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Note

***129 PRIVATE MILITARY CONTRACTORS & JUSTICE: A LOOK AT THE INDUSTRY, BLACKWATER, & THE FALLUJAH INCIDENT**

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In late March of 2004, four U.S. civilians were brutally murdered while working in Iraq. The men were beaten, torched, shot and two of the bodies were hung from a bridge over the Euphrates River. [\[FN1\]](#) The men were part of a large U.S. contingent of private contractors who were hired to help the rebuilding efforts in Iraq. [\[FN2\]](#) Since their deaths, little has been done to seek justice under either Iraqi or U.S. law. [\[FN3\]](#)

In light of this event and others like it, this note is written to examine the private defense contractor industry, the increased U.S. military dependence upon non-military personnel, and the potential avenues private contractors may have for legal protection. This note will explore options for prosecution and justice for the U.S. civilians killed in Iraq and seek to determine whether justice is best pursued under U.S., Iraqi, or international law?

I. Private Military Forces & Private Security Contractors

Private military forces appear to have existed nearly as long as combat itself. The first official recorded use of outside military forces occurred during King Shulgi of Ur's reign (2094-2047 B.C.). [\[FN4\]](#) Ur is ***130** now part of modern-day Iraq. [\[FN5\]](#) Even the Bible mentions the use of for-hire military support: Pharaoh's army was partially composed of paid foreigners, and King David's Israelite men were at one time employed by the Philistines; [\[FN6\]](#) and the Ammonites hired over 30,000 soldiers for an ill-fated battle with Israel. [\[FN7\]](#) Later, during the early American colonial period, vast private military forces were employed, and, for example, the Dutch East India Company in 1782 had a force of 140 ships and 25,000 men while the English East India Company had over 100,000 men. [\[FN8\]](#)

After the Cold War, there was a trend for nations to reduce the size of their militaries. [\[FN9\]](#) This downsizing trend has created a global flood of soldiers and military equipment fueling the growth of the private military industry. [\[FN10\]](#) (Although there are definitional differences, for the purposes of this article, private military firms, private security forces, private security contractors and military contractors will be used synonymously.)

The rapid growth of the private military industry has spread throughout the world to areas as diverse as Sierra Leone, Iraq, and the United States. [\[FN11\]](#) As a result, there are new global firms that operate in over fifty

countries and offer services from low level consulting to commando teams and large-scale military supply operations. [FN12] The majority of these firms are organized in the United States, Great Britain, Russia, and South Africa. [FN13] Since these companies are able to mobilize*131 quickly, remain politically neutral, and handle their expenses without battling government bureaucracy, their continued proliferation and use can be expected. [FN14]

In addition to military outsourcing, there has been a rapid rise in private security firms. [FN15] The private security business, in many countries, is one of the fastest growing economic sectors, including in the United States. [FN16] In the U.S., the government employs approximately one-third of all private security forces, and, surprisingly, there are nearly three times as many persons working for private forces as compared to customary law enforcement. [FN17]

Even though both private security companies and private military firms have emerged in numerous countries, the overwhelming presence of U.S. based companies may be largely attributed to entrepreneurial business savvy and favorable governmental policies. The need for, and dependence upon, private contractors is a prevalent market shift for the U.S. and its military forces.

A. An Increased U.S. Reliance on Private Military Contractors

Over the last twenty years, there has been bipartisan action by Congress to reduce the government's payroll. [FN18] However, while there are now fewer people on the federal payroll, more people than ever before are currently working for the U.S. government. [FN19] This apparent paradox traces its roots to the 1980's when political leaders, including British Prime Minister Margaret Thatcher and President Ronald Reagan, promoted the privatization of certain military functions and other government work. [FN20] However, the real impetus for change occurred after 1992, when the Pentagon paid private security firm, Brown & Root, nine million dollars to study the effectiveness of replacing soldiers in combat zones with private companies to handle support functions, such as cooking and handling supplies. [FN21]

*132 Although the privatization mantra began under the Reagan administration, it has been championed by subsequent administrations, and, in 1998, Congress codified the privatization movement when it enacted the Federal Activities Inventory Reform Act. [FN22] The Act mandated that every year all government agencies take account of tasks that are not inherently governmental functions and allow private companies to bid on handling these functions. [FN23]

The predominately self-reliant U.S. military machine began to morph dramatically in the 1990's. The privatization rush affected most governmental agencies, including the military, and, in the 1990's, the Pentagon cut about 700,000 active-duty troops and 300,000 civilian employees. [FN24] However, as Congress and the Pentagon reduced the size of the military, the need for military presence did not decrease, and from "the first Persian Gulf War, ... [to] Somalia, Haiti, Bosnia and Kosovo . . . [,] the U.S. military used more contract employees to do jobs once given to soldiers." [FN25] For example, in the first Gulf War there was one contractor on the battlefield for every fifty soldiers. [FN26] During the Bosnian conflict, Congress limited the number of troops to 20,000, so the military hired 2,000 contractors to allow more soldiers on the front lines without exceeding their official cap. [FN27] As the recent war in Iraq has progressed, Defense Secretary Donald Rumsfeld has made a priority of using civilian contractors for military supportive services. [FN28] In 2004 there were more than 20,000 contractors working in Iraq alone, which represents a significant increase from the mere 2,000 that were employed in all overseas conflicts in the year 2000. [FN29] The tasks performed by contractors included ordinary support services such as processing claims and running computer systems; [FN30] however, as the need and technology increased, so has the nature of the contractors' mission. [FN31] Private military contractors can now be found gathering *133 intelligence for the CIA, investigating fraud and abuse, and launching weather satellites. [FN32] In addition, military contractors fill critical military roles by working on helicopters, computers and in maintaining systems such as Patriot missiles and radar networks. [FN33]

