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Contractors on the "Battlefield": Providing Adequate Protection, Anti-Terrorism Training, and Personnel Recovery for Civilian Contractors Accompanying the Military in Combat and Contingency Operations

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CONTRACTORS ON THE "BATTLEFIELD:" PROVIDING ADEQUATE PROTECTION, ANTI-TERRORISM TRAINING, AND PERSONNEL RECOVERY FOR CIVILIAN CONTRACTORS ACCOMPANYING THE MILITARY IN COMBAT AND CONTINGENCY OPERATIONS

*Jeffrey F. Addicott**

I. INTRODUCTION 324

II. HISTORY AND STATUS OF CONTRACTORS ON THE BATTLEFIELD 330
A. *Scope of Contractor Support* 332
B. *Status of Contractors* 338

III. FORCE PROTECTION 345
A. *Contractor's Use of Firearms* 347
B. *Protecting Contractors* 350

IV. AT TRAINING 353

V. PARENT CONTRACTOR COMPANY LIABILITY ISSUES REGARDING EMPLOYEES ON THE BATTLEFIELD 361

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VI. PERSONNEL RECOVERY 378

VII. CONCLUSION 385

I. INTRODUCTION

Personnel recovery is no longer limited to high-risk, specialized troops as was the case in the past . . . . Isolated personnel now include U.S. military, contractors and other government civilians, as well as coalition partners.[1]

LTG Norton Schwartz

Providing adequate protection, antiterrorism (AT)[2] training and, if necessary, personnel recovery[3] for civilian contractors

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1. Roxana Tiron, *Pentagon Still Undecided on Polices to Protect Contractors*, NAT'L DEF., Nov. 2004, at 39.

2. U.S. DEP'T OF DEF., DICTIONARY OF MILITARY AND ASSOCIATED TERMS 40 (2001, amended edition 2005) (defining antiterrorism as "[d]efensive measures used to reduce the vulnerability of individuals and property to terrorist acts, to include limited response and containment by local military forces") [hereinafter DICTIONARY OF MILITARY AND ASSOCIATED TERMS]. "The proactive, preventative stage to stopping terrorism, antiterrorism includes techniques designed to harden potential high-profile targets (e.g., government buildings or military installations), as well as actions taken to detect a planned terrorist attack before it occurs." JEFFREY F. ADDICOTT, TERRORISM LAW: THE RULE OF LAW AND THE WAR ON TERROR 19 (Lawyers & Judges Publishing Company, 2004).

3. *See* U.S. DEP'T OF DEF., DIRECTIVE NO. 2310.2, PERSONNEL RECOVERY para. 3.1 (2000) (defining personnel recovery as the "aggregation of military, civil, and political efforts to recover captured, detained, evading, isolated or missing personnel from uncertain or hostile environments and denied areas"). The Defense Prisoner of War/Missing Personnel Office (DPMO) defines personnel recovery as, "[t]he aggregation of military, civil, and political efforts to recover captured, detained, evading, isolated, or missing personnel from uncertain or hostile environments and denied areas." DEF. PRISONER OF WAR/MISSING PERS. OFFICE, PERSONNEL RECOVERY DEFINITION, DEFENSE POW/MISSING PERSONNEL OFFICE OPERATIONS DIRECTORATE FACT SHEET, http://www.dtic.mil/dpmo/personnel_recovery/fact_sheets.htm (last visited Feb. 5, 2006) [hereinafter DPMO]. "Personnel recovery may occur through military action, action by non-governmental organizations, other U.S. Government (USG)-approved action, and diplomatic initiatives, or through any combination of these options." *Id. See also* DICTIONARY OF MILITARY AND ASSOCIATED TERMS, *supra* note 2, at 409 (noting that personnel recovery "includes but is not limited to theater search and rescue; combat search and rescue; search and rescue; survival, evasion, resistance, and escape; evasion and escape; and the coordination of negotiated as well as forcible recovery options").

deployed to support U.S. military operations presents significant legal and policy challenges that both the military and civilian contractor companies have yet to fully appreciate, let alone properly institutionalize.[4] Although many Americans still visualize the U.S. military as a monolithic force of uniformed personnel only, the reality is far different. Due to federally imposed personnel limitations for the armed forces and the need for specialized skills in the modern high-tech military,[5] hundreds of activities once performed by the military are now privatized and outsourced to thousands of civilian contractors.[6] These civilian contractors routinely provide a wide array of important and essential activities in support of the full range of military operations to include infrastructure improvements and rebuilding.[7] In other words, civilian contractors now work shoulder-to-shoulder with military personnel during both armed conflict and in Military Operations Other Than War (MOOTW).[8] While armed conflict refers to traditional combat operations associated with internationally recognized warfare, MOOTWs are contingency[9] missions that include activities such as

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4. *See* U.S. GEN. ACCOUNTABILITY OFFICE, GAO-03-695, MILITARY OPERATIONS: CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS (2003) (recommending that DOD adopt a series of proposals to improve DOD supervision of support contractors including "(1) conducting required reviews to identify mission essential services provided by contractors and include them in planning; (2) developing and implementing the use of standard language for contracts; and (3) developing comprehensive guidance and doctrine to help the services manage contractors' supporting deployed forces") [hereinafter GAO REPORT].

5. *See* OPERATIONAL LAW HANDBOOK 135 (Maj. Derek I. Grimes ed., The Judge Advocate General's Legal Center & School, 2005) [hereinafter OPLAW HANDBOOK].

6. *Id.* at 135. The term contractor personnel "does not include those persons who reside in the country where the contract performance takes place." *Id.*

7. *See* Gordon L. Campbell, *Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend on Them*, JOINT SERVICES CONF. ON PROFESSIONAL ETHICS, Jan. 27–28, 2000, *available at* http://www.usafa.af.mil/jscope/JSCOPE00/Campbell00.html (noting that "[c]ontractor support is an essential, vital part of our force projection capability—and [it is] increasing in its importance").

8. *See* OPLAW HANDBOOK, *supra* note 5, at 57.

9. *See* DICTIONARY OF MILITARY AND ASSOCIATED TERMS, *supra* note 2, at 117 (defining a contingency as "[a]n emergency caused by natural disasters, terrorists, subversives, or by required military operations"). "Due to the uncertainty of the situation, contingencies require plans, rapid response and special procedures to ensure

combating terrorism, counter-narcotic operations, peacekeeping operations, and other high-risk missions around the globe.[10]

One of the consequences of the global War on Terror[11] is that

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the safety and readiness of personnel, installations, and equipment." *Id.*

10. *See* OPLAW HANDBOOK, *supra* note 5, at 57 (stating that MOOTW operations include: Arms Control, Combating Terrorism, DOD Support to Counterdrug Operations, Enforcement of Sanctions/Maritime Intercept Operations, Enforcing Exclusion Zones, Ensuring Freedom of Navigation and Overflight, Humanitarian Assistance, Military Support to Civilian Authorities, Nation Assistance/Support to Counterinsurgency, Noncombat Evacuation Operations, Peace Operations, Protection of Shipping, Recovery Operations, Show of Force Operations, Strikes and Raids, and Support to Insurgency).

11. The term "War on Terror" or "Global War on Terrorism" is used to describe the ongoing global conflict between the United States of America and the al-Qa'eda terror network founded by Osama bin Laden. *See* President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WKLY. COMP. PRES. DOC. 1347, 1348 (Sept. 20, 2001) (citing al-Qa'eda and the nations that support that "radical network of terrorists" as the enemy in the United States' "war on terror"). While it is now certain that the al-Qa'eda network declared "war" on the United States in a 1996 "Fatwa," for most Americans the pivotal moment in the conflict is traced to September 11, 2001, when nineteen members of the terrorist al-Qa'eda organization hijacked four domestic U.S. passenger jet aircraft while in flight (five terrorists in three of the planes and four in the fourth). *See Terrorists Destroy World Trade Center, Hit Pentagon in Raid With Hijacked Jets; Nation Stands in Disbelief and Horror; Streets of Manhattan Resemble War Zone Amid Clouds of Ash*, WALL ST. J., Sept. 12, 2001, at A1 (describing the events leading up to the 9/11 attacks) [hereinafter *Terrorists Destroy World Trade Center*]; Evan Thomas, *A New Date of Infamy*, NEWSWEEK, Sept. 13, 2001, at 22 (creating a timeline of the atrocities and events that occurred on September 11, 2001); Nancy Gibbs, *If You Want to Humble an Empire*, TIME, Sept. 14, 2001, at 32 (recounting the actions of leaders of the federal government and New York City mayor Rudolph Giuliani in response to the terrorist attacks of September 11, 2001). The terrorists crashed two of the aircraft into the twin towers of the World Trade Center in New York. *See Terrorists Destroy World Trade Center, supra*, at A1. A third plane hit the Pentagon in Washington, D.C., but the fourth plane crashed into a field in Pennsylvania, most likely a result of the efforts of some of the passengers. *Id.* at A12; *see also* Dave Barry, *On Hallowed Ground*, MIAMI HERALD, Sept. 7, 2002 (chronicling the exploits of the passengers of United Airlines Flight 93, who "transformed themselves from people on a plane into soldiers . . . [which] made them heroes, immediately and forever, to a wounded, angry nation . . . that desperately wanted to fight back"). According to a *New York Times* tally, along with billions of dollars in property loss, approximately 3,047 were killed, not including the nineteen terrorists. *See A Nation Challenged; Dead and Missing*, N.Y. TIMES, Apr. 24, 2002, at A13; *see also* Thomas J. Lueck, *City Compiles List of Dead and Missing From Sept. 11*, N.Y. TIMES, Aug. 20, 2002, at B1 (reporting on the New York City medical examiner's official list of 2819 people who were killed or missing in the attack on the World Trade Center, prepared for the one-year observance at ground zero). The Bush Administration has repeatedly indicated that the War on Terror also encompasses appropriate action against

American and coalition contractors—particularly in Iraq[12] and Afghanistan[13]—are increasingly subjected to kidnappings, torture,[14] and murder by terrorists, criminal elements, and other

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those rogue States who pose a threat to the United States with the possession or desired possession of weapons of mass destruction. *See* President George W. Bush, *supra* note 11, at 1349 (declaring "[f]rom this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime"). The concern being that these dictatorships, like the current Iranian regime, might provide weapons of mass destruction to terrorist operatives. *See* President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union, 38 WKLY. COMP. PRES. DOC. 133, 135 (January 29, 2002) (proclaiming that "[t]he United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons"); *see also* THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002) (enumerating the so-called Bush Doctrine, which adopts the use of preemptive force in self-defense and is designed to prevent the marriage of al-Qa'eda-styled terrorism with weapons of mass destruction).

12. *See* Charles M. Madigan, *Fast, Furious, Relentless Lightning-Quick Campaign Ousts Hussein in 4 Weeks*, CHI. TRIB., Apr. 20, 2003, at C1 (discussing the initial success of the U.S.-led coalition in Iraq). Dubbed Operation Iraqi Freedom, the multinational operation in Iraq began on March 19, 2003, and major combat operations against Saddam Hussein's forces ended on May 1, 2003. *See* Dana Milbank & Bradley Graham, *Bush Revises Views On 'Combat' in Iraq; 'Major Operations' Over, President Says*, WASH. POST, Aug. 19, 2003, at A15 (reporting on President Bush's May 1, 2003, declaration that "[m]ajor combat operations in Iraq [had] ended"); President George W. Bush, Address to the Nation on Iraq from the U.S.S. *Abraham Lincoln*, 39 WKLY. COMP. PRES. DOC. 516, 516 (May 1, 2003).

