Private Security Contractors and International Law

Ramifications for Human Rights in Iraq

By RICK ZARRELLA

At a dusty crossroads, shortly after twelve o'clock, a group of men disembarked from their caravan and engaged in a shootout in an area known for lawlessness and violence. This story, while familiar, does not take place in the Wild West of American history, but in war-torn Iraq.

The date was September 16, 2007. The convoy was an American diplomatic security team comprised of men employed by Blackwater USA, a private security company headquartered in Moyock, North Carolina. In what was later to become a major international incident the Blackwater team opened fire in Nisour Square, an oval-shaped intersection located in the upper-middle class Mansour district west of central Baghdad, killing seventeen Iraqis.

The deaths of the Iraqis, and the Iraqi Government's ensuing response, are the latest developments in an ongoing evolution of the United States' presence in Iraq. It has created a very visible, although not entirely new, debate on the use of force by private individuals and entities representing the United States in a war zone. The use of force by such private security contractors has serious consequences in regards to human rights.

At first, details of the Nisour Square incident were not entirely clear. In a statement, Blackwater claimed that the shots fired were in self defense when the "convoy was violently attacked by armed insurgents, not civilians," going on to say that their employees "did their job to defend human life." On the opposing side, Iraqi officials claimed that the contractors killed Iraqi citizens in cold blood. This led the Iraqi Government to declare that it had revoked Blackwater's license to operate in the country, although it was noted by American analysts that the Iraqis did not technically have the authority to do so.

Three days later, on September 19th, Iraqi Prime Minister Nuri al-Maliki announced that the government had registered seven other cases of civilian shootings by U.S. contractors. Al-Maliki described that Sunday's actions as "a crime" and insisted that the company "should be held accountable for these violations." It seemed clear that the Iraqi government was taking a firm stance against Blackwater, which had become the poster-child for private security contractors in Iraq.

Both the U.S. and Iraqi Governments launched investigations into the incident in cooperation, although the Iraqis claimed that their investigation was nearly completed after only about a week, despite little information received from the American side. The U.S. investigation, conducted by the F.B.I., indicated almost two months later that at least fourteen of the seventeen shootings on September 16 were unjustified. Although the conclusions were ultimately similar, the paths taken to achieve them were anything but.

Such a divergence in the speediness of the investigations, and the frustrations voiced by both sides, hint at tension between an Iraqi Government attempting to assert itself and a U.S. Government unsure about what to do with the increasing importance of private security contractors in its operations.

Rise of the Private Sector

The growing use of private security contractors (PSCs), in Iraq and elsewhere, has created a fundamental shift in the focus and duties of the United States military. Jobs such as convoy protection, VIP protection, and the guarding of embassies have been taken over by private companies. These jobs, which used to fall squarely within the domain of the military, have now been taken outside the regular chain of command. But it is not just the military that has become reliant upon PSCs for defense duties. Since 2004, the State Department has paid 833.6 million dollars for Blackwater's services, eclipsing the Defense Department's Blackwater budget of 101.2 million dollars. Overall spending on the private security sector is more even, with the Defense Department paying a total of $2.7 billion since 2003 and the State Department spending $2.4 billion. It is important to note that for the purposes of this paper the discussion will focus only on private contractors who provide armed security services, and not on those who provide logistics or service roles, as the former are more likely to be involved in incidents utilizing deadly force.

Questions remain as to how this shift in favor of private entities and away from government and military institutions will affect human rights in the event of an episode such as the Nisour Square shootings. If an abuse of human rights does happen, whom do the private companies answer to? What laws must they abide by? What laws are they protected by? Who is responsible for their actions? How/where can they be prosecuted? To understand these questions, a study of applicable national and international law must be undertaken.

International Law Perspective

Classifications in international law are centered on a key dichotomy: that of civilian vs. combatant. Apart from that original distinction, there are also distinctions within the combatant classification. Combatants can be considered lawful or unlawful, depending upon their actions and standing within a conflict.

When it comes to PSCs, one of the first things noted is the grey area between civilian and combatant that they occupy. Contractors are not part of regular military forces, but neither are they civilian. They carry weapons, but do not carry military rank.