In 2004, the U.S. spent more than 10 percent of the federal budget, \$275 billion, on goods and services from private contractors. [\[FN34\]](#) While no one is certain of the exact number of contractors on the government payroll, Paul Light of the Brookings Institution, estimates that the federal government has nearly 6 million contractors and half of them are in defense. [\[FN35\]](#) In the military, that makes private contractors outnumber military and civil servant personnel by a ratio 2 to 1. [\[FN36\]](#) The private contractor business within the U.S. military, which was in its infancy at the end of the Cold War, has catapulted onto the scene and is quickly becoming a \$100-billion-a-year industry. [\[FN37\]](#)

The War in Iraq has been profitable for the contractors and has been dubbed by Peter Singer as the “coalition of the billing.” [\[FN38\]](#) However, there are tremendous costs associated with being a private contractor, and lately, the “business of war is starting to look more like the war itself: a long, hard slog.” [\[FN39\]](#) Moreover, unlike their military counterparts, the contractors are often fighting a similar battle without adequate equipment, intelligence, or support. Although it is argued that the private military contractors can often perform similar functions at a reduced cost, [\[FN40\]](#) it would be prudent to analyze to whom that cost is transferred.

*134 B. Growing Pains in the Private Military Industry

Although the use of private military contractors is not new to the military, the Iraq War has highlighted the military's reliance upon them. [\[FN41\]](#) As the private contractor force approaches 15,000-20,000, it has basically become the second-largest armed component of the coalition after the United States' 100,000 troops. [\[FN42\]](#) The rapid expansion of the private contractor industry has readily been filled with one-time soldiers, including former Navy SEALs and Special Forces. [\[FN43\]](#) The market was flooded with an ample supply of former soldiers as political actions and the fall of the Soviet Union all converged and contributed to the shrinking military force. [\[FN44\]](#)

Many private contractor companies were created because of the on-going war in Iraq. [\[FN45\]](#) These firms, many of which began as undercapitalized startups, [\[FN46\]](#) have now become heavily financed and backed by the U.S. government [\[FN47\]](#) and the Coalition Provisional Authority (CPA). [\[FN48\]](#) A small \$2 million firm can explode into a company with \$75 million in annual revenues almost overnight. [\[FN49\]](#) Being a private contractor in Iraq is akin to being a tech firm in 1998 in Silicon Valley. [\[FN50\]](#) Now, if you are in the security business, you need to have a presence in the Sunni Triangle. [\[FN51\]](#) Nevertheless, the boom has created large logistics and operations issues for the startup firms that are running their multi-million dollar firms between the U.S. and Iraq. [\[FN52\]](#) Firms founded by ex-military and mission-focused individuals, sometimes got in over their heads when dealing with complex business issues and their explosive growth. [\[FN53\]](#) Other firms suffered from their refusal to create partnerships with other entities that could help with acquiring critical supplies. [\[FN54\]](#) Many opportunities for mutually beneficial *135 business ventures have been lost as rivalries and fierce competition fuel the race for strategic advantage. [\[FN55\]](#) In addition, as the larger more established firms entered the war in Iraq, corporate raiding of talent and rapidly accelerating costs exacerbated some of the problems contractors faced in Iraq. [\[FN56\]](#)

As private contractor companies converge upon the Sunni Triangle and compete for contracts, established market leaders are looking for more regulation. [\[FN57\]](#) In fact, the CEO of ArmorGroup, a reputable private military firm, stated the following: “Our company has had a 40-page code of ethics and a 15-page code of conduct for over 15 years; we set high standards for ourselves. But when others go around hanging out of white SUVs waving guns at people, this business needs to be regulated.” [\[FN58\]](#)

Regulation and liability for private military contractors in Iraq began to change after the Fallujah incident.

C. Blackwater USA & the Fallujah Incident

Blackwater USA, a North Carolina based military and security firm, was founded in 1996 by a former Navy SEAL, Erik Prince. [\[FN59\]](#) Prince seized on an opportunity when he saw the shrinking military close some of their training centers. [\[FN60\]](#) Blackwater, situated on over 6,000 acres, claims its Moyock, North Carolina, compound is “the most comprehensive private tactical training facility in the United states.” [\[FN61\]](#) In addition to training American forces, the firm has decided to only work with U.S. State Department approved foreign governments, unlike many contractors who are not as discriminating in selecting their clientele. [\[FN62\]](#)

After September 11, Blackwater's services were in high demand, and, in 2003, they were paid at least \$18.9 million by the U.S. government. [\[FN63\]](#) As of July 2004, they had 450 people in Iraq and even *136 guarded Ambassador L. Paul Bremer, one of the highest-profile American targets in Iraq. [\[FN64\]](#) The lucrative Bremer contract was worth twenty-one million dollars. [\[FN65\]](#) Besides Bremer, Blackwater also contracted to protect the U.S. Ambassador to Iraq, John Negroponte. [\[FN66\]](#) The increased reliance upon civilian contractors allowed Blackwater to grow rapidly and make significant income by handling work that the military once did on its own. [\[FN67\]](#)

On March 12, 2004, Blackwater signed a contract to protect Eurest Support Services (ESS), a European food company that was feeding U.S. troops. [\[FN68\]](#) The Blackwater contract to protect ESS was actually made with Regency Hotel & Hospital Co., a Kuwait business, because, under Kuwait law, foreign companies are not to operate independently. [\[FN69\]](#) The contract states that transport security teams should include at least six people because of the high risks in parts of Iraq. [\[FN70\]](#) The Regency Hotel Co. also helped acquire small Honda SUV's, which were to be used in the security detail. [\[FN71\]](#)

