



**State of Affairs:
Three Years After Nisoor Square**
**Accountability and Oversight of
U.S. Private Security and Other Contractors**

September 2010

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Introduction

On September 16, 2007, Blackwater Worldwide (now Xe) private security contractors working for the U.S. Department of State killed 17 unarmed civilians and wounded 24 more in an unprovoked incident in Baghdad's Nisoor Square. A political firestorm immediately ensued in Iraq, the United States and around the world. The incident exposed what had been clear for several years: The United States lacked a coordinated, systematic policy for overseeing private contractors abroad and holding them accountable for serious violent crimes.

Now, the United States' reliance on private security contractors in zones of armed conflict is increasing as is the urgent need for effective contractor oversight and accountability. Private contractors continue to outnumber U.S. military forces in Iraq and Afghanistan, and both the surge in Afghanistan and the drawdown in Iraq require additional support from private security and other contractors. It is estimated that up to 50,000 contractors will be required to support the Afghan surge and, with the military drawdown in Iraq, the Department of State plans to more than double the number of private security contractors it employs from 2,700 to 7,000. As Iraq and eventually Afghanistan move from military to civilian control and private contractors replace military forces there, the so-called jurisdictional gap over non-Defense contractors widens. If we learned anything from Nisoor Square it is that oversight and accountability gaps must be filled prior to increasing our private contractor force in conflict zones.

As it revealed serious gaps, Nisoor Square triggered several positive reforms in U.S. law and policy concerning private security contractors. In the three years since the incident, Congress has mandated greater agency oversight and coordination over private security and other contractors in Iraq and Afghanistan, and agencies have, among other things, defined their responsibility for contractor oversight, increased their coordination over contractors, and

established common principles governing contractor conduct.

Yet many oversight and accountability gaps continue. There remain significant gaps in jurisdiction over contractors who commit serious violent crimes. Congress and independent bodies have found serious deficiencies in U.S. agencies' reporting, investigation, prosecution and oversight of serious contractor incidents. Agencies do not even accurately track the number of contractors and subcontractors fielded abroad. By tasking contractors with functions that draw them into hostilities, U.S. policy may increase the risk to civilians and contractors from prosecution.

The U.S.'s inadequate oversight and inability to hold Blackwater and other contractors accountable for serious crimes has alienated local populations and undermined U.S. military efforts in Iraq and Afghanistan. Then-Senator Barack Obama stated, "We cannot win a fight for hearts and minds when we outsource critical missions to unaccountable contractors." The U.S. has a responsibility and a national security interest to ensure that when it fields contractors abroad it provides effective oversight and accountability to protect civilians as well as minimize and remedy potential contractor harm.

This report provides a snapshot of the legal and regulatory gaps in contractor oversight and accountability, notwithstanding the progress made since Nisoor Square. It also offers specific recommendations to strengthen U.S. criminal accountability, control and oversight of contractor functions, remedies for victims of contractor abuse and international standards covering private security providers. These recommendations will help ensure that U.S. law and policy on private security and other contractors fielded abroad advance U.S. national security interests and help prevent another tragic incident such as Nisoor Square from happening again.

Summary Of Recommendations To Improve Contractor Oversight And Accountability

I. Criminal Accountability For Contractor Violent Crimes

- Congress should enact the Civilian Extraterritorial Jurisdiction Act (CEJA) of 2010 (H.R. 4567, S. 2979) to expand criminal jurisdiction over and increase investigative resources for serious crimes committed by U.S. contractors.
- The U.S. government should review the adequacy of existing agreements governing the susceptibility of private contractors in Iraq and Afghanistan to effective and fair criminal prosecution and develop recommended changes.
- DoD and DoS should establish a standard definition of serious incidents, incorporate that definition in PSC guidance and establish independent audit mechanisms to ensure incident reporting compliance.
- Agencies should task contract audit organizations to periodically review the prime contractors' oversight of subcontractor PSCs' compliance with incident reporting requirements.
- DoS and USAID should implement a formal process for receiving and processing reports of serious incidents in Afghanistan.
- Agencies should require oversight bodies to track all serious incidents reported, investigate and remediate when necessary, and maintain all supporting documentation relating to such actions taken.
- DoJ should commit additional resources to investigate and prosecute contractor crime and formally announce that prosecution of contractor

crime abroad is a Justice Department national priority.

- DoJ should review and, where appropriate, reopen referrals previously declined, and take prompt action on new cases.

II. Control And Oversight Over Contractors

- DoD, DoS, and USAID should develop an effective system to track the number of contractors and subcontractors employed by each agency, and report regularly to Congress and the public.
- The U.S. government should provide substantial new resources to federal agency contracting, acquisition, audit and inspector general operations to ensure effective private security contractor management and oversight.
- The U.S. government should ensure federal agencies have adequate uniformed and civilian workforce to perform contracting, acquisition, audit and inspector general functions.
- Agencies should draft contracts to include provisions that ensure transparency and oversight between agencies and relevant subcontractors including agency inspection and audit rights and enforce such provisions.
- The U.S. government should reduce the layers of subcontractors where adequate oversight is not possible.

III. Ensuring Contractors Are Not Drawn Into Hostilities

- The U.S. government should stop tasking contractors with functions that are likely to draw them into hostilities.
- DoD – where necessary and in coordination with DoS – should revise private security contractor RUFs to better track appropriate civilian principles of self-defense.

IV. Remedies For Victims Of Contractor Crimes

- Congress should enact legislation such as the State Secret Protection Act (S. 417, H.R. 984) that would reform the “state secrets” privilege to ensure that victims of abuse have effective remedies for human rights violations.
- The U.S. government should develop and provide access to mechanisms to provide just compensation for wrongful deaths, injuries, or damages caused by private contractors in their employ.

V. Promoting International Standards

- The United States should implement the Montreux Document’s “good practices” in U.S. law and policy and promote the adoption of the “good practices” internationally.
- The United States should advocate for a Code of Conduct that incorporates the essential elements of a governance structure and implementation plan.

I. Criminal Accountability For Contractor Violent Crime

Summary of Issue

The Nisoor Square incident in 2007 highlighted the lack of accountability for serious crimes committed by U.S. contractors deployed in Iraq and Afghanistan. Despite some subsequent efforts to improve accountability, concerns remain regarding the lack of clarity over criminal jurisdiction over non-Defense contractors. Where there is clear jurisdiction, there are outstanding concerns over the complete reporting, investigation and prosecution of serious incidents.