13. *See, e.g.*, James Risen, *A Nation Challenged: Al Qaeda; Bin Laden Aide Reported Killed by U.S. Bombs*, N.Y. TIMES, Nov. 17, 2001, at A1. The multinational military campaign to dislodge the Taliban and al-Qa'eda took less than three months, from October 7, 2001 to December 23, 2001. *See* Michael R. Gordon, *Gains and Limits in a New Low-Risk War*, N.Y. TIMES, Dec. 29, 2001, at A1 (noting that "[t]he military campaign in Afghanistan was a striking success for a new style of warfare," which "enabled the United States to topple the Taliban, install a friendly government and ensure that Al Qaeda could no longer use Afghanistan as a base for terrorism"); *Military: Operation Enduring Freedom-Operations*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/ops/enduring-freedom-ops.htm (last visited Feb. 5, 2006) (further stating that approximately 6500 air combat missions were flown, which attacked over 120 fixed targets). Four hundred vehicles were destroyed and an undetermined number of combatants were killed. *Id.* The multinational military campaign was dubbed Operation Enduring Freedom. *Id.*

14. *See, e.g.*, Melinda Liu, *•Help Me! I'm a Hostage!'*, NEWSWEEK, June 16, 2005, http://msnbc.msn.com/id/8234978/site/newsweek/from/RL.5/ (reporting the rescue of a kidnapped Australian contractor); Ellen Knickemeyer & Jonathan Finer, *In Iraq, 425 Foreigners Estimated Kidnapped Since 2003*, WASH. POST, Dec. 25, 2005, at A28 (suggesting that abductions in Iraq are far more common than previously thought). *See*

insurgency forces.[15] Without question, civilian contractors will continue to be integral participants in the ongoing War on Terror.[16] Therefore, it is imperative that issues of force protection,[17] AT training, and personnel recovery[18] be fully delineated and the related legal contours be more clearly defined.[19] This is particularly important in light of the ever-

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Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT'L & COMP L. REV. 275, 290 (1994) (discussing the international community's development of the concept of freedom from torture as "a core right which was not to be compromised, even in times of public emergency"); *see also United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 46, at 197, U.N. Doc. A/39/46 (Dec. 10, 1984) (defining torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity").

15. *See, e.g.*, THOMAS HAMILL & PAUL T. BROWN, ESCAPE IN IRAQ: THE THOMAS HAMILL STORY 4 (2004) [hereinafter THOMAS HAMILL STORY] (relating that "[r]oadside bombs, improvised from discarded Iraqi artillery shells and bombs—detonated by remote control—and hit-and-run ambush with rocket-propelled grenades and automatic weapons fire increasingly became hazards of the road").

16. Civilian contractors are now frequent victims of violence in war zones. *See, e.g.*, Daniel Bergner, *The Other Army*, N.Y. TIMES MAGAZINE, Aug. 14, 2005, at 29, 34 ("Between January and August 2004 . . . Triple Canopy teams came under attack 40 times, in incidents ranging from incoming rounds of rocket-propelled grenades to assaults lasting at least 24 hours."); Jeffrey Gettleman, *4 From U.S. Killed in Ambush in Iraq; Mob Drags Bodies*, N.Y. TIMES, Apr. 1, 2004, at A1 (discussing the March 2004 ambush, killing, and mutilation of four American contractors working for Blackwater Security Consulting Company). These contractors were providing security services for food delivery operations in the Fallujah area of Iraq. *Id.* Noncontractor civilians also face grave danger in war zones and hostile territories. *See, e.g.*, Sewell Chan & Eunjung Cha, *American Beheaded on Web Video; Militants Say Killing Was Revenge for U.S. Abuses at Iraqi Prison*, WASH. POST, May 12, 2004, at A1 (discussing the travels and subsequent execution of Nicholas Berg, a twenty-six-year-old who journeyed to Iraq independently to pursue potential business opportunities).

17. *See* U.S. DEP'T OF DEF., INST. NO. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES para. 4.4 (2005) [hereinafter DOD INST. NO. 3020.41].

18. *Id.* para. 6.3.6.

19. Interestingly, a number of contracting firms have come out in support of greater oversight and regulation of their activities by their own government and the

evolving nature of terrorism[20] and the attendant responses.

Both the Department of Defense (DOD)[21] and the companies that provide civilian contractors have core moral and legal responsibilities to provide contract personnel with adequate security, AT training,[22] and, in certain circumstances, rescue

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United Nations, if necessary. Bergner, *supra* note 16, at 56. These firms would "like checks on everything from adequate training to human rights violations. They'd like to see their more rash competitors lose their contracts. *They'd like to legitimize the work, to remove the remaining stigma that their own men are rogues, mercenaries.*" *Id.* (emphasis added).

20. There exists no universally accepted definition on terrorism, despite numerous submissions of draft proposals by United Nations Commissions and Subcommissions regarding the definition of terrorism. *See e.g.*, 1954 Draft Code of Offenses Against the Peace and Security of Mankind, 9 U.N. GAOR, 6th Sess., Supp. No. 9, at 11–12, U.N. Doc A/2693 (1954). The International Law Commission's 1954 Draft Code of Offenses Against the Peace and Security of Mankind (1954) contained the following proposed language at Article 2, para. 6.: "The undertaking or encouragement by the authorities of a State of terrorist activity in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State." *Id.* Unfortunately, as of this writing, the U.N. General Assembly has not been able to reach agreement on a final version. *But see* ADDICOTT, *supra* note 2, at 4 (arguing that the intentional targeting of non-combatants is always a terrorist act regardless of the underlying motivation or cause):

> Since the victims of terrorism are invariably innocent civilians, it appears fundamentally logical that a definitional approach should concentrate on the act and not the political, religious, or social causes which motivate the act. Under this regime, the use of violence on a civilian target with intent to cause fear in a given civilian population is easily classified as a terrorist act. In other words, to the common understanding of the general public, terrorism is immediately associated with violence that is directed at the indiscriminate killing of innocent civilians to create a climate of fear . . . .
>
> In this light, bombings of public places, the sending of letter bombs or poisons through the mails, hijackings of aircraft, hostage taking, and so on, are all acts of terrorism regardless of the underlying cause said to justify the attack. In a sense, terrorism can simply be described as making "war" on civilians.

Id.

21. Rudi Williams, *DOD Official Outlines Personnel-Recovery Work to Be Done*, AM. FORCES PRESS SERV., Aug. 31, 2004 (quoting Deputy Assistant Secretary of Defense Jerry D. Jennings that a pending National Security Presidential Directive (NSPD) will clarify policy "by directing the full integration of U.S. diplomatic, civil, and military personnel recovery capabilities into a national architecture to ensure successful outcomes for personnel-recovery events") (internal quotation marks omitted).

22. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.2.7.9.

from capture.[23] In tandem with identifying the legal and policy considerations associated with these issues, this Article will also address the matter of civil liability to the parent contracting company should it fail to provide adequate protection, or appropriate AT training, or both, to their civilian employees serving overseas in hostile environments.[24]

II. HISTORY AND STATUS OF CONTRACTORS ON THE BATTLEFIELD

No one knows better than I the tremendous work that Brown and Root[25] *has done in Somalia. The flexibility and competence demonstrated by your employees were key factors in allowing U.S. forces to transition logistical support to the U.N. . . .*[26]

General John M. Shalikashvili
Chairman, Joint Chiefs of Staff

The military's use of civilian defense contractors certainly did not begin with the military campaigns and counter-terror operations[27] in Afghanistan and Iraq.[28] Since the inception of the

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23. *See Interagency National Personnel Recovery Architecture: Final Report*, INST. FOR DEF. ANALYSES, P-3890 July 2004 [hereinafter *IDA Report*]; *see also* GAO REPORT, *supra* note 4; Dana Priest & Mary Pat Flaherty, *Under Fire, Security Firms Form an Alliance*, WASH. POST, Apr. 8, 2004, at A1 (noting that "[u]nder assault by insurgents and unable to rely on U.S. and coalition troops for intelligence or help under duress, private security firms in Iraq have begun to band together . . . organizing what may effectively be the largest private army in the world, with its own rescue teams and pooled, sensitive intelligence").

24. *See* Williams, *supra* note 21. Hopefully, many of these issues will be resolved in a pending National Security Presidential Directive set to be released in late 2005.

25. Brown and Root, a division of Halliburton, is a large government contractor working especially in Iraq on a variety of reconstruction projects and other DOD support operations. *See Halliburton Iraq Contract Queried*, BBC NEWS, May 30, 2003, http://news.bbc.co.uk/2/hi/business/2950154.stm; Jane Mayer, *CONTRACT SPORT, What Did the Vice President Do for Halliburton*, THE NEW YORKER, Feb. 16, 2004, at 80.

26. David L. Young, *Planning: The Key to Contractors on the Battlefield*, ARMY LOGISTICIAN, May–June 1999, at 10.

27. Most of the operations are directed at combating the al-Qa'eda terror organization or like-minded extremists. Dedicated to the destruction of the West, al-Qa'eda has demonstrated over the past four years that it is truly international in scope with the resources and personnel to coordinate sophisticated terror attacks on a scale never before seen. *See* 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES xvi (2004) (describing

American republic over 200 years ago, civilian contractors have provided a wide array of essential goods and services to military personnel operating both in garrison and in the field.[29] The role of and need for contractor support began to expand greatly during the war in Vietnam[30] and has dramatically increased in the War on Terror.[31] With the accelerated use of civilian

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the terror network as "sophisticated, patient, disciplined, and lethal") [hereinafter 9/11 REPORT]; Michael Elliott, *Why the War on Terror Will Never End*, TIME, May 26, 2003, at 27, 29–30 (noting that the terror network of al-Qa'eda is linked to a vast variety of like-minded terrorist groups from the Philippines to Indonesia and has trained tens of thousands of Arab and non-Arab militants in Afghanistan under the Taliban regime). The al-Qa'eda organization is entrenched in Iraq under Jordanian terrorist Abu Musab al-Zarqawi and still operates, although clandestinely, in Afghanistan. *See* Henry Schuster, *Al-Zarqawi and al Qaeda in Jordan*, CNN, Nov. 12, 2005, http://www.cnn.com/2005/WORLD/meast/11/11/zarqawi.jordan/; Elliott, *supra*, at 29.

28. *See* P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security*, 26 INT'L SECURITY 3, at 186, 188–90 (Winter 2001/2002).

29. *See* Campbell, *supra* note 7 (noting that the use of contractors during wartime spans all the way back to the Revolutionary War, when General "Washington used civilian wagon drivers to haul supplies"). It should be noted that most contracting companies reject the accusation that they are mere mercenaries. *See* Bergner, *supra* note 16, at 31 (noting that security contracting companies, placing great importance on public perception of their work, prefer the term "private security company," or P.S.C., over less accurate and politically charged terminology).