On March 31, 2004, Wesley Batalona, Scott Helvenson, Michael Teague and Jerry Zovko, all private military contractors with Blackwater, were ambushed and killed as they protected an ESS convoy on its way to pick up kitchen equipment. [\[FN72\]](#) The Blackwater protection detail lacked sufficient vehicles and manpower according to their contract and normal Blackwater security protocol, which states there are to be six men in two vehicles. [\[FN73\]](#) However, on this trip, there were just two men in the SUV's, which had very little armor protection, despite the dangers in Fallujah. [\[FN74\]](#) The vehicles' only armor was a single improvised steel plate in the back that offered little protection from the point blank attack. [\[FN75\]](#) The ineffective armor bothered at least one Blackwater contractor, who stated before the Fallujah attack that the *137 Honda was not an armored vehicle and, furthermore, there should be armor “halfway up the window on all the doors' and a horseshoe shaped barricade in the rear.” [\[FN76\]](#)

The attack on the four Blackwater contractors was brutal, quick, and lethal according to staff writers of The News & Observer, Jay Price, Joseph Neff, and correspondent Charles Crain. Armed insurgents attacked the SUV's and the contractors at point blank range. [\[FN77\]](#) It is unclear whether the contractors were even able to get off a single shot in self-defense. [\[FN78\]](#) Following the slaying, the bodies of the contractors and the SUV's were ransacked, looted, and torched. [\[FN79\]](#) All of the contractors were beaten and kicked, and two of them were dragged through the streets behind cars, strung up, and hung on a bridge over the Euphrates River. [\[FN80\]](#)

While a riot ensued, the Marines who controlled the area decided interference would escalate the riot, so they were forced to stand down. [\[FN81\]](#) In fact, the Marines had been unaware of this Blackwater mission into Fallujah. [\[FN82\]](#) Although the private military contractors were armed, they did not have air support, medevac helicopters, quick reinforcements or adequate military intelligence. [\[FN83\]](#) In effect, the contractors were on their own, protected only by their wits, contacts and equipment.

The vehicles provided for this mission lacked adequate armor and protection. Whether more protection would have made a difference is up for debate. According to Blackwater, armored vehicles and bulletproof windows would not have saved the four in Fallujah. At point blank range, bulletproof windows can only withstand a few rounds from an AK-47, according to a Blackwater spokesman. [\[FN84\]](#) However, Mike Geylin of Armor Holdings, an armor

installation company, states that windows can be made to withstand more than that; however, the level of protection is correlated to the amount of money spent. [\[FN85\]](#)

***138** In May 2004, the Marines produced a list of 25 suspects and requested local police and Iraqi security forces to have them arrested. [\[FN86\]](#) However, no arrests were made, and, according to a Marine spokesperson, there has been no significant advancement in locating the murderers. [\[FN87\]](#)

Beyond the immediate loss of fathers, brothers and sons, the gruesome killing and abuse of the Blackwater contractors affected many Iraq's foreign contractors and heightened fears that more incidents against civilians could impede the rebuilding effort. [\[FN88\]](#) The rebuilding efforts, which were growing into the billions of dollars, were hampered as contractors reduced or eliminated travel to large areas of Iraq and remained secluded in fortified on-site encampments. [\[FN89\]](#) Whether the Regency Hotel Co., Blackwater, or the men themselves are culpable, the fact remains that the Islamic Army in Iraq, which claimed responsibility for the attack, affected many lives in Iraq and around the world. [\[FN90\]](#)

II. Who's Liable - Where to Prosecute - Which Law to Apply

The Fallujah incident, where four Americans were ambushed and brutally murdered, offers a web of legal issues. However, rather than drafting an entire treatise, this note focuses on the potential areas of redress available for the families of the four fallen Blackwater contractors.

A. Murder Under U.S. Terrorism Law

During the 1970's and 1980's, there was a proliferation of terrorist attacks abroad. [\[FN91\]](#) Often, when those responsible were captured, little was done by their home country to prosecute and bring them to justice. [\[FN92\]](#) For example, in 1973, gunmen seized persons attending a reception at the Saudi Arabian Embassy in Sudan; after their demands were unfulfilled, they killed the U.S. Ambassador and a Belgian citizen. [\[FN93\]](#)***139** After a trial by a Sudanese court, the terrorists were sentenced to life in prison, which was later reduced to seven years that was to be spent with the Palestine Liberation Office in Cairo. [\[FN94\]](#)

In an effort to produce a vehicle for justice and in response to public concern regarding increased levels and violence of terrorism against American citizens abroad, Congress enacted the Omnibus Diplomatic Security and Antiterrorism Act of 1986. [\[FN95\]](#) The Act greatly enhanced the ability to prosecute foreign nationals who injure or kill U.S. citizens, especially when the courts needed extraterritorial jurisdiction to apprehend the accused. [\[FN96\]](#)

The Act which has since been codified under [18 U.S.C. §2332](#), [\[FN97\]](#) requires that “[w]hoever kills a national of the United States, while such national is outside the United States, shall ... [be] punished by death or imprisonment” “if the killing is murder (as defined in section 1111(a)).” [\[FN98\]](#)

In [18 U.S.C. §1111](#), [\[FN99\]](#) murder is defined as “the unlawful killing of a human being with malice aforethought.” [\[FN100\]](#) Further, murder committed by “lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing” which is “perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.” [\[FN101\]](#) In addition to being murder, the act must also be defined as a terrorist act, which [18 U.S.C. §2331](#)[\[FN102\]](#) defines as “violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State” which intend to “intimidate or coerce a civilian population; to influence the policy of a government by intimidation

or coercion; or to affect the conduct of a government” by acts primarily outside of the “territorial jurisdiction of the United States.” [\[FN103\]](#)