Some of those opposed to allowing the PSC industry to work in combat zones insist that such companies are nothing more than mercenaries. Author Jeremy Scahill's book on Blackwater calls the company "the world's most powerful mercenary army." Others may not go so far as to call contractors mercenaries, but insist that PSCs are "de facto related to mercenary activities and should be banned."

Upon closer inspection, however, one can find that under international law PSCs do not, in fact, fall under the category of mercenary. Article 47 of Protocol I of the Geneva Conventions defines mercenaries and denies them the rights to be lawful combat-

ants and to be treated as prisoners of war. Although PSCs do fulfill certain requirements of Article 47, there are two key requirements that they do not fulfill: (d) “Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict”, and (f) “Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces”. Since PSCs are often made up of nationals of a party to a conflict or hired residents of the territory controlled by a party to a conflict and are sent on behalf of a state that is party to the conflict and being that the requirements set forth by Article 47 are cumulative, PSCs cannot be considered mercenaries under the Geneva Conventions. If PSCs are not mercenaries, not members of the military, and cannot claim civilian protections, then how can they be classified? Are they unlawful combatants, or do they require another classification altogether? How can the grey area be made clear?

> The legal problem in regards to PSC’s, then, appears to be in the lack of enforcement measures applied to them.

Despite the picture that PSCs are invisible to international law, references to their existence can be found in multiple locations. For example, Article I of the fourth Hague convention of 1907 is considered not only to apply to armies, “but also to militia and volunteer corps fulfilling [certain] conditions”. Perhaps PSCs do not exactly fit the description of a militia or volunteer corps, but the reference to lawful combatants outside the army itself stands as precedent for the recognition of such combatants existing outside the military. Additionally, Article 4(A)(4) of the Third Geneva Conventions references “Persons who accompany the armed forces without actually being members thereof…provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card”. Further, Article 43 of Protocol I of the Geneva Conventions indicates awareness of lawful combatants outside of militaries when it allows that “a Party to a conflict [can incorporate] a paramilitary or armed law enforcement agency into its armed forces” so long as it notifies the other parties to the conflict. PSCs seem to fit rather well within the Articles of The Hague, Geneva, and Protocol I Conventions. The problem in Iraq, however, remains.

So, if PSCs can be presumed to exist as fixtures of the conflict in Iraq and given space to exist as lawful combatants within international law, why is there such a problem with their prosecution for human rights abuses? The legal problem in regards to PSCs, then, appears not to be in their classification within international law nor their objective presence on the ground, but in the lack of enforcement measures applied to them.

The Problem of Enforcement: Order 17

On June 27, 2004, head of the Coalition Provisional Authority (CPA) in Iraq, Paul Bremer, signed CPA Order Number 17. Section 4, Clause 2 states: “[PSC] Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts.” Further, Clause 3 states that “Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a contract or any sub-contract thereto.” Order 17, signed on the day before the CPA was to be disbanded and Bremer was to leave, effectively immunized PSC contractors from prosecution by Iraqi courts for abuses committed during armed operations within Iraq’s newly sovereign territory. Although worrying at first sight, this arrangement could presumably work, assuming that contractors who commit offenses while working for the US government in Iraq are to be prosecuted by the US government. The problem, however, is that overwhelming evidence suggests that this is not the case.

Despite the estimated 126,000 contractors operating in Iraq and numerous instances of abuse, as of April 2007 only two have been indicted for crimes there, and both have been unrelated to actual operations. One of the two indicted was for possession of child pornography at Abu Ghraib prison, completely ignoring documented allegations of prisoner abuse (arguably more important than child pornography, given the circumstances) by other contracted interrogators. In fact, according to reports, all of the translators and up to half of the interrogators involved were private contractors working for two firms, Titan and Caci. The U.S. Army found that contractors were involved in 36 percent of the proven incidents and identified 6 employees as individually culpable… however, not one of these individuals has been indicted, prosecuted, or punished, even though the U.S. Army has found the time to try the enlisted soldiers involved.