30. *See* James J. McCullough & Abram J. Pafford, *Contractors on the Battlefield: Emerging Issues for Contractor Support in Combat & Contingency Operations*, *in* BRIEFING PAPERS, June 2002, at 1 (West 2002); *see also* Campbell, *supra* note 7 (explaining that "[b]y Vietnam, contractors were becoming a major part of logistical capabilities within zones of operation providing construction, base operations, water and ground transportation, petroleum supply and . . . support for high-technology systems").

31. *See* GAO REPORT, *supra* note 4, at 2–9; *see also* U.S. GEN. ACCOUNTABILITY OFFICE, GAO/NSIAD-95-5, DOD FORCE MIX ISSUES: GREATER RELIANCE ON CIVILIANS IN SUPPORT OF ROLES COULD PROVIDE SIGNIFICANT BENEFITS (1994) (stating that "[w]ith the transition to an all-volunteer active-duty military force, DOD adopted the 'Total Force' policy in 1973, which recognized that the reserves, retired military members, civilian government workers, and private contractor personnel could add to the active forces in ensuring the national defense"); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 554 (2005) (noting that, in Iraq, the military relies on civilian contractors "for unprecedented levels of battlefield and weaponry operation, support, and maintenance"); Bergner, *supra* note 16, at 32 (reporting that, in 2002, the United States hired a private security detail of roughly forty men from DynCorp to protect Afghan President Hamid Karzai from attacks and assassination attempts). For example, security contracting "businesses add about 16 percent to the coalition's total forces." *Id.* at 31.

contractors who accompany the military, the issue of status looms as a central matter of concern. Are they combatants, noncombatants, or a hybrid?[32]

A. *Scope of Contractor Support*

Civilians accompanying military forces,[33] also known in the DOD lexicon as contractors deploying with the force (CDF),[34] fall into three broad categories, each governed by somewhat different legal and regulatory guidance. These three categories are: DOD civilian employees,[35] civilian contractor personnel, and other nonaffiliated civilians.[36] As the primary topic of interest of these three categories, civilian contractor personnel includes: "Any individual, firm, corporation, partnership, association, or other legal nonfederal entity that enters into a contract directly with the [DOD] to furnish services, supplies, or both, including construction."[37] In addition, many of the civilian contractors who accompany the military on contingency operations are designated as "mission-essential" (M-E) personnel[38] (similar to the designation of DOD civilian employees as "emergency-essential" personnel).[39] In essence, an M-E contractor is someone

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32. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.1.1.

33. Many military publications refer to contractors accompanying the military overseas as "CAF," an acronym for "Contractors Accompanying the Force." *See* OPLAW HANDBOOK, *supra* note 5, at 135.

34. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 1.

35. *See* U.S. DEP'T OF DEF., INST. NO. 1300.23 (defining DOD civilian employees as "U.S. citizens or foreign nationals employed by the [DOD] and paid from appropriated or non appropriated funds under permanent or temporary arrangement") [hereinafter DOD INST. NO. 1300.23].

36. *See* Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 4 & n.9 (2001) (describing nonaffiliated persons as the media, nongovernmental organizations (NGOs), private voluntary organizations (PVOs) refuges, intergovernmental organizations (IGOs) and internally displaced persons (IDPs) [hereinafter Turner & Norton].

37. *See* DOD INST. NO. 1300.23, *supra* note 35, para. E1.1.2.

38. *See generally* U.S. DEP'T OF DEF., INST. NO. 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING CRISIS (1990).

39. In contrast to civilian contractors, DOD civilian employees can be designated as emergency-essential personnel. *See* U.S. DEP'T OF DEF., DIRECTIVE NO. 1404.10, EMERGENCY-ESSENTIAL (E-E) DOD U.S. CITIZEN CIVILIAN EMPLOYEES para. 6 (1992). An E-E employee is expected to sign a "[DOD] Civilian Employee Overseas Emergency-

who works in a position in an overseas contingency operation that is required to ensure the success of the operation.

Given the scope and pace of the modern military, military planners no longer consider civilian contractors a luxury or a "nice to have" addition to the force structure.[40] Indeed, contractors accompanying the military on operations are a necessity without which the modern military could not conduct combat or engage in MOOTW. Because contractors now provide a wide range of technical, logistical, maintenance, and security support services to DOD missions,[41] America's unparalleled military superiority now requires contractor support to maintain military readiness and operational capabilities.[42] As noted, governmental limits on the number of DOD personnel authorized in a particular area,[43] the increasing sophistication of military technologies,[44] and the ever-present need to conserve DOD resources for other potential activities makes contractor personnel support vital.[45] Working for American contractor companies under DOD contracts, thousands of engineers, technicians, construction workers, food service providers, and

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Essential Position Agreement." *Id.* para. E2.1.4.

40. *See* Campbell, *supra* note 7 (arguing that contractor support to the military is an absolutely essential part of force projection).

41. *See* U.S. GEN. ACCOUNTABILITY OFFICE, GAO/NSIAD-95-5, *supra* note 31, Ch. 0:2.

42. *See* Anthony Bianco & Stephanie Anderson Forest, *Outsourcing War*, BUS. WK., Sept. 15, 2003, at 68 (highlighting that "[b]y most estimates, civilian contractors are handling as much as 20% to 30% of essential military support services in Iraq"); Matthew Quirk, *Private Military Contractors: A Buyer's Guide*, THE ATLANTIC MONTHLY, Sept. 2004, at 39 (noting that there are ten times as many contractors per military soldier in Iraq in 2004 as compared to the 1991 Gulf War).

43. Force Caps limit DOD personnel that may be committed to a particular location, combat zone, or mission. *See* HEADQUARTERS DEP'T OF THE ARMY, FIELD MANUAL 100-21, CONTRACTORS ON THE BATTLEFIELD para. 1-3 (2003), *available at* http://www.afsc.army.mil/gc/files/fm3_100x21.pdf [hereinafter FM 100-21] ("When military force caps are imposed on an operation, contractor support can give the commander the flexibility of increasing his combat power by substituting combat units for military support units.").

44. Sophisticated weapons systems may require contractors to operate the system, train military personnel on their operation, or both. *But see infra* footnotes 108–20 and accompanying text (noting that contractors may not operate weapons systems).

45. *See* GAO REPORT, *supra* note 4.

weapon specialists make up a "privatized Army."[46] This privatized Army is currently deployed closer than ever before to imminently dangerous areas, including the actual battlefield.[47] To be sure, this fact has resulted in untoward consequences. Tragically, as of January 2005, over 200 civilian contractors working in Iraq (many of them Americans) have been killed, with hundreds more wounded.[48]

Furthermore, relative to the size of the uniformed armed forces during the Cold War, today's active duty military is a significantly smaller force.[49] This increases the importance of contractor support to maintain the overall flexibility of the active and reserve forces.[50] While no one really knows exactly how many civilian contractors are currently supporting DOD contingency operations overseas,[51] low ranging estimates reveal

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46. Mark Fineman, *Privatized Army in Harm's Way*, L.A. TIMES, Jan. 24, 2003, at A1 (noting that "[t]housands of unarmed American engineers, technicians, electricians, weapons specialists and retired military officers working for U.S. corporations under Defense Department contracts are deployed closer to present and imminent war zones than ever before").

47. *Id.*

48. *See* Joseph Neff & Jay Price, *Iraq: Courts to Resolve Contractor's Deaths*, NEWS & OBSERVER, Jan. 9, 2005, *available at* http://www.corpwatch.org/article.php?id=11781; *but see* Bergner, *supra* note 16 (noting the impossibility of accurately reporting how many security contractors have been killed in Iraq due to a failure on the part of contracting companies to report the deaths). Still, experts estimate that between 160 and 200 security contractors have been killed in Iraq—"more deaths than any one of America's coalition partners have suffered." *Id.* In addition, "[t]here have been more than 150 reported kidnappings in [Iraq] in the last year, most of them involving Iraqi citizens." Solomon Moore, *U.S. Contractor Kidnapped in Iraq; His Identity, That of Firm Withheld*, LA. TIMES, April 12, 2005, at A3.

49. *See* Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 111 (2001) (noting that the armed forces size has been reduced from 2,174,200 to 1,385,700 following the end of the Cold War); *see also generally* Edward F. Bruner, *Military Forces: What is the Appropriate Size for the United States?* (CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS ORDER CODE RS 21754, May 28, 2004), *available at* www.fas.org/man/crs/RS21754.pdf.

50. *See* Schooner, *supra* note 31, at 561–64 (2005) (arguing that the military is not providing proper oversight to some contractors and that the line between inherently governmental functions and commercial activities is improperly blurred); *see also* Bergner, *supra* note 16 (noting that security contractors, despite denials from the Pentagon, often find themselves "perform[ing] inherently military functions" due to inadequate numbers in the U.S. fighting force in Iraq).

51. However, the DOD has mechanisms in place for making such a determination.

that in Iraq alone there is approximately one civilian contractor for every ten active duty military personnel.[52] This amounts to over 20,000 civilian contractors,[53] a number sure to increase over the next few years as the pace of infrastructure support in Iraq (and Afghanistan) increases.[54]

All civilian contractors operate under the terms of a specific contract,[55] either directly with the DOD or as subcontracted with another contractor who is under contract with the DOD. The duties of all contractors are "established solely by the terms of their contract."[56] Usually, the military contract will fall into one of three general categories.[57] First, Theater Support Contracts[58] are contracts associated with providing support[59] to the regional combatant command,[60] for instance, in Colombia, the combatant

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See Defense Federal Acquisition Regulation Supplement (DFARS), Contractor Personnel Supporting a Force Deployed Outside the United States, 70 Fed. Reg. 23,790 (Dep't of Def. May 5, 2005) §§ 252.225-7040 (g)–(h) (to be codified at 48 C.F.R. pts. 207, 212, 225, 252) [hereinafter DFARS] (requiring contractor's input to personnel data list as well as a plan for replacing employees who are unavailable for deployment or need to be replaced during a deployment).

52. *See* Fineman, *supra* note 46.

53. *See* Quirk, *supra* note 42 (noting that there are "ten times as many [contractors] per military soldier" in Iraq in 2004 as compared to the 1991 Gulf War). However, the actual number of civilian contractors on the ground in Iraq is subject to dispute. *Compare id.* (speculating that there are roughly 20,000 civilians in Iraq) *with* Bergner, *supra* note 16 (estimating that the number of unarmed civilians assisting the U.S. military's efforts in Iraq ranges from 50,000 to 70,000, without counting the 25,000 armed contractors) *and* Tom Regan, *US Troops, Security Contractors Increasingly at Odds in Iraq*, CHRISTIAN SCI. MONITOR, June 13, 2005, *available at* http://www.csmonitor.com/2005/0613/dailyUpdate.html (claiming that there are between 50,000 and 100,000 civilian contractors in Iraq, with "over 20,000 of them providing private security").

54. *See* Guy Taylor, *Legal Limbo Shadows Civilians in War Zone*, WASH. TIMES, July 6, 2004, at A1 (noting that "lawyers and representatives from contract firms . . . put the number closer to 80,000").

55. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.1.4.

56. *See* FM 100-21, *supra* note 43, para. 1-6.

57. *See* Campbell, *supra* note 7.

58. *See id.* (describing theater support contractors as those "usually from the local vendor base, providing goods services and minor construction to meet the immediate needs of operational commanders").

59. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.3.

