military bases overseas.

Freedom of Information Act (FOIA) (5 U.S.C. § 552): First enacted in 1966, FOIA provides a mechanism for members of the public and media to seek public disclosure of unclassified U.S. government documents and information.

Torture Convention Implementation Act (18 U.S.C. §§ 2340, 2340A): The Anti-Torture Act was enacted in 1994 to comply with the United States’ obligation under the Convention against Torture to criminalize acts of torture. The law covers conduct by U.S. nationals (including contractors) and those found in the United States for acts committed outside the United States.

War Crimes Act (WCA) (18 U.S.C. § 2441(a)): The 1997 WCA authorizes prosecution of war crimes committed “inside or outside the United States” by or against U.S. nationals (including contractors) or members of the U.S. armed forces. The **Military Commissions Act** (Pub. L. 109-366), enacted in 2006, narrowed the scope of the WCA to cover only specified so-called “grave breaches” of Common Article 3, such as “torture” and “cruel or inhuman treatment.”

Military Extraterritorial Jurisdiction Act (MEJA) (18 U.S.C. §§ 3261-67): First enacted in 2000, MEJA permits the prosecution in U.S. federal court of certain persons (including certain contractors) who commit acts that would be crimes under the **Special Maritime and Territorial Jurisdiction** (18 U.S.C. § 7) that are punishable by imprisonment for more than a year, had the conduct occurred within the United States.

Detainee Treatment Act (DTA) (42 U.S.C. § 2000dd): Enacted as part of the Department of Defense Appropriations Act of 2006 (Title X, H.R. 2863), the DTA prohibits “cruel, inhuman, or degrading treatment or punishment” (acts that violate the 5th, 8th and 14th Amendments) of detainees, and provides for “uniform standards” for interrogation, limiting the U.S. military (and its contractors) to

²⁸ Several of these summaries are adapted from Human Rights First & Physicians for Human Rights, *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, August 2007, <http://www.humanrightsfirst.info/pdf/07801-etn-leave-no-marks.pdf>.

interrogation techniques authorized by the Army Field Manual (currently FM 2-22.3, *Human Intelligence Collector Operations*). Section 1004 of the DTA provides extraordinary defenses and protections in criminal prosecutions and civil litigation to persons accused of detainee abuse.

2008 National Defense Authorization Act (NDAA) (Pub. L. 110-181): The 2008 NDAA requires, among many other things, that the Defense Department, in coordination with the State Department, prescribe regulations for selecting, training and equipping private security contractors in areas of combat operations; and that an independent Commission on Wartime Contracting be established to study U.S. government contracting for logistics support, reconstruction and security functions in Iraq and Afghanistan.

U.S. Treaties and Related Materials

Common Article 3 of the Geneva Conventions: Found in all four Geneva Conventions, Common Article 3 defines core obligations that must be respected by nations in all armed conflicts. It prohibits violence—by armed forces, government civilians or government contractors—against persons in detention (among others), including murder, mutilation, cruel treatment and torture, outrages upon personal dignity, and humiliating and degrading treatment.

International Covenant on Civil and Political Rights (ICCPR): The ICCPR, ratified by the United States in 1992, elaborates on the Universal Declaration of Human Rights’ civil and political rights and freedoms. Article 7 guarantees an individual’s right to be free from torture and cruel, inhuman or degrading treatment or punishment. Article 2 obligates state parties to provide effective (including judicial) remedies to victims of human rights violations.

UN Convention against Torture (CAT): The CAT, ratified by the United States in 1994, prohibits torture and cruel, inhuman or degrading treatment by state actors or those acting with state acquiescence. The treaty also prohibits the transfer of a person to a country “where there are substantial grounds for believing” that the person “would be in danger of being subjected to torture.”

Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict: The Montreux Document, agreed to by the United States and sixteen other nations in September 2008, reaffirms state obligations to ensure that contractors operating in armed conflicts comply with international humanitarian and human rights law, detailing more than seventy good practices for improving contractor regulation and control.

Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq: This agreement, signed by the United States and Iraq in November 2008, and commonly referred to as the status of forces agreement (SOFA), provides among many other things for the exercise of primary criminal jurisdiction by Iraqi authorities in very limited circumstances over U.S. military personnel and Defense Department civilian employees, and in essentially all circumstances over Defense Department contractors.