A. Criminal Jurisdiction

Progress Made

Legislation introduced to clarify and expand criminal jurisdiction over contractors. Three weeks after Nisoor Square, the House passed by a vote of 389-30 the Military Extraterritorial Jurisdiction Act (MEJA) Expansion and Enforcement Act of 2007 (sponsored by Rep. David Price), to clarify and expand criminal jurisdiction over contractors abroad.¹ A similar bill sponsored by then-Senator Obama stalled in the Senate.² In 2010 Sen. Patrick Leahy³ and Rep. Price⁴ introduced identical pieces of legislation – Civilian Extraterritorial Jurisdiction Act of 2010 (CEJA) – which would likewise clarify and expand criminal jurisdiction over non-Department of Defense (DoD) contractors fielded abroad by the United States.

DoD Contractor immunity from Iraqi jurisdiction⁵ reversed by Status of Forces Agreement, 2009.⁶ On January 1, 2009, the Status of Forces Agreement between the U.S. and Iraq (SOFA) effectively reversed the presumptive immunity granted to contractors in Iraq pursuant to Coalition Provisional Authority Order No. 17. SOFA granted Iraq exclusive criminal and civil jurisdiction over contractors in Iraq operating under a contract/subcontract with or for the United

States Forces. There have been two publicized incidences of the Iraqi government exercising criminal jurisdiction over contractors.⁷

Areas Requiring Improvement / Recommendations

Clarification of U.S. Criminal Jurisdiction Over non-DoD Contractors Needed. Presently, MEJA extends U.S. criminal jurisdiction to contractors abroad who are “supporting the mission of the Department of Defense.”⁸ In Iraq and Afghanistan, it is arguable that non-DoD U.S. contractors are all indeed working – at least in substantial part – in support of DoD’s mission. However, soon after Nisoor Square, former Bush administration officials asserted that “there is a hole” in U.S. law that prevented criminal prosecutions of non-DoD U.S. contractors.⁹ Any jurisdictional gap that may currently exist will only increase as the military draws down in Iraq and eventually in Afghanistan because it becomes more difficult to assert that Department of State (DoS) contractors are supporting DoD’s mission. With DoS reporting that it will need to more than double its use of private security contractors (PSCs) from 2,700 to 7,000 by the time the military exits Iraq, it is imperative that U.S. criminal jurisdiction over non-DoD contractors is fully clarified.

Clarification of Iraqi Jurisdiction Over non-DoD Contractors Needed. Similarly, while immunity from Iraqi legal jurisdiction for DoD contractors effectively ended as of January 1, 2009 when SOFA came into effect,¹⁰ the status of non-DoD contractors remains uncertain.¹¹

RECOMMENDATIONS:

- Congress should pass, and the President should sign, the Civilian Extraterritorial Jurisdiction Act (CEJA) of 2010 (H.R. 4567, S. 2979) to clarify and expand criminal jurisdiction over non-DoD contractors fielded abroad by the United States.

- The U.S. government should review the adequacy of existing agreements governing the susceptibility of private contractors fielded in Iraq and Afghanistan to effective and fair criminal prosecution and develop recommendations for changes under Iraqi and Afghan law, and/or U.S. law or practice, as necessary to ensure effective accountability.

B. Reporting Serious Incidents

Progress Made

DoS and DoD established coordinated response for serious PSC incident reporting in Iraq, 2007.¹²

Congress required DoD, in coordination with DoS, to prescribe regulations that establish a process under which PSCs in combat operations are required to report all serious incidents, 2008.¹³ DoD¹⁴ and DoS¹⁵ have issued separate guidance pertaining to reporting serious incidents (such as attacks, deaths, injuries, and property damage), as well as to reporting weapons discharges in Iraq.

Congress required PSCs in combat operations to report active, non-lethal countermeasures taken in response to perceived threat if that incident “could significantly affect U.S. objectives with regard to the military mission or international relations,” 2009.¹⁶

Congress required contractors in Iraq and Afghanistan to report UCMJ or MEJA violations, 2009.¹⁷

DoD Interim Final Rule 3020.50 assigned responsibility and established procedures for incident reporting for PSCs operating in contingency operations, 2009.¹⁸

Areas Requiring Improvement / Recommendations

Significant Deficiencies Exist with Reporting Serious Incidents in Iraq. In 2009, the Special Inspector General for Iraq Reconstruction (SIGIR) found that while DoD and DoS established policies for reporting serious incidents were a significant improvement, the agencies still needed to improve the accuracy and consistency of the information captured. SIGIR found that DoD and DoS databases did not capture all reported serious incidents either

as a result of database management problems or the failure of PSCs to follow reporting requirements. The DoD division (ACOD) responsible for tracking all serious incidents received did not track 57% of the serious incidents reported because it applied a more limited definition than required by DoD guidance; DoD and DoS guidance used different definitions of serious incidents; information for the same incidents were inconsistent among databases; and no organization appeared to have visibility over subcontractor PSCs.¹⁹ Moreover, the USAID’s Office of Inspector General 2009 audit report found PSC subcontractors for USAID in Iraq were not reporting all serious incidents.²⁰

Afghanistan Lacks Systematic, Coordinated

Reporting Process. In Afghanistan, the reporting process is less clear, and as it relates to non-DoD PSCs more problematic. While the requirements set forth by Congress apply to PSCs in Afghanistan, they have not been implemented by non-DoD PSCs because as of May of this year implementing instructions had not been issued.²¹ As a result, USAID/Afghanistan does not require implementing partners to report serious incidents and thus, there is no assurance that its reports are complete or reliable.²²

RECOMMENDATIONS:

- DoD and DoS should jointly establish a standard definition of serious incidents and incorporate that definition in guidance for their PSCs.
- DoD and DoS should establish independent audit mechanisms to ensure PSCs at all levels comply with incident reporting requirements.
- Agencies should task contract audit organizations to periodically review the prime contractors’ oversight of subcontractor PSCs’ compliance with incident reporting requirements.
- DoS and USAID/Afghanistan should implement a formal process, consistent with standards specified in Interim Final Rule 3020.50, for receiving and processing reports of serious incidents in Afghanistan.