60. *See* DICTIONARY OF MILITARY AND ASSOCIATED TERMS, *supra* note 2, at 96 (defining combatant command as "[a] unified or specified command with a broad

command is United States Southern Command. These contracts are typically for day-to-day recurring services at the deployed site, to include minor construction projects, repair parts, and equipment rental.[61] The second type of contracts are called External Support Contracts and are awarded by commands outside the pertinent combatant command,[62] such as the Defense Logistics Agency.[63] Again, under these contracts civilian contractors are expected to provide services at the deployed locations.[64] Finally, Systems Contracts—the third category of contracts—provide the required logistics support to maintain and operate weapons systems and various mechanical systems used in the field.[65] Regardless of the type of contract, the realities of military exigencies necessitate that civilian contract personnel "shall be prepared to respond rapidly, efficiently, and effectively to meet mission requirements for all contingencies and emergencies."[66]

Furthermore, some contracts may require contractor personnel to be U.S. citizens, reflecting a security consideration

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continuing mission under a single commander established and so designated by the President through the Secretary of Defense and with the advice and assistance of the Chairman of the Joint Chiefs of Staff" and further noting that "[c]ombatant commands typically have geographic or functional responsibilities").

61. *See* Campbell, *supra* note 7, at 3; FM 100-21, *supra* note 43, para. 1-8.

62. *See* Campbell, *supra* note 7, at 3 ("[External support contractors] work under contracts awarded by contracting officers serving under the command and procurement authority of supporting headquarters outside the theater. Their support augments the commander's organic combat service support capability."); *see also* FM 100-21, *supra* note 43, para. 1-9.

63. The Defense Logistics Agency is the DOD's "largest combat support agency, providing worldwide logistics support in both peacetime and wartime to the military services as well as several civilian agencies and foreign countries." DEFENSE LOGISTICS AGENCY, FACTS AND FIGURES, ABOUT THE DEFENSE LOGISTICS AGENCY (Jan. 10, 2006), http://www.dla.mil/public_info/facts.asp. The Defense Logistics Agency "supplies almost every consumable item America's military services need to operate, from groceries to jet fuel" and has supported the U.S. military in "every major war and contingency operation of the past four decades," starting with the Vietnam war. *Id.*

64. *See* FM 100-21, *supra* note 43, para. 1-9.

65. *See id.* para. 1-10.

66. U.S. DEP'T OF DEF., DIRECTIVE NO. 1400.31, DOD CIVILIAN WORK FORCE CONTINGENCY AND EMERGENCY PLANNING AND EXECUTION para. 4.1 (1995), *available at* http://www.dtic.mil/whs/directives/corres/pdf/d140031_042895/d140031p.pdf.

associated with intelligence concerns or other sensitive issues.[67] In fact, vetting contractors who might have access to particular DOD military sites is a necessary force-protection measure.[68] For example, the threat posed by in-country contractors with regular access to coalition military facilities was vividly demonstrated in December 2004, at Forward Operating Base (FOB) Marez in Mosul, Iraq. In this tragic incident a suicide bomber penetrated base security measures and killed twenty-two people,[69] including several civilian contractors.[70] While the suicide bomber was not a civilian contractor—he was most likely a terrorist who disguised himself in an Iraqi military uniform[71]—the event

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67. 48 C.F.R. § 3052.237-70(a) (2003) (defining "Sensitive Information"). Citizenry or residency requirements for contract personnel are not uncommon throughout the military, homeland security, and law enforcement communities of the federal government. In December 2003, the Department of Homeland Security (DHS) passed an interim rule requiring that some DHS contractors "be a citizen of the United States of America, or an alien who has been lawfully admitted for permanent residence . . . ." § 3052.237-70(e).

68. While the primary bulk of force protection measures at DOD installations prepare for external threats, safeguarding personnel and military assets from rogue contractors is equally important. The so-called "Insider Threat" scenario occurs when an individual is granted legitimate access to a location and then uses that access to facilitate sabotage or violence. Because the DOD often uses local contractors to provide food, housekeeping, maintenance, and even security services, preventing a hostile from gaining employment under the cover of a contract—and then using that access to a DOD installation to facilitate violence—is a security challenge that pits the necessities of safety and access control against the needs of military exigency, readiness, and in-country support. *See* Karl Vick, *Iraq Base Was Hit By Suicide Attack, U.S. General Says; Bomber Penetrated Tightly Secure Area*, WASH. POST, Dec. 23, 2004, at A1 (describing the fact that "U.S. firms contracted to feed the troops routinely employ citizens from third countries, such as the Philippines, but Iraqis come on base each day to fill temporary jobs and or do construction work, such as building").

69. *See* George Edmonson, *Evidence Points to Suicide Bomber; Base Infiltrator Likely Wore Device Packed with Shrapnel, U.S. Says*, AUSTIN AM.-STATESMAN, Dec. 23, 2004, at A1 (noting that four Halliburton employees were killed in the blast, including two from Texas, where Halliburton is based).

70. *See* Bill Nichols & Dave Moniz, *Suicide Bomber Blamed in Blast*, USA TODAY, Dec. 23, 2004, at A1 (noting that the December 22, 2004 suicide bombing inside a mess hall at a U.S. base near Mosul would result in "a reassessment of U.S. security procedures . . . ."

71. *See* Jackie Spinner, *Bomber Likely in Iraqi Uniform; U.S. Officials Offer Theory in Deadly Attack on Mess Tent*, WASH. POST, Dec. 24, 2004, at A14 (explaining that "Iraqi soldiers . . . are often present on U.S. bases . . . enabling[ing] a bomber dressed in a uniform to move about without raising suspicion").

illustrated the fact that a non-American civilian who falsely gained employment under the pretense of an in-country contractor could accomplish the same act of terrorism.

While the United States clearly adopts international law[72] prohibiting contractors from engaging in hostilities,[73] the reality is that contractors can be deployed throughout the battlefield, including forward-deployed positions (relative to enemy forces) to support operations during armed conflict or in other hostile environments associated with contingency operations.[74] As evidenced by contractor casualties at the FOB Mosul attack,[75] civilian contractors are regularly exposed to the risks of physical harm similar to that of military personnel.[76] An enemy that blends in with the civilian population is far more able to employ violence against support and civilian contract personnel. To prepare for the physical dangers inherent in such asymmetrical conflicts, contractors must be properly informed, trained, and equipped[77] not only to understand their own rights and obligations, but also to understand those of the U.S. military and the parent contractor company.[78]

B. Status of Contractors

Unlike military personnel, civilian contractors accompanying the armed forces in the field do not fit neatly into well-defined arenas of military law and procedure. While the military has always carefully outlined its own command structure for its uniformed personnel, for civilians accompanying the forces the picture is far less certain. In fact, except in a

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72. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.1.1.

73. *See* JOINT PUBLICATION 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS, at V-1 (2000) [hereinafter JP 4-0] ("In all instances, contractor employees cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants.").

74. James E. Manker, *Contractors in Contingency Operations: Panacea or Pain*, A.F. J. OF LOGISTICS (2004), *available at* http://www.findarticles.com/p/articles/mi_m0ibo/is_3_28/ai_n9544154/print.

75. *See* Vick, *supra* note 68 (noting that four of the 22 deaths in the blast were American civilians).

76. Manker, *supra* note 74.

77. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.3.4.

78. *See generally* Campbell, *supra* note 7; FM 100-21, *supra* note 43.

Congressional declaration of war (which last occurred in 1941 during World War II), civilian contractors are not subject to the provisions of the Uniformed Code of Military Justice (UCMJ), that is, military law.[79] Not only do military commanders have extremely limited authority to take any type of direct disciplinary action against contractors to make them perform their duties,[80] contractors are generally not required to do anything outside of the terms of their specific contract.[81] Simply stated, commanders must look to the contracting officer[82] for enforcement of the terms of the contract.[83] DOD Instruction 3020.41 in paragraph 6.1.1 entitled, "International Law and Contractor Legal Status" states:

> Under applicable law, contractors may support military operations as civilians accompanying the force, so long as such personnel have been designated as such by the force they accompany and are provided with an appropriate identification card under the provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War .... If captured during armed conflict, contingency contractor personnel

79. *See* FM 100-21, *supra* note 43, para. 1-6.

80. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.3.3.

81. Civilian contractors may be subject to the host nation laws or be prosecuted for certain criminal offenses by the Department of Justice under the provisions of the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261, as amended by § 1008 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004). *See* Turner & Norton, *supra* note 36, at 36, 38; Defense Federal Acquisition Regulation Supplement (DFARS); Contractor Performance of Security-Guard Functions, 70 FR 14,576-01 (Mar. 23, 2005) (to be codified at 48 C.F.R. pt. 237).

82. *See* DFARS, *supra* note 51, § 225.7402-3(b) (describing the duties of the contracting officer to include confirming the contract contains valid terms of agreement between the parties).

83. *See* DOD INST. NO. 3020.41, *supra* note 17, at para. 6.3.3. Commanders may take administrative actions against civilian contractor to include revocation of security clearances or restriction from installations or facilities. Commanders have limited authority to take direct action against contractor personnel to perform their duties. In addition, only Department of Justice may prosecute misconduct. Contractor personnel are normally disciplined by the contractor through the terms of the applicable employment agreement. However, contracts should recognize the ability for a commander to take certain actions affecting contractor personnel such as the ability to revoke or suspend security clearances and restriction from installations or facilities. *See id.*

accompanying the force are entitled to prisoner of war status.[84]

The reason for this dilemma revolves around the exact nature of the civilian contractor vis-à-vis the concept of armed conflict. To begin with, traditional international law has focused sharply on the distinction between international and internal armed conflict with most of the concern to the former. Even under the international laws of war, the precise status of contractors is still the subject of some debate.[85] The current corpus of the law of war,[86] which consists of all laws created by treaty and customary principles[87] that are applicable to international warfare, is largely encompassed by the 1949 Geneva Conventions.[88] The Geneva Conventions serve as the primary source of law in the event of an international armed conflict.[89] While the Geneva Conventions require all militaries to distinguish between combatants (armed forces) and

84. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.1.1.

85. *See* Turner & Norton, *supra* note 36, at 9 (noting that not all civilian contractors will be afforded protection upon capture, under the Geneva Convention Relative to the Treatment of Prisoners of War). Phillip Carter, *Hired Guns: What to Do About Military Contractors Run Amok*, SLATE, Apr. 9, 2004, *available at* http://www.slate.com/id/2098571.

86. The basic goal of the law of war is to limit the impact of the inevitable evils of war by: "[1] [p]rotecting both combatants and noncombatants from unnecessary suffering; [2] [s]afeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and [3] [f]acilitating the restoration of peace." DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 2 (1956).

87. Customary international law consists of all those binding norms practiced by nations. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

88. The 1949 Geneva Conventions cover four categories: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; (2) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; (3) Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and (4) Geneva Convention Relative to the Protections of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287.