***140** Basically, Congress enacted a law which grants jurisdiction to United States courts to prosecute foreign nationals who make any violent attack upon any Americans, if the act is deemed international terrorism. [\[FN104\]](#) To apply the jurisdictional reach, the accused must have committed an act against an American, [\[FN105\]](#) and the act must be a terrorist act [\[FN106\]](#) as certified by the Attorney General or his office. [\[FN107\]](#)

When drafting this legislation, Congress based its powers upon Article I, Section 8, Clause 10 of the Constitution which authorizes the “expansion of extraterritorial jurisdiction, even if the statute violates customary international law . . . [and] provides Congress with the power to ‘define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.’” [\[FN108\]](#)

At least one court has ruled upon this antiterrorism statute. That court found that Congress can legislate extraterritorially on two different jurisdictional theories of international law. [\[FN109\]](#) First, under the “universal principle,” States may prosecute crimes of universal concern, crimes such as piracy, slave trade, hijacking, genocide, war crimes, and perhaps certain acts of terrorism. [\[FN110\]](#) Next, a State may punish non-nationals for crimes outside its territory, under the “passive personal principle,” when the State has a particularly strong interest in the crime. [\[FN111\]](#)

As for the Blackwater incident, it appears this approach may be a viable option for prosecution and justice for the slain Americans. The United States has a strong interest in quashing and dispelling all terrorist acts, especially those in Iraq. Furthermore, the terrorist actions appeared to have been intended to intimidate and coerce, and seemed willful, deliberate, and premeditated. Even though this law offers the U.S. Government an option to prosecute foreign nationals, its application***141** is largely unproven in Iraq. Another option, rather than attempting to apply U.S. law, is to seek justice under Iraqi law.

B. Issues Under Iraqi Law

There are several issues surrounding defense contractors and Iraqi law. First, defense contractors working in Iraq have had wide-reaching immunity from prosecution under Iraqi law prior to the transfer of power. [\[FN112\]](#) The immunity from prosecution has enraged many Iraqis who claim there is a lack of accountability, which may encourage some lawlessness by the contractors. [\[FN113\]](#) However, to address those concerns, Paul Bremer, before departing Iraq, issued two directives relating to private military contractors. He stated contractors “shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts,” but that private security companies may be held liable for acts not so related. [\[FN114\]](#)

The contractors argue that immunity is necessary to hold down insurance costs, but regardless of the financial burdens, many Iraqi officials do not like the seemingly carte blanche protection. [\[FN115\]](#) Whatever the long-term impact, it appears that the Bremer directives extended more protection to Iraqi citizens who are injured or killed by private contractors, but offered little to address what should happen when Iraqis kill American contractors. Although some feel there is little rule of law in Iraq, [\[FN116\]](#) at one time Iraq was progressive in its legal concepts and rather influential in the Arab world. [\[FN117\]](#)

1. Iraqi Law - Historically

Iraq gained its independence in 1930 and adapted French and Germanic civil and legal codes while still keeping

personal law under ***142** the auspices of the Islamic traditions. [\[FN118\]](#) In the early 1950's, great strides were made in Iraqis' civil rights, surpassing many other Middle Eastern countries, especially relating to women. [\[FN119\]](#) However, after the Baath Party ascended into power in 1969 and especially after Saddam's ascension to president in 1979, most legal rights were vacated, and torture became a sanctioned pre-trial tactic. [\[FN120\]](#) Saddam, during the last fifteen years of his presidency, helped promulgate thousands of legal resolutions annually; [\[FN121\]](#) however, even with the volumes of resolutions, Saddam and the Baath Party ruled, not by legitimate law, but rather by fiat and fear that supplanted decades of Iraqi legal progress. [\[FN122\]](#) For example, the 1969 Iraq Penal Code [\[FN123\]](#) states that, if someone “publicly insults the President or his representative,” he may be imprisoned for seven years. [\[FN124\]](#)

Amidst this legal backdrop, the coalition ousted Saddam and the Baath Party and established the Coalition Provisional Authority (CPA). [\[FN125\]](#) For Iraq to function properly, a balance must be struck between necessary rules of law and historical Iraqi legal doctrines. Accordingly, the Iraqi people and the private contractors must have a venue to “find justice while avoiding vengeance.” [\[FN126\]](#)

2. Coalition Provisional Authority

To help fill the vacuum after the Saddam Regime toppled, the CPA orchestrated the transition of power for the Iraqi people. Even though the CPA has now been disbanded, some of its work may still be relevant for certain legal issues.

***143** In its first regulation, the CPA proclaimed under “relevant U.N. Security Council resolutions, including Resolution 1483 (2003), [\[FN127\]](#) and the laws and usages of war” that it “shall exercise power of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability.” [\[FN128\]](#) The CPA was given all authority necessary to achieve its objectives. [\[FN129\]](#) Furthermore, the CPA kept in place all laws that existed in Iraq as of April 16, 2003, so long as they did not prevent or interfere with the obligations or rights of the CPA. [\[FN130\]](#)

Since the CPA was under considerable time constraints, it used the existing Iraqi penal code to begin building a modern legal system. [\[FN131\]](#) As illuminated in CPA Order No. 7 that states, “[w]ithout prejudice to the continuing review of Iraqi laws, the Third Edition of the 1969 Iraqi Penal Code with amendments . . . shall apply.” [\[FN132\]](#) Although the Penal Code was retained, the CPA suspended certain methods of justice used in the former regime, including torture and inhuman treatment. [\[FN133\]](#) The Penal Code stipulates that murder is punishable by life in prison or death, depending on the nature of the act. [\[FN134\]](#) Under Iraqi law, a person can receive the death penalty if, among other things, the “killing is premeditated” or “[i]f the offender intends to kill two or more people and does so as a result of a single act.” [\[FN135\]](#) Furthermore, the Penal Code stipulates discretion between life in prison or the death penalty, “[i]f the offender mutilates the body of the victim.” [\[FN136\]](#)

It would appear that under the CPA and Iraqi law, the Blackwater victims have options for justice; however, before any criminals were brought to trial, a new authority emerged, which must decide what to do with the CPA's proclamations.