C. Investigating Serious Incidents

Progress Made

DoS implemented Panel recommendation to establish an Embassy Joint Incident Review Board to review all PSC incidents in Iraq involving the use of deadly force that caused injury, death, or serious consequences, 2008.²³ A month after Nisoor Square, DoS assembled a panel to review its security practices and provide recommendations to increase oversight and accountability of DoS's PSCs in Iraq. The panel recommended the establishment of a joint review board to review PSC incidents which was formed in 2008.²⁴ According to an April 2009 SIGIR report, the Board meets on a quarterly basis.²⁵

DoS and DoD established coordinated response for investigating serious PSCs incidents in Iraq, 2007.²⁶

DoD issued fragmentary orders that provide the requirements, procedures, and responsibilities that military commanders are to use to review and investigate serious incidents, 2007- 09.²⁷

Congress required DoD, DoS, and USAID to delineate responsibility for investigating and referring possible violations of UCMJ or MEJA, 2008.²⁸

DoS, DoD, and USAID entered into a memorandum of understanding on contracting in Iraq and Afghanistan, which included each agencies responsibility for collecting and referring information on offenses under the Uniform Code of Military Justice (UCMJ) or the MEJA, 2008.²⁹

Areas Requiring Improvement / Recommendation

Investigation Process for Serious Incidents Need Improvement. In 2009, SIGIR found that DoD's investigation process for the most serious of incidents – those involving death, serious injury, or property damage over \$10,000 – was not working as required.³⁰ It found the Armed Contractor Oversight Branch (ACOB) – the DoD unit in Iraq responsible for ensuring all serious incidents recorded are reviewed and, when necessary, investigated and remediated – tracked less than half of the most serious incidents that required a formal investigation.³¹ For

example, SIGIR found ACOB did not have a record of 5 incidents involving weapons discharge in which at least 1 of the incidents required an army investigation³² because of loss of life.³³ Moreover, it found ACOB did not have the required supporting documentation in its database for 51% of the incidents involving weapons discharges. Therefore, SIGIR could not verify actions taken to investigate and remediate those incidents.³⁴

SIGIR's 2009 findings highlight troubling weaknesses in the serious incident investigation process in Iraq. Similar review of DoS's serious incident investigation process in Iraq was not conducted. Nor has there been a similar audit conducted in Afghanistan.

RECOMMENDATION: Oversight bodies should be required to track all serious incidents reported, investigate and remediate when necessary, and maintain all supporting documentation relating to actions taken to investigate and remediate serious incidents.

D. Prosecuting Serious Incidents

Progress Made

DoD issued a memorandum addressing contractor accountability in contingency operations, 2007.³⁵ It made explicit that military commanders bear significant responsibility for contractor abuses³⁶ and that administrative and legal measures are available to commanders to rein in contractor abuse.³⁷

DoD issued implementing guidance for its expanded UCMJ jurisdiction over DoD contractors, 2008.³⁸

Since issuing the guidance, only 1 DoD contractor has been court-martialed for stabbing a fellow contractor at a U.S. military base in Iraq.³⁹

Criminal charges brought against Blackwater security guards for Nisoor Square, 2008. In 2009, a trial judge dismissed the criminal case against five Blackwater private security contractors implicated in the Nisoor Square shooting because the government inappropriately relied on statements that the guards had been compelled to make to DoS shortly after the incident.⁴⁰ The U.S. government is reportedly appealing the decision.⁴¹

CEJA introduced in both chambers of Congress which would enhance resources to investigate contractor crime abroad, 2010.⁴² Sponsors of the Civilian Extraterritorial Jurisdiction Act (CEJA) remain committed to advance legislation to increase investigatory resources to fight contractor crime abroad. The introduction of CEJA follows similar 2007 legislation that overwhelmingly passed in the House by a vote of 389-30;⁴³ but stalled in the Senate.⁴⁴

Areas Requiring Improvement / Recommendations

Prosecutions for Contractor Misconduct are Rarely Pursued. Despite numerous allegations of serious misconduct by contractors working in Iraq and Afghanistan,⁴⁵ few have been prosecuted. According to the Commission on Wartime Contracting (CWC), DoJ filed charges in only 12 of 58 cases referred to it by DoD for contractor violations of MEJA from 2000 through March 2008.⁴⁶ There has been no explanation as to why DoJ declined to prosecute 79% of cases involving allegations of contractor abuse. In early 2008, just a few months after Nisoor Square, DoJ officials informed the Senate that they had declined to prosecute 22 cases of alleged detainee abuse committed by contractors in Iraq and Afghanistan, including at Abu Ghraib, where photos of detainee torture and abuse ignited a firestorm of protest around the world.⁴⁷ The gross mishandling of the Blackwater case highlights that the dearth of prosecutions against private contractors in Iraq and Afghanistan has little to do with the so-called “hole” in the law.⁴⁸ Instead, the uncoordinated, botched and delayed U.S. response in Blackwater underscores that holding U.S. contractors accountable for serious crimes committed abroad has not been a national priority.

The United States has both the obligation and capacity to hold its contractors accountable for crimes overseas, but it has failed to make contractor accountability a priority, or to devote adequate resources to the effort.

RECOMMENDATIONS:

- Congress should pass, and the President should sign, CEJA to establish investigative units, and allocate necessary resources for serious crimes committed by U.S. contractors fielded abroad.

- DoJ should commit additional resources to investigate and prosecute contractor crime.
- DoJ should formally announce that prosecution of contractor crime abroad is a priority.
- DoJ should review and, where appropriate, reopen referrals previously declined, and take prompt action on new cases.

II. Control And Oversight Over Contractors

Summary of Issue

Nisoor Square underscored the lack of control and oversight the U.S. government had over its contractors in Iraq. While Congress has taken important steps in mandating regulations to increase oversight over contractors fielded abroad, gaps persist when it comes to effectively tracking contracts and contractor personnel, ensuring adequate oversight over contractors in the field, and ensuring oversight over subcontractors at every level.

A. Tracking Contracts and Contractor Personnel

Progress Made

Congress required DoD, DoS, and USAID to agree on a joint database to track contracts and contractor personnel in Iraq and Afghanistan, 2008.⁴⁹ DoD, DoS, and USAID signed a memorandum of understanding agreeing to use a common database – the Synchronized Predeployment and Operational Tracker (SPOT).⁵⁰

Congress amended their original requirements to also require agencies track contracts and contractor personnel operating under grants and cooperative agreements, 2009.⁵¹ DoD, DoS, and USAID have drafted a new MOU to address the changes.⁵²

Both DoS⁵³ and USAID⁵⁴ issued policy directives requiring information on personnel working under grants and cooperative agreements, 2009.