89. *See* John Cerone, *Status of Detainees in International Armed Conflict, and Their Protection in the Court of Criminal Proceedings*, ASIL INSIGHTS, Jan. 2002, *available at* http://www.asil.org/insights/insigh81.htm.

noncombatants (civilians),[90] civilian contractors are neither combatants nor noncombatants in the traditional sense of the terms. Contractors are simply civilians that are authorized to accompany regular military forces on assorted military operations, including in times of international armed conflict (the United States' policy is to handle all hostile adversaries consistent with the spirit and terms of the Geneva Conventions irrespective of the nature of the conflict).[91]

When taking a broader meaning of the term "non-combatant", that is, the general civilian population, the concept actually embraces "certain categories of persons who, although members of or accompanying the armed forces, enjoy special protected status, such as medical officers, corpsmen, chaplains, technical (i.e., contractor) representatives, and civilian war correspondents."[92] In fact, the Geneva Conventions provide that prisoner of war (POW) protected status is given to "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces . . . ."[93] Thus, contractors are viewed as separate

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90. *See* FM 100-21, *supra* note 43, para. 4-49; *see also* U.S. DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3, (1995) [hereinafter COMMANDER'S HANDBOOK]. The term combatant and noncombatant have special implications on the battlefield, especially in the context of prisoner-of-war (POW) status.

91. *See* DFARS, *supra* note 51, § 252.225-7040. This clause requires parent contracting companies to ensure that its deployed personnel are familiar with and comply with:

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

Id. § 252.225-7040(d).

92. *See* COMMANDER'S HANDBOOK, *supra* note 90. If a noncombatant actively participates in armed conflict he may lose his protected status and be deemed an illegal combatant subject to criminal prosecution for war crimes. *Id.*

93. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(A)(4),

from the general civilian population, and must be treated as POWs if captured by enemy forces during an international armed conflict.[94]

As long as the civilian contractor takes no direct part in hostilities, he must be given POW status.[95] Still, this noncombatant status does not insulate contractors from the exigencies of the battlefield, including the possibility of capture, injury, or death.[96] This fact should always be stressed to civilian contractors before they are assigned to work in hostile environments outside of the United States.

Furthermore, with the defeat of the radical Taliban regime[97] and the dictatorship of Saddam Hussein, a state of international armed conflict no longer exists between the United States (and its allies), and Afghanistan or Iraq. In this environment, MOOTW, the protections of the Geneva Conventions are not applicable.[98] In fact, the ongoing terrorist activities in Iraq and Afghanistan would probably not even qualify as an internal armed conflict.[99] Although one could argue that the basic

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Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

94. *See id.* art. 4(B)(2).

95. *Id.*

96. *See generally* discussion, *supra* Part II.

97. For an excellent umbrella definition of a totalitarian regime, see JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 61 (2d ed. 2005).

> A radical totalitarian regime . . . seems to blend together a mixture of a failing centrally planned economy, severe limitations on economic freedom, a one-party political system, an absence of an independent judiciary, a police state with minimal human rights and political freedoms at home, denials of the right to emigrate, heavy involvement of the military in political leadership, a large percentage of GNP devoted to the military sector, a high percentage of the population in the military, leaders strongly motivated by an ideology of "true beliefs" including willingness to use force, aggressively anti-Western and antidemocratic in behavior, and selective support for wars of national liberation, terrorism, and disinformation against Western or democratic interests.

Id.

98. *See infra* note 99. *But see* U.S. DEP'T OF DEF., DIRECTIVE NO. 5100.77, DOD LAW OF WAR PROGRAM (1998) (generally believing that the law of war should be applicable in all military operations; the United States will comply with the spirit and associated principles of the law of war on all MOOTW).

99. The United States is not a signatory to Protocol Additional to the Geneva Conventions of August 12, 1946, and Relating to the Protection of Victims of

protections associated with basic humanitarian law and human rights law[100] would protect the captured contractor from abuse or torture, the sad reality of the War on Terror is that civilian contractors are often specifically targeted by terrorists who recognize no law whatsoever and provide no distinction between civilians and the military.[101] Humanitarian law has no value to

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International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3. Commonly known as Protocol I, this instrument seeks to extend coverage of non-international conflicts "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their rights to self-determination." *Id.* art. 1.4; *see also generally* Abraham Sofaer, *The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims,* 82 AM. J. INT'L L. 784, 786 (1988) (arguing generally that Protocol I's effect of "[t]reating . . . terrorists as soldiers . . . enhances their stature, to the detriment of the civilized world community").

100. The term "human rights" is commonly meant to include so-called first and second-generation human rights. *See* Dianne Otto, *Rethinking the "Universality" of Human Rights Law,* 29 COLUM. HUM. RTS L. REV. 1, 5–6 (1997) (noting that the Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/819, Dec. 10, 1948, contains two Covenants consisting of "first" and "second" generation human rights). Through treaty and customary international law, first generation human rights are binding on all nation-states. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (listing first generation human rights as: "[1] genocide, [2] slavery or slave trade, [3] the murder of, or causing the disappearance of, individuals, [4] torture or other cruel, inhumane or degrading treatment or punishment, [5] prolonged arbitrary detention, [6] systematic racial discrimination, and [7] a consistent pattern of committing gross violations of internationally recognized human rights"). Second generation human rights are legally binding only on those nation-states that have obligated themselves through treaty. These rights speak to political and civil freedoms such as the freedom of religion, peaceful assembly, privacy, association, fair and public trial, open participation in government, and movement. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 101 CONG REC. S17486-01 (daily ed. Oct. 27, 1990) (comments of Sen. Pell) *reprinted in* DAVID WEISSBRODT, ET AL., SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 282–83 (3d ed. 2001). Essentially second generation human rights are the functional equivalents of democratic values found in the United States Constitution.

101. *See Bomb Kills 4 U.S. Security Contractors in Iraq,* HOUS. CHRON., Sept. 7, 2005 (reporting on the death of four American contractors from a roadside bomb outside of Basra); *see also* THOMAS HAMILL STORY, *supra* note 15, at 150. When captured by terrorists in Iraq, Hamill noted that he was considered a solider by the terrorists:

> "What do you do?" asked the well-dressed man [Iraqi terrorist].
>
> "I am a civilian contractor," I replied.
>
> "You are a soldier," pronounced the well-dressed man. "You haul supplies and fuel to soldiers for the trucks, tanks, and planes that bomb Fallujah."
>
> "You are a soldier!" said the man in the red wrap [Iraqi terrorist].

terrorists. Thus, self-defense, AT training, and personnel recovery policy are best viewed from the perspective of the adversary. In other words, will the hostile forces abide by the applicable legal norms and standards of civilized behavior?[102]

During MOOTW, either the normative law[103] of the host nation or any applicable Status of Forces Agreements (SOFAs) will determine the rights and privileges bestowed on civilian contractors while they are present in the host nation (special diplomatic arrangements may also exist for particular deployments).[104] Unless a state of international armed conflict exists or some other set of special circumstances exist (for example, the United States serving in an occupation role as it did in Iraq and Afghanistan), the use of civilian contractors will be strictly limited by these parameters.[105] Again, as stated in the June 2005 Defense Federal Acquisition Regulation Supplement (DFARS): "Contractor personnel are not combatants and shall not undertake any role that would jeopardize their status."[106]

> "No I am not a soldier," I said. "I am here to support the military. I am a truck driver."
>
> "You were driving military trucks, no?" said the well-dressed man.
>
> "Yes, I was, but I am a civilian," I said.
>
> "You are a soldier," he said.

Id.

102. *See* Evan Thomas & Stryker McGuire, *Terror at Rush Hour*, NEWSWEEK, July 18, 2005, at 29 (discussing the continuing terror attacks aimed this time at civilians in London on July 7, 2005).

103. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.1.2. CDF personnel remain subject to U.S. law and regulations. *Id.* para. 6.1.3.

104. *Id.* para. 6.3.3. ("Contractor personnel are subject to the domestic criminal laws of the [host nation] . . . absent a SOFA or international agreement to the contrary.").

105. *See* FM 100-21, *supra* note 43, para. 1-34.

> Typically, these agreements and laws affect contractor support by—Directing the use of host-nation resources prior to contracting with external commercial firms. Restricting firms or services to be contracted. Establishing legal obligations to the host nation (e.g., customs, taxes, vehicle registration and licensing, communications and facilities support, passports, inter- or intracountry travel, mail, work permits, and hiring of local workers). Prohibiting contractor use altogether.

Id.

106. DFARS, *supra* note 51, § 252.225-7040(b)(3).

III. FORCE PROTECTION

The responsibility for assuring that contractors receive adequate force protection starts with the combatant commander, extends downward, and includes the contractor.[107]

Department of the Army Field Manual 100-21

Force protection[108] does not consist of simply providing armed military escorts to civilian contractors; instead, it is a process of events that begins long before the civilian contractor is deployed.[109] In recognition of this fact, force protection is defined as "actions taken to prevent or mitigate hostile actions against DOD personnel, resources, facilities, and critical information."[110] Thus, the process of force protection clearly encompasses AT training to include such things as ensuring that civilian contractors have "an understanding of [the] threat and the development of a system of indications and warnings that will facilitate a proactive, predictive response to enemy and terrorist action."[111]

Force protection is a shared obligation by the military and the contractor company, tempered by the restriction that while accompanying the forces during an armed international conflict, civilian contractors cannot conduct force protection measures that would be tantamount to engaging in hostilities.[112] Further, if armed contractors are used to provide security[113] during a MOOTW, such activities must be spelled out in the contract and

> [r]equests for permission to arm contingency contractor personnel to provide security services shall be reviewed

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107. FM 100-21, *supra* note 43, para. 6-4.

108. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.3.4.

109. *See* FM 100-21, *supra* note 43, para. 6-2. "Force protection and antiterrorism measures are meant to confuse and deceive the enemy so that military forces and accompanying civilian personnel are less vulnerable from attack." *Id.*

110. *Id.* para. 6-1.

111. *Id.* para. 6-2. "Force protection may include fortification construction, electronic countermeasures, integrated air defense coverage, NBC [nuclear, biological and chemical] defensive measures, and rear operations to include specific antiterrorist actions." *Id.*

112. *See id.* paras. 6-1, 6-3.

113. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.3.5.

> on a case-by-case basis by the appropriate Staff Judge Advocate to the geographic Combatant Commander to ensure there is a legal basis for approval. The request will then be approved or denied by the geographic Combatant Commander . . . .[114]

Although the responsibility for force protection "starts with the combatant commander, extends downward, and includes the contractor,"[115] the exact extent of force protection afforded to the contractors as a general class is not entirely clear.[116] Even the recently adopted June 2005 DFARS on contractors deployed on contingency operations offers only general guidance for the Combatant Commander.[117] Of course, as a practical matter, the military's failure to adequately protect the civilian contractor may compromise the contractor's ability to perform the tasks (or terms) of the contract, thereby hampering the ability of the deployed military force to conduct operations. With the continuing cycle of violence in Iraq, some contracting companies have decided that the atmosphere is simply too dangerous and have pulled out.[118] For instance, in December 2004, American contracting company Contrack International abandoned a $325 million contract in which they supervised a consortium that rebuilt transportation infrastructure in Iraq.[119] In making their announcement to withdraw, a Contrack spokesman confided that "work [in Iraq] was too dangerous and costly."[120]

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114. *Id.* para. 6.3.5.1.

115. FM 100-21, *supra* note 43, para. 6-4.

116. *See id.*

117. *See* DFARS, *supra* note 51, § 252.225-740(c). "The Combatant Commander will develop a security plan to provide protection, through military means, of Contractor personnel engaged in [a] theater of operations unless [the] terms of the contract place the responsibility with another party." *Id.*

118. *See, e.g.*, Del Jones, *Citing Security, U.S. Contractor Pulls Out of Rebuilding Project in Iraq*, USA TODAY, Dec. 23, 2004, at A4 (reporting on the first instance of a large American contractor withdrawing reconstruction efforts in Iraq, due to cost and safety concerns).