Additionally, contractors themselves appeared to know that they would not be held responsible:

> “We were always told, from the very beginning, if for some reason something happened and the Iraqis were trying to prosecute us, they would put you in the back of a car and sneak you out of the country in the middle of the night.” According to another, U.S. contractors in Iraq had their own motto: “What happens here today, stays here today.”

These disturbing revelations reveal that the fundamental problem with PSCs is a lack of enforcement. But the issue is not just about the prosecution of PSC contractors, it is about protecting them as well. To be guaranteed protections under the Geneva Conventions, it must be ensured that contractors follow those Conventions. Sadly, as seen from the DynCorp and Abu Ghraib examples, this is not the case. The ramifications for the contractors themselves can be dire. In Colombia in 2003, three contractors hired by the CIA were flying in a small single-engine aircraft when it crashed in rebel held territory and all those aboard were captured. Afforded no Geneva protections, the three are still being held with no indication of possible release. This example will continue to be the case until effective enforcement measures are initiated to ensure PSC contractors operate within the bounds of international law, thus ensuring their own protection under those laws as well.

Worse than Abu Ghraib

Considering how bad the human rights abuses at Abu Ghraib were, and the political aftermath of the latest civilian shootings, the outlook for the reputation of PSCs (and by extension the U.S. Government) seems grim. One senior U.S. military official commented that the September shootings “may be worse than Abu Ghraib… and come at a time when we’re trying to have [a positive] impact for the long term.”

Indeed, PSCs seem to be roundly criticized when it comes to the battle for hearts and minds. American military leaders join with Iraqi diplomats in criticizing the recklessness of contractors, describing them as "out of control" and "not seeming to play by the rules that everyone else tries to play by." An American Army lieutenant colonel has even been quoted as saying, while referring to the September shootings, "None of us believe they were engaged [by an enemy], but we are all carrying their black eyes."

It appears that the people on the ground for both sides, Iraqi and American, agree that something must be done to hold contractors accountable and reign in unruly behavior. Since international law provides a space for PSCs to exist but does not give direct tools to aid in the prosecution of abuses, a look at applicable domestic law must take place.

Domestic Law Perspective

The United States has had, for most of its history, a domestic law regime that allowed civilians accompanying the armed forces to be tried under military courts-martial. Indeed, jurisdiction for courts-martial of civilians dates prior to the Constitution, all the way back to the Continental Congress of 1775 with the enactment of the first American Articles of War. Those Articles applied to "all persons whatsoever serving with the continental army in the field." The same provision was kept, mostly unchanged in the redrafting of the Articles in 1806 and 1874. Jurisdiction was even expanded in 1916 by adding the words "both within and without the territorial jurisdiction of the United States", and reaffirmed in 1920 after World War I. It was not until the post-World War II era that military jurisdiction over civilians accompanying the armed forces was fundamentally redrawn.

In May 1950, the Uniform Code of Military Justice (UCMJ) replaced the Articles of War and has since governed the conduct of armed services personnel. This code was originally established in the same way as the Articles of War - from Congress' constitutional right "to make rules for the government and regulation of the land and naval forces" – and initially the UCMJ held jurisdiction over civilians accompanying military forces, again, in the same way as the Articles of War had.

It was not until ten years later, already into the Cold War, that the Supreme Court began to erode UCMJ jurisdiction over civilians. Beginning with Reid v. Covert in 1960 and ending with United States v. Averette in 1970, a series of cases decided by the Supreme Court and various military courts culminated in the fact "that the last vestiges of UCMJ jurisdiction over civilians were, for all practical purposes, eliminated."

As a result of this disintegration of military jurisdiction over civilians accompanying the armed forces, a "jurisdictional gap" opened "due in part to the elimination of court-martial jurisdiction and also to the inability to prosecute civilians [who accompany the armed forces abroad] in U.S. federal courts." This "jurisdictional gap" forms the core of the problem of how to ensure that PSCs abide by the rules of international law. There are, however, several options for filling the gap that can be found within the realm of US domestic law, in accordance with the guidance of the UN and international law.