Areas Requiring Improvement / Recommendation

Complete and Accurate Data on Contracts and Contractor Personnel Still Needed. The Government Accountability Office (GAO) testified in 2010 that SPOT is not yet fully implemented to track contracts and personnel and agencies differ regarding which personnel to enter into the system.⁵⁵ As a result, DoD

tracks the number of contractors in Iraq and Afghanistan through a self-reporting mechanism established in 2007, which has been found seriously deficient by both the CWC⁵⁶ and the GAO.⁵⁷ There is no comparable data for DoS or USAID.⁵⁸ Without complete and accurate data on contracts and its personnel, adequate and sufficient oversight is impossible.

RECOMMENDATION: DoD, DoS, and USAID should develop an effective system to track the number of contractors and subcontractors employed by each agency, and report regularly to Congress and the public.

B. Oversight in the Field

Progress Made

DoS and DoD agreed to jointly develop, implement, and follow policies and procedures for oversight of PSCs in Iraq, 2007.⁵⁹

DoS implements Panel recommendation to place cameras in security vehicles and have diplomatic security officers accompany PSC details, 2008.⁶⁰

Congress mandated regulations to improve oversight of PSCs in Iraq and Afghanistan, 2008.⁶¹

DoD issued policies and regulations to increase oversight over PSCs, 2009.⁶² According to DoD instruction, Contracting Officer Representatives (CORs) need to be identified for U.S. government private security contractors operating in a designated area of combat operations. CORs are responsible for monitoring the contractor's performance and compliance with contractual requirements, including compliance with all applicable laws, regulations, orders, and directives.⁶³ Some CORs are also responsible for ensuring PSCs adhere to arming requirements, personnel reporting systems, serious incident reporting systems, badging (ID tasks), and compliance with MNF-I fragmentary orders.⁶⁴

Areas Requiring Improvement / Recommendations

Insufficient Number of Qualified Contracting Officer Representatives to Oversee Contractors in the Field.

GAO,⁶⁵ SIGIR,⁶⁶ and CWC⁶⁷ have reported that there is an insufficient number of CORs, CORs' experience and training was limited, and they lacked sufficient time to devote to their oversight responsibilities. The CWC also found that there was a lack of subject-matter experts in both Iraq and Afghanistan to oversee security contractors.⁶⁸ With the military drawdown in Iraq and the military surge in Afghanistan, more contractors will be needed which will require more, not less oversight.

RECOMMENDATION: 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.

Agencies Substantially Rely on Contractors to Oversee other Contractors. GAO reported in April 2010 that DoD, DoS, and USAID "relied on contractors to provide a wide range of services, including on-site monitoring of other contractors' activities, supporting contracting or program offices on contract-related matters, and awarding or administering grants."⁶⁹ It also found that there was no established uniform policy on when to use contractors to perform these services, but rather decisions were made on a case-by-case basis by individual contracting or program offices.⁷⁰ Similarly, the CWC reported that in Afghanistan, the directorate tasked to oversee private security contractors was primarily staffed by a private security contractor.⁷¹

In an attempt to fill some of these gaps, the Senate Armed Services Committee in June 2010 included additional provisions of oversight and accountability in the National Defense Authorization Act of Fiscal Year 2011.⁷² The provision would require that an appropriate number of personnel are assigned to the oversight of contractors performing private security functions.

RECOMMENDATION: Ensure federal agencies have 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.

C. Subcontractors

Progress Made

DoD issued policies and regulations to increase oversight over private security contractors including subcontractors, 2009.⁷³

Areas Requiring Improvement / Recommendations

Agencies Have Little to No Oversight of Subcontractors. The recent June 2010 House Committee on Oversight and Governmental Reform report on private contractors in Afghanistan made clear that U.S. agencies have little to no oversight over its subcontractors.⁷⁴ This was echoed earlier this year at a Senate Armed Services Committee hearing on Paravant subcontractors in which Paravant subcontract employees were alleged to have killed Afghan civilians.⁷⁵ Finally, the CWC in its June 2009 interim report highlighted the lack of oversight over subcontractors as an issue of concern.⁷⁶ The Special Inspector General for Afghanistan Reconstruction (SIGAR) testified before the CWC that "the U.S. government has difficulty identifying and monitoring second and third tier subcontractors that are Afghan or third-country-owned businesses. Multi-tiered subcontracting is problematic and results in weak oversight, control and accountability."⁷⁷

The Senate Armed Services Committee included additional provisions in the National Defense Authorization Act of Fiscal Year 2011 to provide new measures to hold contractors accountable for any failure by their employees or subcontractors to comply with the requirements of law or regulation, or with directives from combatant commanders of oversight and accountability.⁷⁸

RECOMMENDATIONS:

- Contracts should be drafted to include provisions that ensure transparency and oversight between agencies and relevant subcontractors including agency inspection and audit rights, and agencies should robustly enforce regulations that already require such provisions.
- The U.S. government should reduce the layers of subcontractors where adequate oversight is not possible.

III. Ensuring Contractors Are Not Drawn Into Hostilities

Summary of Issue

In the aftermath of Nisoor Square, increased attention was directed to the type of functions performed by private contractors and the rules governing their conduct, particularly the rules for the use of force. Restrictions on what functions private contractors are asked to fulfill and when they are permitted to use force are essential to maintaining the important distinction under international humanitarian law between combatants, who are legitimate military targets, and civilians who are not. To do otherwise, dangerously blurs the principle of distinction designed to protect civilians in conflict from harm and leaves contractors susceptible to domestic prosecution.

A. Functions Performed

Progress Made

Congress tasked the Commission on Wartime Contracting (CWC) with assessing which contractor functions may be “inherently governmental,” 2008.⁷⁹ In June of this year, the CWC held a two-day hearing on whether PSCs are performing inherently governmental functions and is expected to report its findings in its final report to Congress scheduled for 2011.⁸⁰

Congress passed a Sense of Congress stating PSCs should not perform inherently governmental functions in an area of combat operations, 2009.⁸¹

Office of Management and Budget (OMB) issued a draft policy letter to provide guidance on inherently governmental functions, 2010.

Areas Requiring Improvement / Recommendation

Current U.S. Policy on PSC Functions Threatens to Draw Contractors into Hostilities. While U.S. government policy bars security contractors from engaging in combat or in offensive military

operations, it permits contractors to use deadly force to protect lawful military targets, including military facilities, property and personnel, from even non-imminent threats.