119. *See id.*

120. *Id.* (reporting additionally that a company named Orascom, the Egyptian parent for Iraq's primary mobile phone provider, was also thinking about withdrawing from Iraq). Orascom Chairman Naguib Sawiris related that "I'm not into the business of putting the lives of my people in danger." *Id.*

A. Contractor's Use of Firearms

As stated, if the contract allows, the military may position civilian contractors anywhere in the theater of operations. While they can never be used in "direct support" of hostile operations,[121] the dangers of the battlefield and the limitations of the military to provide adequate force protection may subject contractors to bodily harm, necessitating the contractors' possession of firearms for self-defense.[122]

DOD policy[123] discourages contractor personnel from possessing firearms for self-defense[124] (U.S. law does not preclude the possession of firearms for DOD employees under certain conditions[125]). If weapons are authorized,[126] they must be a military specification sidearm (the 9mm automatic pistol)

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121. *See generally* Turner & Norton, *supra* note 36. From a legal perspective, the concept of direct support is not settled under either international law or U.S. policy. While taking up arms to engage in combat is clearly direct support, some commentators have argued that serving as a guard or lookout may entail direct support. Turner & Norton, *supra* note 36, at 28. The Army FM notes that:

> Civilian contractors may be employed to support Army operations and/or weapon systems domestically or overseas. Contractors will generally be assigned duties at echelons above division (EAD); EAD should be thought of organizationally instead of a location on a map. However, if the senior military commander deems it necessary, contractors may be temporarily deployed anywhere as needed, consistent with the terms of the contract and the tactical situation.

See FM 100-21, *supra* note 43, para. 1-39.

122. *See* Cathy Booth & Thomas Magnolia, *Fear and Loathing on Iraqi Roads*, TIME, June 7, 2004, at 40 (describing the experience of former contractor John Shane Ratliff).

> Once while driving, [Ratliff] took a rock to the head, which knocked him unconscious. His lone weapon was a can of ravioli his wife sent in a care package. "[The Iraqis who attacked his truck] didn't know what [the can of ravioli] was, something red shaped like that . . . maybe they thought it was a bomb."

Id. In a separate incident, another former contractor described how he beat one Iraqi attacker to death with a hammer. *Id.*

123. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.3.4.1.

124. *See* JP 4-0, *supra* note 73, at V-7.

125. *See* 10 U.S.C § 1585 (1958) ("[C]ivilian officers and employees of the Department of Defense may carry firearms or other appropriate weapons while assigned investigative duties or such other duties as the Secretary [of Defense] may prescribe.").

126. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 4.4.1.

utilizing military specification ammunition.[127] A new draft DOD Instruction provides that the Combatant Commander may "authorize issuance of standard military side arms or appropriate weapons to selected contractor personnel for individual self-defense"[128] but only on those "rare occasions when military force protection is deemed unavailable."[129] The June 2005 DEFARS states that the "Combatant Commander will determine whether to authorize in-theater contractor personnel to carry weapons and what weapons will be allowed."[130]

While a hostile environment and the limits of force protection may favor the possession of weapons by civilian contract personnel, other factors may weigh against it.[131] First, arming contractors may distort their battlefield status as civilians accompanying the force.[132] Second, contractors—especially those with prior military experience—may use the weapon in an unauthorized manner, further blurring the line between combatant and noncombatant.[133] Furthermore, possession of a sidearm may cause the enemy to mistake a contractor for a soldier, thereby having the unintended effect of increasing the risk of physical harm to the contractor.[134] To prevent accidents and misuse, contractors must be properly trained[135] in use of firearms for self-defense only and must comply with all applicable local laws.[136]

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127. *See* FM 100-21, *supra* note 43, para. 6-29; *see also* Bergner, *supra* note 16, at 29 ("A C.P.A. decree, which has now evolved into Iraqi law, limits the caliber and type of weapons that private security personnel employ[, b]ut . . . heavy machine guns and grenades are—perhaps by necessity—sometimes part of the arsenal.").

128. U.S. DEP'T OF DEF., DRAFT WORKING PAPER INST. NO. 4XXX.bb, MANAGEMENT OF CONTRACTOR PERSONNEL DURING CONTINGENCY OPERATIONS para. 6.3.5.1 (2004) [hereinafter DOD DRAFT INST. NO. 4XXX.bb].

129. *Id.*

130. *See* DFARS, *supra* note 51, § 252.225-7040(j).

131. *See* JP 4-0, *supra* note 73, at V-7.

132. *Id.*

133. *See id.* (stating that "[s]ince contractor personnel are not subject to command authority enforced by an internal system of penal discipline, commanders have no method of guaranteeing armed contractor personnel will act in accordance with the law of war or HN [Host Nation] law").

134. *Id.*

135. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.3.5.3.4.

136. *See* FM 100-21, *supra* note 43, para. 6-29.

Even if the contractor gains approval from the Combatant Commander to carry a sidearm in theater, the terms of the contract or parent-company policy may forbid it.[137] In reality, contractors who wish to possess a firearm for self-defense must not only gain approval of the Combatant Commander but must also be authorized (or not expressly forbidden) by the terms of the contract under which they are employed.[138] In the majority of cases, civilian contractors may be provided with protective clothing such as bulletproof vests[139] and helmets,[140] but few are ever allowed to carry firearms.[141] Additionally, in some circumstances, host-nation law may also prohibit contractors from possessing firearms.[142] The exception, of course, would be those civilian contractors who are specifically hired to provide armed security protection to other civilians.[143] Depending on the agreement with the host nation, in times of noninternational armed conflict, these individuals may be armed with firearms other than pistols.[144]

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137. *Id.*; *see also* DFARS, *supra* note 51, § 252.225-7040(i) (stating that "[s]everal respondents want the rule to clarify that acceptance of weapons by contractor employees is strictly voluntary and must be explicitly authorized by the contractor").

138. *See* FM 100-21, *supra* note 43, para. 6-29.

> The bayonet was the only weapon I was allowed to carry. I took it out of the bug-out bag every night and placed it on the table next to my bed for quick use in case militants broke into the camp . . . .
>
> Since all KBR [Kellogg, Brown & Root] employees are required to wear protective gear when they're outside the camp, the next thing I reached for was a flak vest. When not in use, it remained next to my military-style Kevlar helmet . . . .

THOMAS HAMILL STORY, *supra* note 15, at 28.

139. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.2.7.6.

140. *See* DFARS, *supra* note 51, § 252.225-7040(i).

141. *See* THOMAS HAMILL STORY, *supra* note 15, at 28. Civilian contractor Thomas Hamill describes how on April 9, 2004, a terrorist attack on his truck convoy killed five unarmed civilian contractor drivers and left two other civilians unaccounted for. *Id.* at 36, 46.

142. *See* Turner & Norton, *supra* note 36, at 57.

143. *See* Taylor, *supra* note 54 (quoting Addicott that "large number[s] of security personnel [are] hired to provide security for civilian contractors building bridges, roads and providing transportation").

144. *See* DFARS, *supra* note 51, § 252.225-7040(j)(2) (requiring the parent contracting company to ensure that its personnel are adequately trained in the weapon they are authorized to carry).

B. *Protecting Contractors*

Army doctrine clearly provides that civilian contractors accompanying the force must be protected. "[T]he Army's policy has become that when contractors are deployed in support of Army operations/weapons systems, they [contractors] will be provided force protection commensurate with that provided to DAC[145] personnel."[146] Still, force protection measures necessary to safeguard contract personnel will vary depending on the circumstances, taking into account known and perceived risks.[147] This is a directly proportional relationship; a more direct threat requires greater force protection to safeguard contractor personnel.[148] For instance, during military operations in Somalia in 1993, the risks to contract personnel supporting DOD operations in theater were acute—armed gangs hostile to the American presence and the humanitarian mission presented a serious threat to the safety of civilian contract personnel.[149] As a result, some contract personnel required an armed military escort at all times. Conversely, other military operations present lower levels of threat. In the late 1990s, civilian contract personnel traveled "nearly 1 million miles a month on the open roads of Bosnia, Croatia, and Hungary . . . for the most part without the benefit of any force protection."[150]

In the War on Terror, ample evidence demonstrates that contractors, particularly those who have not received training on the rudimentary aspects of battlefield risks and how to manage them,[151] are more likely the targets of kidnapping or other acts of violence.[152] Within the general class of contractors, it is apparent that those without prior military experience or those who

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145. DAC is an acronym for civilians who work for the Army: Department of the Army Civilian. ACRONYMS AND ABBREVIATIONS, http://www.fortsamhoustonmwr.com/acs/acronyms_and_abbreviations.asp (last visited Feb. 5, 2006).

146. *See* FM 100-21, *supra* note 43, para. 6-3.

147. *See* Young, *supra* note 26.

148. *Id.* at 11–12.

149. *Id.* at 11.

150. *Id.*

151. *See* DOD INST. NO. 3020.41, *supra* note 17, at 6.2.7.9.

152. *See* Campbell, *supra* note 7, at 5 (stating that "[t]he commander must protect his contractors—they can do little to protect themselves").

operate without the benefit of weapons for self-defense are at the greatest risk. Nevertheless, even if the contractor is former military, "the currency of their conditioning, both mental and physical, must be taken into account."[153]

Army policy regarding contractor force protection must be juxtaposed more generally against Joint DOD doctrine, which relates to all the military services.[154] Interestingly, Joint Publication (JP) 4-0, issued by the Chairman of the Joint Chiefs of Staff in 2000, provides that "[f]orce protection responsibility for DOD contractor employees is a contractor responsibility, unless valid contract terms place that responsibility with another party . . . ."[155] Consistent with JP 4-0, DOD force protection makes it clear that contractors are private American citizens and, accordingly, "[t]he Commanders do not have the same legal responsibility to provide security for [DOD] contractors as that provided for military forces or direct-hire employees."[156] Thus, while commanders may feel a moral or practical obligation to provide active and comprehensive force protection, in the sphere of legality, "[c]ontractors working within a U.S. military facility or in close proximity of U.S. Forces shall receive incidentally the benefits of measures undertaken to protect U.S. Forces."[157]

The Draft DOD Instruction entitled Management of Contractor Personnel During Contingency Operations provides that contractors shall "receive incidentally the benefits of measures undertaken to protect U.S. forces . . . ."[158] However, the draft also mandates a higher level of responsibility in certain instances: "[C]ommanders shall provide force protection, commensurate with the level of force protection provided to military forces, when contractor personnel are integral to the military forces and providing essential contractor services (e.g.,

153. *Id.* at 4.

154. *See* JP 4-0, *supra* note 73, at V-7.