Domestic Law Regimes: Closing the Jurisdictional Gap

One simple option for closing the jurisdictional gap would be to simply extend the UCMJ back to its prior jurisdiction over civilians. US Army Colonel Kevan Jacobson argues that despite the Supreme Court's past activist rulings, "they did not forever close the jurisdictional door." He points out that the relevant court cases stemming from Reid all occurred in peacetime.

The realities of prosecuting civilians under the UCMJ are necessarily different in times of peace than in times of war. Accordingly, during a time of war, the argument could be made that UCMJ jurisdiction over civilians accompanying the military should be restored based on 185 years of precedent from 1775 to 1960 (as opposed to the 47 years of non-jurisdiction since the Reid decisions). The problem, however, is that the court's close reading of 'time of war' prevents the Reid precedent from being overturned.

Analyzing this problem, Jacobson goes on to discuss the court's decision in Averette and the fact that the case "stands for the proposition that the jurisdictional authority of [the UCMJ] is limited to periods of 'declared war'". He finds fault with the court's close reading of the language of 'declared war', which would not recognize conflicts after World War II as wars. He points to the fact that "Korea, Vietnam, and the Persian Gulf War, all had virtually every historic hallmark of 'war'", despite their not being congressionally declared wars. Indeed, the same is true today for the war in Iraq, although Congress did pass a resolution authorizing the use of force.

To remedy this, Jacobson offers a two-pronged solution: First, to have congress amend the language of UCMJ Article 2(a)(10) from "in time of war" to "in time of war or during periods of armed hostilities", effectively negating Averette's overly close reading of 'time of war' and restoring UCMJ jurisdiction to civilians accompanying the military into conflict. Second, he proposes that the status of the individual to be tried be clarified. The problem, however, is that this second proposal is easier said than done. Jacobson provides ample evidence to the fact that civilians accompanying the armed forces should be considered as part of the armed forces from a jurisdictional standpoint:

> Those persons move with and often support combat troops… and failure on their part to perform their duty may be disastrous. In addition, they acquire much valuable information and they may be a fertile source of valuable intelligence data for the enemy. They receive benefits and protection from the military arm while performing their tasks, and their efforts are essential to the accomplishment of the military mission. The security of the nation may depend on their activities… [and] they willingly place themselves in an assignment where the success or failure of the mission of the particular armed force may be governed by their conduct, behavior, and strict compliance with orders.

However, he does not give a clear example of how to officially recognize this status. He admits that doing so is a key requirement, since "a constitutional challenge to the first assertion [of applying UCMJ to civilians] would be inevitable." Ultimately, his argument hinges on the fact that "courts could sustain congressional action" (emphasis added) to amend Article 2(a)(10). Problematically, there is no concrete guarantee that this would occur, especially given the evidence throughout the body of his work showing the courts sustaining the faulty Reid decision and its progeny. Alas, despite strong arguments for it, this approach appears to lead right back at the original problem of how to define civilian contractor status in order to ensure proper jurisdiction for prosecution.

Another option to fill the jurisdictional shortcoming is the Military Extraterritorial Jurisdiction Act (MEJA) of 2000. The passage of this law was expressly intended to extend domestic US law to cover PSC contractors and "fill [the] jurisdictional gap by extending many of the criminal laws of the United States to overseas areas." Although the law was already being crafted at the time, a major impetus for the speedy development of MEJA was written in the decision of United States v. Gatlin. In that case, a man proved to have committed statutory rape was allowed to go free because of the jurisdictional gap. In an unprecedented move, circuit judge Jose Cabranes' opinion in the case directly appealed to congress to pass legislation to fill the gap, and he even had the decision forwarded to the House and Senate Armed Services and Judiciary committees.