***144** 3. Life After the CPA

The last Order by the CPA was signed on June 28th, 2004, which dissolved the CPA and fully transferred all governing authority to the Iraqi Interim Government as well as all the “revisions to the laws, regulations, orders, memoranda, instructions and directives issued by the CPA.” [\[FN137\]](#) The original goal was to transfer power on

June 30th, 2004, [\[FN138\]](#) but the CPA decided to hand over sovereignty two days early on June 28th, 2004. [\[FN139\]](#) When the CPA was dissolved, the Iraqis were given full sovereignty and the ability to govern as a sovereign. [\[FN140\]](#) The Iraqi Interim Government was predominately responsible for governing Iraqi affairs including welfare, security, economic growth and national elections. [\[FN141\]](#) The Interim Government had full sovereign powers, but was not allowed to enter into agreements that “alter the destiny of Iraq” or change the Transitional Administrative Law (TAL), and as such, only the elected officials shall amend the law. [\[FN142\]](#) The newly elected Iraqi Government is composed of a President, two Deputy Presidents, and a Prime Minister leading the Council of Ministers. [\[FN143\]](#) Even though Iraq is an independent sovereign, the U.S. remains active in the region both in military force and with offices like the Project and Contracting Office, [\[FN144\]](#) which oversee many of the resources allocated to the rebuilding efforts.

Notwithstanding the aforementioned CPA transition, P.W. Singer of the Brookings Institution, states that it is unclear how CPA orders are going to be enforceable as the CPA no longer exists, and the Iraqis are in power. [\[FN145\]](#) In fact, private contractors must now show the “Iraq Ministry of the Interior that they have adequate insurance; they *145 must submit to semiannual audits; and they must satisfy a host of other requirements to prove they’re substantive, law-abiding businesses.” [\[FN146\]](#)

In addition to the quagmire of laws, there is the still confusion in the international community surrounding the status and protection of private military contractors.

C. International Law and the Geneva Convention

Even though private military contractors have become an integral part of military operations, their international legal status is murky and unsettled as they fall through the cracks in current legal codes. [\[FN147\]](#) Because international law has yet to define the status of private military contractors, it is unclear what laws apply and protect these individuals. [\[FN148\]](#) A major reason for the ambiguity rests in the fact that existing international treaties for conflict and war are structured around diplomacy and the international recognition of “the state as a cornerstone and building block of international law and international relations.” [\[FN149\]](#)

Private military contractors do not fit the definition of “noncombatants,” as defined by the Fourth Geneva Convention, since they “carry weapons and act on behalf of the government.” [\[FN150\]](#) Also, according to the Third Geneva Convention, they are not “lawful combatants,” since “they do not wear regular uniforms or answer to a military command hierarchy.” [\[FN151\]](#) In addition, the contractors do not fit within the definition of mercenaries, which “requires that they work for a foreign government in a war zone in which their own country is not part of the fight.” [\[FN152\]](#) This legal murkiness can create real a problem in Iraq, especially when International Humanitarian Law (IHL) mandates that soldiers distinguish between combatants and noncombatants. [\[FN153\]](#) Without a *146 clear legal definition, the contractors have the potential as being treated as unlawful combatants by foreign governments. [\[FN154\]](#)

However, the main legal issue may turn on whether the contractors are involved either directly or indirectly in hostilities.

Derived from Common article 3 to the Geneva Conventions, the notion of “direct” or “active” participation in hostilities is found in multiple provisions of international humanitarian law. Direct participation in hostilities by civilians entails loss of immunity from attack during the time of such participation and may also subject them, upon capture, to penal prosecution under the domestic law of the detaining state. Despite the serious legal consequences involved, neither the Geneva Conventions nor their Additional Protocols include a definition of what constitutes “direct participation in hostilities.” [\[FN155\]](#) The 1949 Geneva Conventions distinguish between armed combatants and non-armed civilians. [\[FN156\]](#) Contractors, who are classified as civilians, may accompany the armed forces in the field and generally cannot be

the “intentional object of a military attack,” but often become injured or killed because of their close proximity to military activities. [\[FN157\]](#) However, if the contractors directly support the military operations, they may lose their legal protection and could become the subject of a direct attack. [\[FN158\]](#)

It appears that under existing international law and the 1949 Geneva Conventions, armed and participating private military contractors fall outside of many current legal protections. Because of the private military contractor's undefined legal status, they may find themselves fighting in close proximity to the armed military forces, but may not be subject to or protected by the same international laws or conventions.

III. Conclusion - 4 Victims; No Justice

Aside from the confusing legal issues, there is also the problem of finding the criminals. In May of 2004, the Marines handed over a list *147 of twenty-five suspects to both the Fallujah police and Iraqi forces; however, this effort has netted zero arrests. [\[FN159\]](#) Without a criminal to punish, no penal code or law will make a difference.