155. *Id.*

156. U.S. DEP'T OF DEF., DIRECTIVE NO. 2000.12, DOD ANTITERRORISM (AT) PROGRAM para. 4.6 (2003).

157. *Id.*

158. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.3.4.

contractor logistics convoys)."[159]

While the Combatant Commander will make the final decision "to provide force protection to participating contractors,"[160] the degree of force protection civilian contractors receive can also be a contractual matter that is determined by the contract itself.[161] Consequently, astute negotiations on the part of civilian contractors seeking to provide services to DOD operations in hostile environments could obligate military personnel to provide increased levels of force protection. Yet, even if a particular contract absolves the military of formal force protection responsibilities, military policy maintains that commanders assume some duty to protect civilians accompanying the force,[162] particularly those who are deemed to be M-E personnel. The June 2005 DFARS simply acknowledges that the military should at least provide training to those contractors that are issued special equipment. "The deployment center, or the Combatant Commander, shall issue OCIE [organizational clothing and individual equipment] and shall provide training, if necessary, to ensure the safety and security of contractor personnel."[163]

Obviously, commanders should "ensure that contractor security provisions are incorporated" into the operational plans (OPLANs) and operational orders (OPORDs) when determining the size of theater security forces.[164] Given the importance of certain categories of contract personnel to certain missions, it is likely that the commander will willingly assume the responsibility of providing appropriate force protection commensurate with risks and resources available.

Paradoxically, although the military requires force protection for civilian contract personnel accompanying the forces, it is an impossible task to perform. In turn, a lack of precise (and often contradictory) guidance can certainly hamper the ability of contractor companies to fulfill their obligations vis-

159. DOD DRAFT INST. NO. 4XXX.bb, *supra* note 128, para. 6.3.5.

160. FM 100-21, *supra* note 43, para. 6-7.

161. *See id.*, paras. 6-7, 6-9; DOD INST. NO. 3020.41, *supra* note 17, para. 6.1.4.

162. *See* FM 100-21, *supra* note 43, para. 1-39.

163. DFARS, *supra* note 51, § 252.225-740(i)(3).

164. JP 4-0, *supra* note 73.

à-vis providing viable AT training to their employees. In short, to protect their employees from harm (and themselves from time consuming and costly lawsuits), contracting companies must assume high levels of force protection and AT training that may not be provided by the military.[165]

Equally disadvantaged by the absence of a uniform standard, military commanders must "work with requirements that vary according to the services and the individual contracts"[166] between the military and the contractor. Indeed, the confusing nature of the contractor force protection doctrine has led "the combatant commanders . . . [to request] DOD-wide guidance on the use of contractors to support deployed forces to establish a baseline [force protection policy] that applies to all the services."[167] Until uniform DOD guidance is fully developed regarding force protection, the only alternative is to ensure that proper and adequate AT training is provided by the parent contracting company to help close the gap.

IV. AT TRAINING

Although AT training is clearly a central theme of force protection in general, it is an area that requires special attention, particularly since the parent contracting company has a much larger role to play in AT training.[168]

MG (Ret.) Alfred A. Valenzuela

The current reality of the War on Terror has merged traditional force protection concerns with antiterrorism policies and security initiatives. It is now DOD policy that "[DOD] Components and the [DOD] Elements and Personnel shall be

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165. *See, e.g.*, Jeremy Kahn & Nelson D. Schwartz, *With Violence Escalating in Iraq, Tens of Thousands of U.S. Contractors are Getting More Than They Bargained For*, FORTUNE, May 3, 2004, at 33 (stating that "[g]iven the danger, little work is getting done in Iraq . . . [c]onvoys are stalled, waiting for protection, and [contract] workers are trying to keep a low profile").

166. GAO REPORT, *supra* note 4, at 25.

167. *Id.* at 25–26.

168. Interview with Alfred A. Valenzuela, Major Gen. (Ret.), U.S. Army, formerly Commander U.S. Army S.; Deputy Commanding Gen., U.S. S. Command (June 20, 2005) (on file with Author).

protected from terrorist acts through a high priority, comprehensive AT program."[169] Again, military commanders have the primary "responsibility and authority to enforce appropriate security measures to ensure the protection of [DOD] Elements and Personnel subject to their control and shall ensure AT awareness and readiness of all [DOD] Elements and Personnel . . . assigned or attached."[170] Unfortunately, this Directive does not define what constitutes "appropriate security measures."[171] Instead, the matter is left to the discretion of the commander on the ground,[172] who is in the best position to understand the most salient threats and the proper methodologies to counter them.[173]

DOD policy[174] provides that training—both in certain basic legal issues and in techniques to manage personal security in hostile environments—should always be a prerequisite to deployment.[175] Preventing the need for the military to engage in personnel recovery of captured civilians, military doctrine is clear on the need to provide appropriate AT training:

> Before entering a theater of operations or an area of responsibility . . . identified [DOD] civilian employees, [DOD] contractors (under the terms of the contract), and other designated personnel shall receive or already have completed the training necessary to survive isolation in a hostile environment, including captivity, and to return home safely and with honor.[176]

Consistent with military doctrine, it seems entirely logical that all civilian contractors should be processed and trained through a DOD training site. Unfortunately, while a Draft DOD

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169. U.S. DEP'T OF DEF., DIRECTIVE NO. 2000.12, *supra* note 156, para. 4.1.

170. *Id.* para. 4.2.

171. *Id.*

172. *Id.*

173. Terrorist threats, though broadly classifiable, vary widely according to time, place, and circumstance. The real-time intelligence and threat reporting known to a commander must dictate the amount and scope of AT force protection afforded to all personnel under the commander's authority. Attempting to institutionalize "appropriate security measures" simply cannot be distilled in a DOD-wide directive.

174. *See* DOD INST. NO. 3020.41, *supra* note 17, para. 6.2.7.9.

175. *See* DOD INST. NO. 1300.23, *supra* note 35, paras. 4.2, 4.3.

176. *Id.* para. 4.2.

Instruction understands this basic need,[177] it is not currently the case. In reality, AT training is approached in an extremely fragmented and ad hoc manner. Although the military may provide AT training at Individual Deployment Sites (IDS)[178] or Continental United States (CONUS) Replacement Centers (CRC)[179] this does not always happen.[180] In fact, the use of IDS or CRC facilities by contract personnel is determined based upon the terms of the contract between the contractor and DOD.[181] Then again, if contract personnel do require IDS or CRC pre-deployment processing they may not get meaningful AT training since the IDS/CRC is tasked with actions to "screen contractor personnel records, conduct theater specific briefings[182] and training, issue theater specific clothing and individual equipment, verify that medical requirements . . . for deployment have been met, and arrange for transportation to the theater of operations."[183] Moreover, CRC focus is on military unit training

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177. *See* DOD INST. NO. 3020.41, *supra* note,17, para. 6.2.7.

> The [DOD] Components shall ensure these requirements are delineated in contracts. At a minimum, contracts shall state the means by which the Government will inform contractors of the requirements and procedures applicable to a deployment. The [DOD] Components shall ensure use of one of the formally designated group or individual joint or Military Department deployment centers (e.g., Continental U.S. Replacement Center, Individual Replacement Center, Federal Deployment Center, Unit Deployment Site) to conduct deployment and redeployment processing for CDF . . . . The following general procedures, waiver, administrative preparation, medical, training, and equipping considerations are applicable during deployment processing of CDF and for theater admission of contingency contractor personnel, where indicated . . . .

Id.

178. *See* Turner & Norton, *supra* note 36, at 58.

179. *See generally* FM 100-21, *supra* note 43, ch. 3.

180. *See* DEP'T OF THE ARMY, PAMPHLET 715-16, CONTRACTOR PERFORMANCE CERTIFICATION PROGRAM para. 3-1(b) (2000).

181. *Id.* para. 3-1(b).

182. Briefings might include classified threat and vulnerability information relevant to the deployed location. In comparison to those contract personnel who do not receive such briefings, contract personnel who receive CRC support will be better positioned to understand the risks of, and the security precautions necessary for the specific theater.

183. DEP'T OF THE ARMY, PAMPHLET 715–16, *supra* note 180, para. 3-1(c).

versus training of individual survival skill sets.[184]

The fact "that [DOD] contracts have varying and sometimes inconsistent language addressing deployment requirements" creates a sloppy training model for contractors engaged in contingency operations.[185] Sending contractors into harm's way absent a basic understanding of the threat or of the basic principles associated with terrorism law[186] places the contractors and the military forces they support at great risk.[187] Thus, while military doctrine provides that "[c]ontractors arriving in theater . . . must receive appropriate processing,"[188] specified AT training is not a mandatory component of contractor pre-deployment.[189] Certainly, the rise of terrorism and the challenges of providing support to the armed forces in urban settings necessitate additional AT training for contractors in these high-risk environments.[190] Yet, commanders are only required to offer "AT training to contractors under the terms specified in the contract,"[191] leaving many contract personnel ill-prepared and under-equipped to operate in locations plagued by the threat of car bombs, suicide bombers, and ambushes.

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184. *See generally* DEP'T OF THE ARMY, PAMPHLET 600-81, INFORMATION HANDBOOK FOR OPERATING CONTINENTAL UNITED STATES (CONUS) REPLACEMENT CENTERS AND INDIVIDUAL DEPLOYMENT SITES (2001), *available at* http://www.army.mil/usapa/epubs/pdf/p600_81.pdf (providing continental U.S. replacement centers and individual deployment sites with a standardized checklist for planning, operating, and executing CRC operations).

185. *See* GAO REPORT, *supra* note 4, at 35–36.

186. Terrorism law is a phrase coined by the Author to apply to all the legal aspects of terrorism. *See* ADDICOTT, *supra* note 2, at xviii. Bill Piatt, Dean at St. Mary's University School of Law, terms terrorism law as an "emerging legal discipline critical to understanding the complex balance between global security and civil justice." *Id.* at xiii (internal quotations omitted).

187. GAO REPORT, *supra* note 4, at 35–36. For instance, in closing, the GAO recommends that the Secretary of Defense "[d]evelop and require the use of standardized deployment language . . . . This language should address the need to deploy into and around the theater, *required training*, entitlements, force protection, and other deployment related issues." *Id.* at 37 (emphasis added).

188. JP 4-0, *supra* note 73, at V-4.

189. *See* 48 C.F.R. § 5124.74-9000 (2005).

190. Working and living in an environment threatened by terrorism requires specialized training in personnel, physical, and operational security that is distinct from and in addition to traditional pre-deployment training.

191. *See* U.S. DEP'T OF DEF., DIRECTIVE NO. 2000.12, *supra* note 156, para. 4.6.

The 2003 DOD guidance on isolated personnel training for civilian contractors does outline certain AT training requirements for contractors accompanying the force, but the level of training is not uniform—it varies based on the level of threat determined by the Combatant Commander.[192] The guidance designates three levels of training regarding specific principals of resistance: Level A, if the perceived threat by hostile forces is low; Level B, for a medium threat level; and Level C, for a high threat level.[193] The mechanics of the training is often accomplished through the use of videos[194] and is designed to help the contractor survive capture and exploitation by hostile forces.[195] The training is not representative of comprehensive Survival, Evasion, Resistance, Escape (SERE) training given to certain categories of military personnel.

Another glaring deficiency associated with AT training is the lack of a Civilian Code of Conduct[196] for civilian contractors who may be captured by hostile forces, including terrorists.[197] Civilian contractors sorely need "guidelines to increase their chance of survival in captivity, and to avoid potential criminal sanctions upon repatriation."[198] For example, all Americans owe an unconditional allegiance to the United States and that allegiance is not cut off simply because of capture by hostile forces.[199]

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192. *See* DOD INST. NO. 1300.23, *supra* note 35, para. 2.2.

193. *Id.* para. 6.2.1.