Department of Defense Instruction No. 3020.41 prohibits security contractors from performing “inherently governmental military functions,”⁸² but DoD guidance defines this term narrowly, limiting the restriction to “offensive tactics,”⁸³ such as conducting assault or preemptive attacks, even though many defense activities can also constitute direct participation in hostilities.⁸⁴ When protecting military sites and hardware, contractors may be acting in a defensive capacity but that defensive action is also a combat function. This puts contractors at high risk for being drawn into direct participation in hostilities which renders them targetable under the laws of war without the privileges that military personnel enjoy under the law of war as combatants. Moreover, such deployment erodes critical distinctions between civilians and combatants under the law of war, thus jeopardizing other civilians performing important roles in theater.

RECOMMENDATION: The U.S. government should stop tasking PSCs with functions that are likely to draw them into hostilities regardless of whether they would be acting in an offensive or defensive capacity. Consideration should be given to the nature of the object, property, or persons that contractors are hired to protect and other circumstances that put civilians at high risk of being pulled into combat.

B. Rules for the Use of Force

Progress Made

DoD and DoS agreed to common principles on the Rules for the Use of Force for PSCs in Iraq, 2007.⁸⁵

Areas Requiring Improvement / Recommendation

PSC Rules for the Use of Force Increase the Likelihood that PSCs will be Drawn into Hostilities.

Private security contractors, as civilians, follow the Rules for the Use of Force (RUF), not the military's Rules of Engagement (ROE). Binding rules for the use of force should be modeled on appropriate civilian principles of self-defense and defense of others. Current regulations, while barring security contractors from engaging in "combat" or in "offensive" military operations, allow contractors to use deadly force under a "hostile act/hostile threat" framework that sets an unacceptably low threshold for civilian (even security contractors) use of deadly force. For example, the Memorandum of Agreement (MoA) between the DoD and DoS regarding private security contractors in Iraq⁸⁶ and DoD Instruction No. 3020.41 (including corresponding federal acquisition regulations⁸⁷) authorize private security contractors to use deadly force beyond self-defense when necessary to execute their contract security missions to protect assets and/or persons. By doing so, the rules increase the likelihood that security contractors will be drawn into combat.

RECOMMENDATION: DoD –where necessary and in coordination with DoS—should revise PSC RUFs to better track appropriate civilian principles of self-defense thereby reducing the risk that contractors will directly participate in hostilities that would subject them to the laws of war without the privileges of combatants.

IV. Remedies For Victims Of Contractor Crimes

Summary of Issue

Victims of contractor abuse often face obstacles in bringing civil claims for relief in U.S. courts even though the United States has an international legal obligation under the International Covenant on Civil and Political Rights (ICCPR)⁸⁸ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁸⁹ to provide access to effective remedies for human rights violations. Moreover, the U.S. does not have an effective, consistent condolence system to provide just compensation for victims of contractor abuse.

A. Civil Remedies

Progress Made

State Secrets reform legislation introduced, but stalled in both chambers of Congress, 2008-2010.⁹⁰

The legislation would encourage independent and meaningful judicial review of government actions, including violations involving U.S. government contractors, while protecting against disclosure of sensitive national security information.

DoJ adopted new state secrets policies and procedures to increase accountability and oversight in the government's assertion of the privilege, 2009.⁹¹ The policy, effective October 1, 2009, was designed to set out "clear procedures that will provide greater accountability and ensure the state secrets privilege is invoked only when necessary and in the narrowest way possible."⁹²

Areas Requiring Improvement / Recommendation

Vast Improvement Needed to Ensure Victims of Contractor Crimes Have Effective Remedies. 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.⁹³ DoJ's effort to internally review and limit when the government asserts the secrecy privilege, while an important step forward, does not provide victims of contractor crimes an independent, meaningful review of their serious allegations. The September 2010 *Jeppesen* case underscores that DoJ's new procedures still allow a court to dismiss a case pre-trial if the government asserts that the very subject matter of the lawsuit is a state secret - "even assuming plaintiffs could establish their entire case solely through nonprivileged evidence."⁹⁴ Reforming the state secrets privilege would help bring the United States back toward compliance with its international legal obligations.

RECOMMENDATION: Congress should enact legislation such as the State Secret Protection Act (S. 417, H.R. 984) that would reform the "state secrets" privilege to ensure that victims of abuse have effective remedies for human rights violations.

B. Condolence Payments

Progress Made

DoS panel recommended prompt offers of appropriate condolence payments be made to families of civilians killed or seriously injured in Iraq by PSCs, 2007.⁹⁵ Through its Claims and Condolence Payment Program, DoS has made some payments, characterized as in accordance with local custom, to Iraqi civilians harmed in incidents involving U.S. private contractor protective security details. The U.S. Embassy in Iraq is authorized to make payments of \$5,000 for death, \$2,500 for injury, and \$2,500 for

property damage.⁹⁶ For high profile incidents such as Nisoor Square, the Embassy authorized an increase in payments to \$10,000 for death and \$5,000 for injury.⁹⁷

Areas Requiring Improvement / Recommendation

Condolence Payments Require Standardization and Transparency. In contrast to DoS's Claims and Condolence Payment Program in Iraq, DoD requires PSCs involved in incidents of wrongful death, injury, or serious property damage to pay Iraqis an appropriate amount as soon as possible.⁹⁸ DoD provides no guidance on what would constitute an appropriate amount and does not follow up to determine whether payments were made.⁹⁹ According to SIGIR, "DoD and DoS have different approaches and policies for condolence payments to Iraqis [harmed by U.S. private contractors] for the same types of incidents. Consequently, the United States is not presenting a uniform approach to the Iraqi people and government."¹⁰⁰

RECOMMENDATION: The U.S. government should develop and provide access to mechanisms to provide just compensation for wrongful deaths, injuries, or damages caused by private contractors in their employ, founded on principles of transparency, consistency, and fairness.

V. Promoting International Standards

Summary of Issue

U.S. and private companies have an independent obligation to ensure private contractors comply with international humanitarian and human rights law including establishing effective mechanisms of oversight and accountability. The U.S. has taken important steps to meet its own obligations as described in the Montreux Document, but it still needs to better implement the Document's good practices and ensure that it promotes higher standards and accountability for the industry around the globe.

Progress Made

United States joined the Montreux Document, 2008.

Almost exactly one year after Nisoor Square, the United States, joined by 16 other states, agreed 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," which laid out state obligations via such companies under existing international law.¹⁰¹ Since its release, an additional 18 states have joined, making a total of 35 participating states.

The United States has engaged in an initiative to establish a Global Code of Conduct. Following the completion of the Montreux Document, a number of key stakeholders came together, led by the Swiss Department of Foreign Affairs, to establish a Global Code of Conduct that would apply directly to the industry. This initiative has involved various key governments, companies, and civil society representatives who are working to establish a set of robust standards and mechanisms for implementation and accountability.