The resulting legislation found in MEJA "authorizes punishment of specified persons who commit acts outside the United States… which would constitute a felony offense." Section 3261(a) references jurisdiction over "whosoever engages in [felony] conduct outside the United States" (a)(1) "while employed by or accompanying the Armed Forces outside the United States." Originally the law only applied to those employed by or accompanying the Department of Defense, although attempts were made to amend the law in 2004, and again in 2007, to apply to contractors employed by any government agency. The MEJA also intersects with the UCMJ by providing for concurrent jurisdiction over persons subject to the UCMJ when their co-accused are civilians. Further, the act "is carefully drawn not to upset existing jurisdictional schemes." Instead, the Act and the existing scheme of international law based on treaties and international agreements provide a comprehensive process for the trial of civilians accompanying the force overseas. This imparts a multi-layered jurisdictional approach. Under the new scheme, the gaps created by the non-exercise of jurisdiction by a foreign state are filled by an expansion of the applicability of U.S. laws, giving them extraterritorial effect.

Ultimately, as solid as the MEJA looks, it must be effectively implemented to take appropriate effect. At present, there is a "dearth of doctrine, procedure, and policy on just how this new criminal statute will affect the way the military does business with contractors." As it stands now, no one is quite sure how or when to apply it. Marine Corps Major Joseph R. Perlak says that "changes must be made so that the act becomes an integral part of United States contract practice" by "writing the Act into Department of Defense instructions, joint doctrine, and contract law regulations." Although there have been some prosecutions under the MEJA, they have been domestic in nature (cases of spousal murder) and have not been related to contractor operations. Its capacity to regulate and ensure contractor adherence to international conventions remains as yet untested.

Looking to the Future

When the United States invaded Iraq in 2003, although weapons of mass destruction were never found, the America prided itself on ending the reign of a brutal dictator. Saddam Hussein's numerous human rights abuses were vicious and well-documented. From gas attacks on the Kurds, to torture chambers and mass graves, the memory of Hussein can be found written in blood.

Now, however, the finger is pointed at the United States. While not comparable in any way to the reports of Saddam's abuses, transgressions by American soldiers and private contractors have taken the spotlight of international scrutiny. The army has a system that, while sometimes criticized, has been effective in dealing with soldiers who have crossed the boundaries of human decency. It is apparent, from this article and from recent events in Iraq, that the same cannot be said for private security contractors.

Commentators and analysts of the private military industry have come to the general consensus that legal statutes are not the only problem. Ultimately, it is the lack of a political or moral will to enforce existing law has led to the reckless nature of PSCs and the dearth of prosecution over abuses. Even Blackwater president Gary Jackson has said that "the issue… has always been about lack of enforcement – we don't need a new law, we need to enforce the ones we have." For years, experts in the field have been saying that a failure to correct the lack of enforcement would lead to more abuses, until a major scandal or incident would force a new look at the system. Unfortunately, this major incident would undoubtedly include loss of innocent life.

Perhaps the shooting deaths of seventeen Iraqis at the hands of private security contractors on September 16, 2007 has provided the push needed to restore balance and transparency to a clouded system of private operations involving the use of force. The State Department, the Department of Defense, and the Iraqi Government have engaged in talks to decide the fate of Blackwater and the many other firms like it working in Iraq. The United States government has taken the unprecedented step of convening a grand jury to investigate multiple shootings by contractors, no doubt spurred by the September 16 incident. Another promising development has been an agreement signed by General David Petraeus, top U.S. commander in Iraq, and Ryan C. Crocker, U.S. ambassador to Iraq, requiring contractors to coordinate their movements with the military command and setting minimum standards for training. The agreement, based on discussions between Defense Secretary Robert Gates and Secretary of State Condoleezza Rice, also sets guidelines for appropriate use of force for self-defense.

Despite these advances in oversight, there are limitations. Potential prosecutions stemming from the grand jury investigation must overcome obstacles stemming from a continuing lack of clarity over which laws to apply. Further, the Petraeus-Crocker accord does not address any legal framework for prosecution.

This article has given a brief introduction to the domestic law that potential prosecutions will most likely stem from. It has also given an overview of the international perspective in which PSCs operate. What remains to be seen is how far the new measures and the resurgence of political will can go in reforming the trend of privatization in Iraq. Only when abuses are stopped and reckless actions are diminished can the United States hope to win the battle for hearts and minds that is so critical to success in Iraq and beyond. Hopefully, justice and forgiveness on both sides of the battle lines can be attained through a clarification of the roles of, and the rules governing, these private security contractors.

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