Private military contractors have operated out of the public eye for a long time, especially in Iraq. [\[FN160\]](#) However, after incidents like the one in Fallujah, increased regulations and scrutiny upon the entire industry may be just around the corner. The four men may have been brutally murdered, but there are at least viable options for justice if and when the criminals are apprehended. Justice can be sought under U.S. terrorism laws, which extend the jurisdictional reach of U.S. courts, allowing for the apprehension of criminals who murder U.S. citizens abroad. In addition, the criminals may be prosecuted under Iraqi law, if the Iraqi government enforces the CPA provisions, directives, and upholds the prior Iraqi Penal Code.

Regardless of forthcoming civil or criminal charges, [\[FN161\]](#) there are likely to be changes in private security law, as more light is shed upon the industry. [\[FN162\]](#) Although there may never be a criminal prosecuted in the Fallujah incident, the deaths of Wesley Batalona, Scott Helvenson, Michael Teague and Jerry Zovko will not be in vain, if changes are enacted which would help to protect others who serve in the same industry.

[\[FN1a\]](#). J.D. Candidate, Regent University School of Law, 2006; M.B.A, McColl School of Business, Queens University, 2000; B.A., Furman University, 1998.

[\[FN1\]](#). Neil King Jr. & Greg Jaffe, Killings in Iraq Cast New Cloud Over Rebuilding: Attacks on Civilians Stoke Security Fears Even as U.S. Issues More Work Contracts, WALL ST. J., Apr. 1, 2004, at A1, available at 2004 WL-WSJ 56924713.

[\[FN2\]](#). See [Anthony Bianco et al., Outsourcing War: An Inside Look at Brown & Root, the Kingpin of America's New Military-Industrial Complex, BUS. WK., Sept. 15, 2003, at 68, available at 2003 WL 62195579.](#)

[\[FN3\]](#). Jay Price & Joseph Neff, After the Horror, Strong Words Mask Inaction, NEWS & OBSERVER, Aug. 1, 2004, at A1, available at 2004 WLNR 17531383 [hereinafter Price & Neff, After the Horror].

[\[FN4\]](#). P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 20 (Robert Art, et al. eds., 2003). Peter W. Singer has a Ph.D. from Harvard, an undergrad degree from Princeton University and is a Fellow with the Brookings Institution. He has expertise in the areas of contemporary warfare,

foreign policy, national security, peacekeeping, terrorism, U.S. policy towards the Islamic world and the private military industry. See The Brookings Institution Webpage, <http://www.brookings.edu/scholars/fellows/psinger.htm> (last visited 1/21/06).

[FN5]. Jacqueline Maley, A Brief History of Iraq, SYDNEY MORNING HERALD, Apr. 9, 2003, <http://www.smh.com.au/articles/2003/04/09/1049567734303.html>.

[FN6]. SINGER, supra note 4, at 20.

[FN7]. 2 Samuel 10:6 (NIV).

[FN8]. SINGER, supra note 4, at 35.

[FN9]. Jay Price & Joseph Neff, Army Molds Future, NEWS & OBSERVER, July 27, 2004, at A1, available at 2004 WLNR 17518616 [hereinafter Price & Neff, Army].

[FN10]. Jay Price & Joseph Neff, A Business Gets a Start, NEWS & OBSERVER, July 29, 2004, at A1, available at 2004 WLNR 17521651 [hereinafter Price & Neff, Business]. For example, in the early 1990's there were nine million former U.S. and Soviet Union soldiers in the civilian market. Id.

[FN11]. P.W. Singer, [War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law](#), 42 COLUM. J. TRANSNAT'L L. 521, 521 (2004).

[FN12]. Id. at 521-22.

[FN13]. See Tina Garmon, [Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act](#), 11 TUL. J. INT'L & COMP. L. 325, 330 (2003).

[FN14]. See id.

[FN15]. See SINGER, supra note 4, at 69.

[FN16]. Id.

[FN17]. Id.

[FN18]. Linda Bilmes, Government Transformed Contractors Cast Dark Shadow: The Iraq War Provides Wake-Up Call on Push to Privatize More and More Civil Service Jobs, NEWSDAY, July 22, 2004, at A37, available at [2004 WL 84871988](#).

[FN19]. Id.

[FN20]. Price & Neff, Army, supra note 9.

[FN21]. Id.

[FN22]. Bilmes, supra note 18 (Codified at [31 U.S.C. § 501 \(2000\)](#)).

[FN23]. Id.

[FN24]. Price & Neff, Business, supra note 10.

[FN25]. Id.

[FN26]. Jay Price & Joseph Neff, A Private, Driven Man, NEWS & OBSERVER, July 28, 2004, at A1, available at 2004 WLNR 17519988 [hereinafter Price & Neff, Driven Man].

[FN27]. Id.

[FN28]. Christopher Cooper, Iraq Reconstruction Work Picks Up Pace Again, WALL ST. J., Apr. 16, 2004, at A2, available at [2004 WL 56926278](#).

[FN29]. Julie Poucher Harbin, Civilian Contractors Consider Overseas Responsibilities, SAN DIEGO BUS. J., May 10, 2004, at 1, available at [2004 WL 67203033](#).

[FN30]. Bilmes, supra note 18.

[FN31]. See generally id.

[FN32]. Id.

[FN33]. Price & Neff, Business, supra note 10.

[FN34]. Bilmes, supra note 18.

[FN35]. Id.

[FN36]. Id.

[FN37]. Id.

[FN38]. Tom Squitieri, Role of Security Companies Likely to Become More Visible, USA TODAY, Apr. 2, 2004, at A.04, available at [2004 WL 58554236](#).

[FN39]. John Helyar, Fortunes of a War: A Mercenaries Dream at the Outset of the War, Iraq is Turning into a Difficult Market for Security Firms. Most of Their Problems Would be Familiar to Any Startup, FORTUNE, July 26, 2004, at 80, available at [2004 WL 17888467](#).