Areas Requiring Improvement / Recommendations

U.S. Should Implement the Montreux Document's "Good Practices." The document reaffirms the obligation of nations to ensure that private security

and other contractors comply with international humanitarian and human rights law, and details more than seventy "good practices" for improving regulation and control of contractors. The U.S. as a participating state to the Montreux Document needs to better implement the document's "good practices," including taking concrete steps to ensure prosecution when serious contractor crimes occur,¹⁰² ensuring services contracted out would not cause contractors to become involved in direct participation in hostilities,¹⁰³ and to provide for non-criminal accountability mechanisms including civil liability for unlawful contractor conduct.¹⁰⁴

Global Code of Conduct Must be Accompanied by a Robust Governance Structure and Implementation Plan.

While the Code of Conduct for private security companies is still in its initial stages, the experience of existing multi-stakeholder initiatives suggests that a Code accompanied by a robust enforcement mechanism has the potential to effectively assist companies in significantly mitigating their negative human rights impacts. Existing multi-stakeholder frameworks such as the Fair Labor Association, in the textiles and footwear industry, incorporate due diligence requirements designed to help protect companies against the risk of legal non-compliance and the cost of community resistance, in addition to reducing adverse human rights impacts.

For a code of standards to be meaningful, companies must commit to take specific steps to fulfill their due diligence responsibility to respect human rights. Any Code governance structure must be credible, include all relevant stakeholders and enjoy the authority needed to be effective. Additionally, it should reflect the need for effective, credible implementation that includes independent assessment, public reporting, and transparency among stakeholders. Implementation must be holistic and go beyond binary, yes/no auditing to look closely at how companies fulfill a particular code requirement or meet a specific benchmark in the field. This information is then used to identify systematic or

entrenched problems and to formulate a capacity building plan that addresses the issues identified.

RECOMMENDATIONS:

- The United States should implement the Montreux Document’s “good practices” in U.S law and policy and promote the adoption of the “good practices” internationally.
- The United States should advocate for a Code of Conduct that incorporates the essential elements of a governance structure and implementation plan.

Endnotes

¹ Military Extraterritorial Jurisdiction Act (MEJA) Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. (1st Sess. 2007).

² Security Contractor Accountability Act of 2007, S. 2147, 110th Cong. (1st Sess. 2007).

³ Civilian Extraterritorial Jurisdiction Act (CEJA) of 2010, S. 2979, 111th Cong. (2010).

⁴ Civilian Extraterritorial Jurisdiction Act (CEJA) of 2010, H.R. 4567, 111th Cong. (2010).

⁵ Coalition Provisional Authority Order No. 17 (revised), Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, CPA/ORD/27 § 4(3) (June 27, 2004), *available at*

http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev__with_Annex_A.pdf.

⁶ 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, U.S.-Iraq, art. 12, Nov. 17, 2008 (entered into force Jan. 1, 2009) [hereinafter U.S.-Iraq Withdrawal/SOFA].

⁷ Nada Bakri, *Iraqi Security Forces Arrest Five American Civilians*, WASH. POST, June 8, 2009, *available at*

http://www.washingtonpost.com/wp-dyn/content/article/2009/06/07/AR2009060700989_pf.html; Martin Chulov, *Murder Charge Brit Daniel Fitzsimons Insists Iraq Killings Were In Self-Defense*, THE GUARDIAN, March 18, 2010, *available at*

<http://www.guardian.co.uk/world/2010/mar/18/iraq-daniel-fitzsimons-contractor-killings>.

⁸ Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261 - 3267 (2010).

⁹ *The State Department and the Iraq War: Hearing Before House Committee on Oversight and Government Reform*, 110th Cong. 93-105 (2007) (statement by Secretary of State Rice).

¹⁰ U.S.-Iraq Withdrawal/SOFA, *supra* note 6, art. 2,12.

¹¹ *See, e.g.*, R. CHUCK MASON, CONGRESSIONAL RESEARCH SERVICE, U.S.-IRAQ WITHDRAWAL/STATUS OF FORCES AGREEMENT: ISSUES FOR CONGRESSIONAL OVERSIGHT 7 (2009) (stating SOFA only applies to contractors operating under contract/subcontract with the United States Forces and not other U.S. departments/agencies). *But see* Michael R. Gordon, *Civilians to Take U.S. Lead as Military Leaves Iraq*, N.Y. TIMES, Aug. 18, 2010, *available at*

<http://www.nytimes.com/2010/08/19/world/middleeast/19withdrawal.html?pagewanted=2> (reporting that administration officials have stated that security contractors in Iraq under contract with DoS would not have any special immunity).

¹² Memorandum of Agreement (MOA) Between the Department of Defense and the Department of State on USG Private Security Contractors (Dec. 5, 2007), www.defenselink.mil/pubs/pdfs/Signed%20MOA%20Dec%205%2007.pdf [hereinafter MOA Between DoD and DoS on PSCs].

¹³ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 862, 122 Stat. 253 (2008) [hereinafter NDAA FY 2008].

¹⁴ Fragmentary Order 09-109, Overarching FRAGO for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management, and Oversight of Armed Contractors/DoD Civilians and Private Companies (March 2009) [hereinafter FRAGO Order 09-109].

¹⁵ DEP'T OF STATE, U.S. EMBASSY IN BAGHDAD, IRAQ, POLICY DIRECTIVES FOR ARMED PRIVATE SECURITY CONTRACTORS IN IRAQ (May 18, 2008).

¹⁶ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 853, 122 Stat. 4544 (2008) [hereinafter NDAA FY 2009].

¹⁷ *Id.* § 854.

¹⁸ DEP'T OF DEFENSE, INSTRUCTION No. 3020.50 (July 22, 2009).

¹⁹ OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, OPPORTUNITIES TO IMPROVE PROCESSES FOR REPORTING, INVESTIGATING, AND REMEDIATING SERIOUS INCIDENTS INVOLVING PRIVATE SECURITY CONTRACTORS IN IRAQ SIGIR 09-019 (April 30, 2009) [hereinafter SIGIR Report 09-019].

²⁰ OFFICE OF INSPECTOR GENERAL, AUDIT OF USAID/IRAQ'S OVERSIGHT OF PRIVATE SECURITY CONTRACTORS IN IRAQ, AUDIT REPORT No. E-267-09-002-P (March, 4 2009).