Foreign Law

Coalition Provisional Authority (CPA) Order No. 17: In Iraq in 2004, the U.S. government-led Coalition Provisional Authority (CPA) promulgated Order No. 17, conferring presumptive immunity from Iraqi legal jurisdiction upon international (non-Iraqi) contractors working in Iraq for Coalition governments or international organizations. At this writing, CPA Order No. 17’s contractor immunity remains Iraqi law.

Appendix B

Recommended Public Reporting regarding Private Security and Other Contractors

Human Rights First recommends that President-elect Obama direct the Attorney General, Secretary of Defense, Secretary of State (the latter also on behalf of USAID and *all* U.S. government civilian agencies falling under Chief of Mission authority in missions abroad) and Director of Central Intelligence to regularly—*i.e.*, at least annually—report to Congress and the American people the following information regarding private security and other contractors fielded abroad:

<p>Department of Defense Department of State Central Intelligence Agency</p>	<ul style="list-style-type: none"> ▪ Census of private contractors utilized abroad, with numbers broken down by contracting agency, country of assignment, contract, contractor nationality and basic contractor function (security, interrogation, interpreter, construction, base support, transportation, etc.),²⁹ and making all contracts publicly available ▪ Number of contractor casualties, by country, contracting agency, contract and contractor nationality ▪ Total funding obligations for private security contractors abroad, by contracting agency and contract ▪ Number of serious incidents reported (to include all reports of possible death or serious injury as a result of private contractor conduct, all weapons discharges, and all complaints regarding contractor conduct), specifying the contracting agency, date, nature, locale and victim category of each incident; the company affiliation of individual(s) involved in the incident; and the description, status and outcome of any resulting company, U.S. government agency or local national investigation, or other action ▪ Referrals to DoJ for investigation of alleged private contractor crime abroad, specifying for each referral: contracting agency, date of referral; date, nature, locale and victim category of alleged offense; and company affiliation of individual(s) suspected of criminal conduct
<p>Department of Defense (additional requirements)</p>	<ul style="list-style-type: none"> ▪ Status of UCMJ actions regarding private contractors, specifying for each matter: <ul style="list-style-type: none"> ▪ Date, nature, locale and victim category (contractor, local civilian, U.S. soldier, etc.) of alleged offense ▪ Company affiliation of individual suspected of criminal conduct ▪ Identity of relevant general court-martial convening authority ▪ Status of investigation and/or prosecution (if ongoing)³⁰
<p>Department of Justice</p>	<ul style="list-style-type: none"> ▪ Referrals for investigation of alleged private contractor crime abroad, specifying for each referral: <ul style="list-style-type: none"> ▪ Referring agency ▪ Date of referral ▪ Date, nature, locale and victim category of alleged offense ▪ Company affiliation of individual suspected of criminal conduct ▪ Status of DoJ action regarding referrals, specifying for each referral: <ul style="list-style-type: none"> ▪ Date and reason for DoJ declination ▪ Date of assignment to specified U.S. Attorney's (or other) office for further action ▪ Status of investigation and/or prosecution (if ongoing)³¹

²⁹ For U.S. government contractors fielded in Iraq and Afghanistan, much of this information already is being collected for most if not all U.S. government agencies through the Defense Department's Synchronized Pre-Deployment and Operational Tracker (SPOT) database, as required by the 2008 NDAA. However, as recently as October 2008, GAO reported: "Complete and reliable data were not available for us to determine the total number of contractor personnel, including those performing security functions, who worked on DOD, State, and USAID contracts in Iraq and Afghanistan during fiscal year 2007 and the first half of fiscal year 2008." GAO, *Contingency Contracting: DoD, State and USAID Contracts and Contractor Personnel in Iraq and Afghanistan*, Report No. 09-19, October 2008, <http://www.gao.gov/new.items/d0919.pdf>.

³⁰ Except in cases where charges are filed and names are thus in the public domain, this information should be reported without personally-identifying information regarding individuals suspected of criminal offenses.

³¹ See note 19.



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