[FN40]. James Larry Taulbee, [War, Poverty, and Privatization](#), 17 EMORY Int'l L. REV. 1109, 1123-24 (2003) (reviewing ALLAN GERSON & NAT J. COLLETTA, PRIVATIZING PEACE: FROM CONFLICT TO SECURITY (2002)).

[FN41]. See [Richard Sammon, Pentagon to Rein in Private Companies](#), KIPLINGER BUS. FORECASTS, May 21, 2004, available at [2004 WL 386894](#).

[FN42]. Squitieri, supra note 38.

[FN43]. Helyar, supra note 39.

[\[FN44\]](#). See Price & Neff, Army, *supra* note 9.

[\[FN45\]](#). Helyar, *supra* note 39.

[\[FN46\]](#). *Id.*

[\[FN47\]](#). See Price & Neff, Army, *supra* note 9.

[\[FN48\]](#). *Id.*

[\[FN49\]](#). *Id.*

[\[FN50\]](#). *Id.*

[\[FN51\]](#). Helyar, *supra* note 39.

[\[FN52\]](#). *Id.*

[\[FN53\]](#). *Id.*

[\[FN54\]](#). *Id.*

[\[FN55\]](#). Helyar, *supra* note 39.

[\[FN56\]](#). *Id.* After a private contracting firm wins a large contract they often will poach talent from competing firms by enticing them monetarily which in turn inflates overall costs. *Id.*

[\[FN57\]](#). *Id.*

[\[FN58\]](#). *Id.*

[\[FN59\]](#). Price & Neff, Driven Man, *supra* note 26.

[\[FN60\]](#). Price & Neff, Business, *supra* note 10.

[\[FN61\]](#). *Id.*

[\[FN62\]](#). *Id.*

[\[FN63\]](#). *Id.*

[\[FN64\]](#). *Id.*

[\[FN65\]](#). Jay Price et al., The Bridge, NEWS & OBSERVER, July 25, 2004, at A1, available at WLNR 17512661 [hereinafter Price et al., The Bridge].

[\[FN66\]](#). Price & Neff, Business, *supra* note 10.

[\[FN67\]](#). See Price et al., *The Bridge*, *supra* note 65.

[\[FN68\]](#). Jay Price & Joseph Neff, *Security Company Broke Own Rules*, *NEWS & OBSERVER*, Aug. 22, 2004, at A1, available at 2004 WLNR 17410403 [*hereinafter* Price & Neff, *Security Company*].

[\[FN69\]](#). *Id.*

[\[FN70\]](#). *Id.*

[\[FN71\]](#). *Id.*

[\[FN72\]](#). Price & Neff, *After the Horror*, *supra* note 3.

[\[FN73\]](#). *Id.*

[\[FN74\]](#). *Id.*

[\[FN75\]](#). Price & Neff, *Security Company*, *supra* note 68.

[\[FN76\]](#). *Id.*

[\[FN77\]](#). Jay Price et al., *Graveyard*, *NEWS & OBSERVER*, July 31, 2004, at A1, available at WLNR 17528205 [*hereinafter* Price et al., *Graveyard*].

[\[FN78\]](#). *Id.*

[\[FN79\]](#). *Id.*

[\[FN80\]](#). *Id.*

[\[FN81\]](#). Price et al., *The Bridge*, *supra* note 65.

[\[FN82\]](#). *Id.*

[\[FN83\]](#). Jay Price et al., *Graveyard*, *supra* note 77.

[\[FN84\]](#). Price & Neff, *Security Company*, *supra* note 68.

[\[FN85\]](#). *Id.*

[\[FN86\]](#). *Id.*

[\[FN87\]](#). *Id.*

[\[FN88\]](#). King & Jaffe, *supra* note 1.

[\[FN89\]](#). *Id.*

[\[FN90\]](#). *News in Brief*, *HOUS. CHRON.*, July 8, 2004, at 12, available at [2004 WL 83648553](#).

[FN91]. Arlen Specter, [The Time Has Come for a Terrorist Death Penalty Law](#), 95 DICK. L. REV. 739, 739 (Summer 1991).

[FN92]. Id.

[FN93]. Id.

[FN94]. Id. at 739-40.

[FN95]. Patrick L. Donnelly, Note, [Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986](#), 72 CORNELL L. REV. 599, 599 (1987).

[FN96]. Id. at 599, 606.

[FN97]. [18 U.S.C. §2332 \(1996\)](#).

[FN98]. Id.

[FN99]. [18 U.S.C. §1111 \(2003\)](#).

[FN100]. Id.

[FN101]. Id.

[FN102]. [18 U.S.C. §2331 \(2001\)](#).

[FN103]. Id.

[FN104]. [18 U.S.C. §2331 \(2001\)](#); Donnelly, *supra* note 95 at 606.

[FN105]. [18 U.S.C. §2331 \(2001\)](#); Donnelly, *supra* note 95 at 607.

[FN106]. Brandon S. Chabner, Comment, [The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Prescribing and Enforcing United States Law Against Terrorist Violence Overseas](#), 37 UCLA L. REV. 985, 986 (1990).

[FN107]. [18 U.S.C. §2332 \(1996\)](#).

[FN108]. Donnelly, *supra* note 95, at 608.

[FN109]. [United States v. Yunis](#), 924 F.2d 1086, 1091 (D.C. Cir. 1991).

[FN110]. Id.

[FN111]. Id.; The Constitutionality of [18 U.S.C. §§ 2331](#) and [2332](#) have largely been unchallenged in the Courts. The major cases which have addressed these issues were primarily focused upon the “specific elements of the crimes” and not Congress' ability to legislate the definition and punishment of terrorism. Gabriel Soll, Comment, [Terrorism: The Known Element No One Can Define](#), 11 Willamette J. Int'l L. & Disp. Resol. 123, 141 (2004).