²¹ OFFICE OF INSPECTOR GENERAL, AUDIT OF USAID/AFGHANISTAN'S OVERSIGHT OF PRIVATE SECURITY CONTRACTORS IN AFGHANISTAN, AUDIT REPORT No. 5-306-10-009-P 7 (May 21, 2010).

²² *Id.* at 6.

²³ U.S. DEP'T OF STATE & OFFICE OF INSPECTOR GENERAL, THE BROADCASTING BOARD OF GOVERNORS, STATUS OF THE SECRETARY OF STATE'S PANEL ON PERSONAL PROTECTIVE SERVICES IN IRAQ, REPORT RECOMMENDATIONS, REPORT No. MERO-IQO-09-01 23 (Dec. 2008) [hereinafter MERO-IQO-09-01].

²⁴ *Id.*

²⁵ SIGIR Report 09-019, *supra* note 19, at 13 n.33.

²⁶ MOA Between DoD and DoS on PSCs , *supra* note 12, Annex A, Part VII, at 7.

²⁷ FRAGO Order 09-109, *supra* note 14, Annex E.

²⁸ NDAA FY 2008, *supra* note 13, § 861.

²⁹ MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE U.S. DEPARTMENT OF DEFENSE (DOD) AND THE U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID) RELATING TO CONTRACTING IN IRAQ AND AFGHANISTAN (July 2008) [hereinafter MOU Between DoS, DoD AND USAID] available at http://www.acq.osd.mil/log/PS/p_vault/MOU_Signed_July2008.pdf.

³⁰ SIGIR Report 09-019, *supra* note 19, at 22.

³¹ *Id.*

³² Army Regulation 15-6 investigation is required for incidents involving death, serious injury, or property damage over \$10,000. See SIGIR Report 09-019, *supra* note 19, at 22.

³³ OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, INVESTIGATION AND REMEDIATION RECORDS CONCERNING INCIDENTS OF WEAPONS DISCHARGES BY PRIVATE SECURITY CONTRACTORS CAN BE IMPROVED SIGIR 09-023 14 (July 28, 2009) [hereinafter SIGIR Report 09-023].

³⁴ *Id.* at 10.

³⁵ DEP'T OF DEFENSE, GORDON ENGLAND, DEPUTY SECRETARY OF DEFENSE, MEMORANDUM TO DoD OFFICIALS ON MANAGEMENT OF DoD CONTRACTORS AND CONTRACTOR PERSONNEL ACCOMPANYING U.S. ARMED FORCES IN CONTINGENCY OPERATIONS OUTSIDE THE UNITED STATES (Sept. 25, 2007), http://www.mcclatchydc.com/static/pdf/092507_contractors_memo.pdf.

³⁶ *Id.* at 1.

³⁷ *Id.* at 2.

³⁸ DEP'T OF DEFENSE, ROBERT GATES, SECRETARY OF DEFENSE, MEMORANDUM TO DoD OFFICIALS ON UCMJ JURISDICTION OVER DoD CIVILIAN EMPLOYEES, DoD CONTRACTOR PERSONNEL, AND OTHER PERSONS SERVING WITH OR ACCOMPANYING THE ARMED FORCES OVERSEAS DURING DECLARED WAR AND IN CONTINGENCY OPERATIONS (March 10, 2008), <http://www.justice.gov/criminal/hrsp/docs/03-10-08dod-ucmj.pdf>.

³⁹ *Ali v. Austin*, 67 M.J. 186 (C.A.A.F. 2008).

⁴⁰ *U.S. v. Slough*, 677 F.Supp.2d 112 (D. D.C. 2009).

⁴¹ Ernesto Londono, *Justice Department to Appeal Dismissal of Blackwater Indictment*, WASH. POST, Jan. 24, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/23/AR2010012301121.html>.

⁴² Civilian Extraterritorial Jurisdiction Act (CEJA) of 2010, S. 2979, 111th Cong. (2010); Civilian Extraterritorial Jurisdiction Act (CEJA) of 2010, H.R. 4567, 111th Cong. (2010).

⁴³ Military Extraterritorial Jurisdiction Act (MEJA) Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. (2007).

⁴⁴ Security Contractor Accountability Act of 2007, S. 2147, 110th Cong. (2007).

⁴⁵ See HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS AT WAR ENDING THE CULTURE OF IMPUNITY (2008); see also DEP'T OF DEFENSE, MAJOR GENERAL GEORGE R. FAY, INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE (2004).

⁴⁶ COMMISSION ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, AT WHAT COST? CONTINGENCY CONTRACTING IN IRAQ AND AFGHANISTAN INTERIM REPORT 69 (June 2009) [hereinafter CWC Interim Report].

⁴⁷ Letter from Michael Mukasey, Attorney General, Department of Justice, to Richard Durbin, Senator, United States Congress (January 2, 2008).

⁴⁸ The charges against the Department of State Blackwater contractors were brought under MEJA. The defendants argued that the court lacked jurisdiction to hear the case because they were contracted by the State Department to provide security for diplomats and not to support the DoD mission as required under MEJA. The judge denied the defendants' motion to dismiss on that ground but noted that evidence would need to be presented at trial to demonstrate the necessary nexus. See *U.S. v. Slough*, 677 F.Supp.2d 112 (D. D.C. 2009).

⁴⁹ NDAA FY 2008, *supra* note 13, § 861.

⁵⁰ MOU Between DoS, DoD and USAID, *supra* note 29, ¶ VII.

⁵¹ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 813, 123 Stat. 2190 (2009) [hereinafter NDAA FY 2010].

⁵² *Iraq and Afghanistan: Agencies Face Challenges in Tracking Contracts, Grants, Cooperative Agreements, and Associated Personnel: Hearing Before the Subcomm. on Oversight and Investigations*, H. Comm. on Armed Services, GAO-10-509T 3 (2010) (Testimony provided by the Government Accountability Office) [hereinafter GAO-10-509T].

⁵³ DEP'T OF STATE, STATE GRANTS POLICY DIRECTIVE NUMBER 33, RECIPIENT PERFORMANCE IN A DESIGNATED AREA OF COMBAT OPERATIONS (2009).

⁵⁴ UNITED STATES AGENCY FOR INT'L DEVELOPMENT, USAID ACQUISITION & ASSISTANCE POLICY DIRECTIVE 09-01, CONTRACT CLAUSE AND ASSISTANCE PROVISION FOR AWARDS IN IRAQ (2009).