[FN112]. James Cox, Last-Minute Decisions in Iraq Confuse Contractors, USA TODAY, June 29, 2004, at B1, available at 2004 WLNR 6663698.

[FN113]. Id.

[FN114]. Id.; see also Coalition Provisional Authority Memorandum No. 17 §§ 9-10 (June 26, 2006), http://www.iraqcoalition.org/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf.

[FN115]. Id.

[FN116]. Harbin, *supra* note 29 (for example, Thomas Abbott, a California attorney, quoted in the article by Harbin).

[FN117]. Khaled Abou El Fadl, Rebuilding the Law, WALL ST. J., Apr. 21, 2003, available at <http://www.scholarofthehouse.org/rlaopwastjoa.html>.

[FN118]. Id.

[FN119]. Id.

[FN120]. Id.

[FN121]. Id.

[FN122]. Id.

[FN123]. IRAQ PENAL CODE, NO. (111) (1969), https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/d616b3e179d6210285256d0a006391f1/Body/M2/iraqip_english.doc?OpenElement.

[FN124]. Id. at ¶ 225.

[FN125]. See Coalition Provisional Authority Regulation No. 1 §1-3 (May 16, 2003), http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf.

[FN126]. El Fadl, *supra* note 117.

[FN127]. U.N. SCOR, 4761th mtg., U.N. Doc. S/RES/1483 (2003), [http://www.un.org/Docs/journal/asp/ws.asp?m=s/res/1483\(2003\)](http://www.un.org/Docs/journal/asp/ws.asp?m=s/res/1483(2003)) (last visited Oct. 25, 2004).

[FN128]. Coalition Provisional Authority Regulation No. 1 §1, *supra* note 125.

[FN129]. Id.

[FN130]. Id. at § 2.

[FN131]. Michael M. Farhang, *Reconstructing Justice: The Coalition Provisional Authority Took Giant Steps to Guarantee Iraq a Functioning Criminal Justice System*, L.A. LAW., July-Aug. 2004, at 45, 46.

[FN132]. Coalition Provisional Authority Order No. 7 §2 (June 10, 2003), <http://www.aina.org/books/cpapenalcode.htm>.

[FN133]. Farhang, *supra* note 131, at 46.

[FN134]. IRAQ PENAL CODE, NO. (111), *supra* note 123 at ¶ 405.

[FN135]. *Id.*

[FN136]. *Id.*

[FN137]. Coalition Provisional Authority Order No. 100 §1 (June 28th, 2004), http://www.iraqcoalition.org/regulations/20040628_CPAORD_100_Transition_of_Laws_Regulations_Orders_and_Directives.pdf.

[FN138]. See IRAQI INTERIM GOVERNMENT ANNOUNCEMENT CEREMONY PRESS PACKET, http://www.cpa-iraq.org/government/press_packet.pdf [hereinafter Press Packet].

[FN139]. See Coalition Provisional Authority Order No. 100 §1, *supra* note 137.

[FN140]. PRESS PACKET, *supra* note 138.

[FN141]. *Id.*

[FN142]. *Id.*

[FN143]. *Id.*

[FN144]. Gulf Region and Project and Contracting Office Website, <http://www.rebuilding-iraq.net> (last visited Mar. 23, 2006).

[FN145]. Cox, *supra* note 112.

[FN146]. Helyar, *supra* note 39.

[FN147]. Peter Singer, *Outsourcing War*, FOREIGN AFFAIRS, Mar. 1, 2005, <http://www.brookings.edu/views/articles/fellows/singer20050301.htm> [hereinafter Singer Outsourcing].

[FN148]. Fred Schreier & Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, OCCASIONAL PAPER - NO. 6 (Geneva Centre for the Democratic Control of Armed Forces) Mar. 2005, at 56, 59, http://www.dcaf.ch/_docs/occasional_6.pdf [hereinafter Schreier & Caparini].

[FN149]. *Id.* at 56 (citations omitted).

[FN150]. *Id.* at 57.

[\[FN151\]](#). Id.

[\[FN152\]](#). Id.

[\[FN153\]](#). Id.

[\[FN154\]](#). Schreier & Caparini, *supra* note 148 at 57.

[\[FN155\]](#). Id.

[\[FN156\]](#). Q&A: Private Military Contractors and the Law, HUMAN RIGHTS WATCH, Oct. 21, 2004, <http://www.hrw.org/english/docs/2004/05/05/iraq8547.htm>.

[\[FN157\]](#). Id.

[\[FN158\]](#). Id.

[\[FN159\]](#). Price & Neff, *After the Horror*, *supra* note 3.

[\[FN160\]](#). Helyar, *supra* note 39.

[\[FN161\]](#). Alternatively, and not addressed in this article, are the potential civil suits against the companies involved. Assuming that hold harmless agreements could be pierced, it would be interesting to see the plausibility of a negligence, contributory negligence or breach of contract claim against Blackwater or Regency by the victims' families. Although a life can never be replaced, a civil lawsuit may offer the family some solace in its ability to identify an entity to sue, unlike in the criminal counterpart.

[\[FN162\]](#). After writing this note and before publication, the families of the four slain contractors brought a civil action against Blackwater Security Consulting alleging two state law claims for wrongful death and fraud. See [Nordan v. Blackwater Sec. Consulting](#), 382 F.Supp.2d 801 (E.D.N.C. 2005). A copy of the complaint is available at http://www.newsobserver.com/content/news/nation_world/blackwater/20040106_blackwater.pdf.

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