⁵⁵ U.S. GOV. ACCOUNTABILITY OFFICE, GAO-10-1, CONTINGENCY CONTRACTING: DOD, STATE, AND USAID CONTINUE TO FACE CHALLENGES IN TRACKING CONTRACTOR PERSONNEL AND CONTRACTS IN IRAQ AND AFGHANISTAN (2009) [hereinafter GAO-10-1 Report]; GAO-10-509T, *supra* note 52, at 6.

⁵⁶ CWC Interim Report, *supra* note 46, at 16-17.

⁵⁷ GAO-10-1 Report, *supra* note 55 at 10-11; GAO-10-509T, *supra* note 52, at 9-10; CONGRESSIONAL RESEARCH SERVICE, THE DEPARTMENT OF DEFENSE'S USE OF PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND, ANALYSIS, AND OPTIONS FOR CONGRESS 5 (2009) [hereinafter DoD's Use of PSCs in Iraq & Afghanistan].

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- ⁵⁸ CWC Interim Report, *supra* note 46, at 16.
- ⁵⁹ MOA Between DoD and DoS on PSCs, *supra* note 12, ¶ III.C.
- ⁶⁰ MERO-IQO-09-01, *supra* note 23, at 5.
- ⁶¹ NDAA FY 2008, *supra* note 13, § 862.
- ⁶² DODI 3020.50, *supra* note 18, at 1.
- ⁶³ FRAGO Order 09-109, *supra* note 14, Annex G: Contracting Officer Representative's (COR) Role in Management and Oversight of Private Security Company Services.
- ⁶⁴ OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, SIGIR-09-017, NEED TO ENHANCE OVERSIGHT OF THEATER-WIDE INTERNAL SECURITY SERVICES CONTRACTS (2009) [hereinafter SIGIR Report 09-017].
- ⁶⁵ GOV. ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, 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 (2008).
- ⁶⁶ SIGIR Report 09-017, *supra* note 64, at 10-11.
- ⁶⁷ CWC Interim Report, *supra* note 46, at 9-10.
- ⁶⁸ *Id.* at 70.
- ⁶⁹ GOV. ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, IMPROVEMENTS NEEDED IN MANAGEMENT OF CONTRACTORS SUPPORTING CONTRACT AND GRANT ADMINISTRATION IN IRAQ AND AFGHANISTAN (2010).
- ⁷⁰ *Id.*
- ⁷¹ CWC Interim Report, *supra* note 46, at 73-74.
- ⁷² National Defense Authorization Act for Fiscal Year 2011, S. 3454, 111th Cong. § 842 (2010).
- ⁷³ DODI 3020.50, *supra* note 18, at 1.
- ⁷⁴ MAJORITY STAFF OF SUBCOMM. ON NATIONAL SECURITY AND FOREIGN AFFAIRS, H. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 111TH CONG., WARLORD, INC.: EXTORTION AND CORRUPTION ALONG THE U.S. SUPPLY CHAIN IN AFGHANISTAN (2010).
- ⁷⁵ *Contracting in a Counterinsurgency: An examination of the Blackwater-Parvant Contract and the Need for Oversight: Hearing before the S. Comm. on Armed Services*, 111th Cong. (2010), available at http://www.wartimecontracting.gov/docs/hearing2010-06-18_transcript.pdf.
- ⁷⁶ CWC Interim Report, *supra* note 46, at 2-3.
- ⁷⁷ *How Good is Our System for Curbing Contract Waste, Fraud, and Abuse?: Hearing Before the Commission on Wartime Contracting in Iraq and Afghanistan*, 111th Cong. (2010) (Statement by Raymond J. DiNuzio, Special Inspector General for Afghanistan Reconstruction).
- ⁷⁸ National Defense Authorization Act for Fiscal Year 2011, S. 3454, 111th Cong. § 842 (2010).
- ⁷⁹ NDAA FY 2008, *supra* note 13, § 841 (d)(3)(C)(4).
- ⁸⁰ *Are Private Security Contractors Performing Inherently Governmental Functions?: Hearing Before the Commission on Wartime Contracting in Iraq and Afghanistan*, 111th Cong. (2010).
- ⁸¹ NDAA FY 2009, *supra* note 16, § 832.
- ⁸² DEP'T OF DEFENSE, INSTRUCTION NO. 3020.41 (2005).
- ⁸³ DEP'T OF DEFENSE, INSTRUCTION NO. 1100.22, Enclosure 5, ¶2.d.(6)(a) (2010).
- ⁸⁴ DEP'T OF DEFENSE, INSTRUCTION NO. 1100.22, Enclosure 4, ¶ 1.d. (2010).
- ⁸⁵ MOA Between DoD and DoS on PSCs, *supra* note 12, Annex A ¶ IV, at 2.
- ⁸⁶ *Id.*
- ⁸⁷ DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT, Subpart 252.225-7040 (2009); DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT, Subpart, 52.225-19 (2008).
- ⁸⁸ International Covenant on Civil and Political Rights art. 2, Mar. 23, 1976, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171.
- ⁸⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Feb. 4, 1985, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.
- ⁹⁰ State Secrets Reform Act of 2008, S.2533, 110th Cong. (2008); State Secrets Reform Act of 2008, H.R.5607, 110th Cong. (2008).
- ⁹¹ Memorandum from Eric Holder, Attorney General, to the Heads of the Executive Departments and Agencies (Sept. 30, 1998) (describing new DOJ procedures that will govern when the department will invoke the States Secrets privilege).
- ⁹² Press Release, Department of Justice, Attorney General Establishes New State Secrets Policies and Procedures (Sept. 23, 2009).
- ⁹³ See, e.g., *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 552 U.S. 947, 128 S. Ct. 373 (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).
- ⁹⁴ *Mohamed v. Jeppesen Dataplan, Inc.*, 2010 WL 3489913 (9th Cir. 2010).

⁹⁵ DEP'T OF STATE, REPORT OF THE SECRETARY OF STATE'S PANEL ON PERSONAL PROTECTIVE SERVICES IN IRAQ 11-12 (2007).

⁹⁶ SIGIR Report 09-019, *supra* note 19, at 26.

⁹⁷ *Id.*

⁹⁸ *Id.* at 24.

⁹⁹ *Id.* at 25.

¹⁰⁰ *Id.* at 27.

¹⁰¹ INT'L COMM. OF THE RED CROSS, MONTREUX DOCUMENT ON THE PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT (2008).

¹⁰² *Id.* at 19.

¹⁰³ *Id.* at 16 (stating "in determining which services may not be contracted out, Contracting States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities").

¹⁰⁴ *Id.* at 20.