194. Before deploying on invitational travel orders to Colombia in 2004, the Author was required to view a series of videos provided by U.S. Southern Command (the Combatant Command). The videos covered the risks of terrorism and crime and how to avoid capture or exploitation.

195. *Id.*

196. For an excellent discussion of this issue, see Charlotte M. Liegl-Paul, *Civilian Prisoners of War: A Proposed Citizen Code of Conduct,* 182 MIL. L. REV. 106 (2004).

197. *See* DOD INST. NO. 1300.23, *supra* note 35, para. 5.6 (directing the Commander of U.S. Joint Forces Command to "develop Code of Conduct training standards" that are similar to the military Code of Conduct for the armed forces).

198. Liegl-Paul, *supra* note 196, at 123–24.

199. *See, e.g.*, United States v. Tomoya Kawakita, 96 F. Supp. 824, 826 (S.D. Cal. 1950); *see also* 18 U.S.C. § 794 (2000) (forbidding U.S. citizens from intentionally obtaining or delivering national security information to be used to harm the United States.).

DOD guidance regarding the provision of basic AT training has not kept up with the volume of contractors pouring into Iraq and other places around the globe. In effect, civilian contractor companies operating under the U.S. Army's Logistics Civil Augmentation Program (LOGCAP),[200] are left to provide their own AT training. Unfortunately, in far too many cases the AT training is sorely inadequate or is simply not done.[201] The case of Thomas Hamill of Macon, Mississippi, is typical of how this process plays out in the real world.[202] In late 2003, Hamill was hired by Kellogg Brown and Root (KBR) to serve as a driver of large tanker trucks in Iraq.[203] Hamill's case is noteworthy because he is one of the few civilian contractors to have ever survived a terrorist kidnapping—he escaped from his terrorist captors following a brutal ambush of his truck convoy.[204] His escape in 2004 is all the more amazing because he received only limited training from KBR in basic force protection related solely to his driving duties. He had no training whatsoever from the military in how to survive, evade, resist, or escape from the terrorists.[205] Escaping after twenty-four days in captivity, military SERE experts who interviewed him after the ordeal were impressed by Hamill's level-headed dealings with his terrorist captors, stating: "We don't know how you did it. You aren't a soldier, and you haven't been trained [in AT techniques]."[206]

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200. ARMY REGULATION 700-37, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) (1985).

201. *See* James Dao, *Private Guards Take Big Risks, For Right Price*, N.Y. TIMES, Apr. 2, 2004, at A9 (noting that "little regulation of the quality of training or recruitment [of contractors] by private companies" exists, possibly resulting in "inexperienced, poorly prepared and weakly led units playing vital roles in combat situations"). "Even elite former commandos [employed by security contracting firms] may not be well trained for every danger . . . ." *Id.*

202. *See* THOMAS HAMILL STORY, *supra* note 15, at 16. KBR is the engineering and construction group at Halliburton. *See* Halliburton, Welcome to KBR, http://www.halliburton.com/kbr/index.jsp (last visited Feb. 5, 2006) (stating that KBR is "a global engineering, construction, technology and services company").

203. THOMAS HAMILL STORY, *supra* note 15, at 16.

204. *See generally* THOMAS HAMILL STORY, *supra* note 15, at 37–38, 244–45.

205. *Id.* at 258–59.

206. *Id.* at 259 (internal quotations omitted).

Hamill was only slightly better prepared from the KBR training than if he had received no AT training at all. When first hired in 2003, Hamill was flown to KBR headquarters in Houston, Texas, for "a seven-day orientation class."[207] A month after the course, Hamill was flown to Kuwait where he was given a second round of training courses.[208] "They had us attend [a] defensive-driving course[] where we discussed things such as convoy formations, how to spot explosive devices, booby traps, and how to recognize and avoid suspicious automobiles."[209] Then, before each convoy was started on the road for its destination, Hamill, now a convoy commander, would receive a safety briefing from KBR as to road conditions and possible danger from terrorist attacks.[210] Beyond this, Hamill never received any other type of AT training.

In light of the Hamill experience, it is imperative that either the military or the parent contracting company provide a higher level of meaningful and realistic AT training that prepares DOD contract personnel for high-risk deployments.[211] For the contractor, adequate AT training provides "the first opportunity to get the contractor's head in the current joint operational and tactical situation"[212] present within the theater. Obviously, the preferred point of contact for this obligation should be the military. As it becomes the "primer for theater specific force protection and personnel recovery readiness of contractors en route from [the continental United States] to high-threat overseas venues,"[213] the CRC has the potential to provide near real-time information that will improve contractor safety and survivability. Training also facilitates contractor compliance

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207. *Id.* at 16.

208. *Id.* at 17.

209. *Id.*

210. *Id.* at 18–19. Hamilton wrote, "KBR started our mission with a meeting to issue safety and task instructions. The convoy commander discussed hazard identification and talked about dangers we might encounter." *Id.* at 18.

211. *See IDA Report*, *supra* note 23, at F-6 (describing that the U.S. Army CONUS CRC at Fort Benning, Georgia "could serve as a joint and interagency CRC to potentially enhance the accountability, survivability, and recoverability of a major segment of overseas personnel, including USG contractors").

212. *Id.* at F-10.

213. *Id.* at F-11.

with and understanding of security-related DOD regulations, such as those regarding temporary duty travel abroad,[214] made applicable to contract personnel through the DOD AT Program Directive.[215]

If the military does not provide the proper AT training, parent contracting companies need to hire specialists to provide in-house training to ensure that their employees are as ready as possible to handle the exigencies associated with contingency operations and possible capture by hostiles. Not only is there a moral duty to see that this is accomplished, but the parent company that fails in this regard may be subjecting itself to possible civil liability. Just as contracting companies must ensure that employees have proper equipment, clothing, and supplies to perform the contract, they are also responsible to provide AT awareness training to their employees similar to that provided to military personnel.

In short, contractors who receive AT and security-related training prior to deployment are better positioned to avoid and manage the risks encountered on MOOTW or armed conflict.[216] This, in turn, takes pressure off the commander in terms of force protection concerns and the conservation of military resources.

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214. U.S. DEP'T OF DEF., DIRECTIVE NO. 4500.54, OFFICIAL TEMPORARY DUTY TRAVEL ABROAD para. 3 (1991).

It is [DOD] policy that the number of visits and visitors to overseas areas shall be minimal, and be made only when their purpose cannot be satisfied by other means. Visits shall be arranged with a minimum requirement on equipment, facilities, time and services of installations, and personnel being visited. When practicable, trips to the same general area and in the same general period shall be consolidated.

Id.

215. U.S. DEP'T OF DEF., DIRECTIVE NO. 2000.12, *supra* note 156, para. 4.5 (requiring that "[a]ll [DOD] military, [DOD] civilians, [DOD] dependent family members, and [DOD] contractors shall comply with theater, country, and special clearance requirements").

216. *See* DEP'T OF THE ARMY, PAMPHLET 27-50-323, MAJ. THOMAS W. MURREY, JR., KHOBAR TOWERS' PROGENY: THE DEVELOPMENT OF FORCE PROTECTION (1999).

V. PARENT CONTRACTOR COMPANY LIABILITY ISSUES REGARDING EMPLOYEES ON THE BATTLEFIELD.

The [civilian contractor] industry falls through the cracks at the national and international level . . . . Private military contractors exist in the same legal vacuum as detainees at Guantanamo Bay.

Peter Singer, Brookings Institution[217]

With the increasing number of terrorist-related deaths and woundings of civilian contractors accompanying the military in the War on Terror, the question of civil liability for contracting companies has become an important concern. Considering the rapid rate at which individual employee contractors are prepared, processed, and trained to go into dangerous environments—such as Iraq, Afghanistan, and Colombia—it is inevitable that civil litigation against parent contract companies will arise. A 2004 civil lawsuit filed in Wake County Superior Court, Raleigh, North Carolina, against the contracting company Blackwater Security Consulting and other named defendants, illustrates the concern.[218]

Nordan v. Blackwater Security Consulting[219] was filed by the survivors of four deceased independent civilian contractors and is the first in the nation to be lodged against a private military contracting company for death during a MOOTW mission.[220] The four contractors were hired as security consulting contractors and were viciously murdered on March 31, 2004, while escorting a civilian convoy through Fallujah, Iraq, a known hostile environment at the time.[221] Among a list of allegations of

217. Neff & Price, *supra* note 48.

218. *See id.* (discussing the suit brought by the families of four contractors who were ambushed and killed in Fallujah in March 2004); Complaint at 1, Nordan v. Blackwater Security Consulting (N.C. Super. Ct. 2005) [hereinafter Nordan Complaint]. "The lawsuit, filed in Wake County Superior Court, is the first in the nation to be filed against a private military contractor for death on the battlefield, according to military, legal and industry experts." Neff & Price, *supra* note 48.

219. Nordan Complaint, *supra* note 218, at 1, 32.

220. *See* Neff & Price, *supra* note 48.

221. *See id.*; Nordan Complaint, *supra* note 218, at 4; *see also* Bergner, *supra* note 16, at 33 (detailing the brutal murders of the security contractors who, in the process of accompanying a kitchen-supply truck to a nearby base, were attacked by insurgents). "At

wrongdoing, the families contend that Blackwater sent the contractors into this hostile environment without proper equipment or armed escorts as promised in the contract.[222] The families also alleged that the amount of AT training given to the deceased contractors was insufficient.[223] The formal allegations lodged by the survivors consist of fraud in the inducement of the contract and wrongful death as the contractors had been promised protection and proper information (associated with AT training) when they signed the contracts.[224]

A new development in the *Nordan* case appeared in the summer of 2005, when a federal judge sent the suit back to state court. Not long after the case was first filed in January 2005, Blackwater filed a motion to have the case heard in federal court.[225] Blackwater's rationale for having the case heard in federal court was twofold: First, it argued that the Defense Base Act,[226] a federal law capping death benefits for contractors working outside of the United States, entirely preempted state law relevant to this matter.[227] Second, Blackwater asserted that the question of remedies available to contractors in war zones was an issue of "unique federal interest."[228] U.S. District Judge Louise W. Flanagan, while conceding that the case dealt with "novel and complex" issues, rejected Blackwater's arguments and ruled that the case was appropriate for the North Carolina court.[229] This decision was widely interpreted as a victory for the

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the time, the Fallujah killings seemed notable not only for their brutality but also for the fact that private security men had been the victims." Bergner, *supra* note 16, at 33–34.

222. *See* Nordan Complaint, *supra* note 218, at 5–6, 25–26.

223. *See id.* at 9, 12, 14, 17, 21.

224. *See id.* at 21–30.

225. Emery P. Dalesio, *Blackwater Suit Sent to State: Wrongful Death Case to Be Heard in N.C. Court, Federal Judge Says*, CHARLOTTE OBSERVER, Aug. 16, 2005.

226. *See infra* note 250.

227. *See* Dalesio, *supra* note 225; *see also* Defense Base Act, 42 U.S.C. § 1651 (2004).

228. *See* Dalesio, *supra* note 225.

229. *Id.* The court ordered that Blackwater's contention "that this case is removable by virtue of complete preemption under the DBA is without merit." Press Release, Callahan & Blaine Attorneys at Law, Federal Court Rules in Favor of the Families of American Security Contractors Executed in Iraq (Aug. 15, 2005), *available at* http://www.callahan-law.com (follow "news & articles" hyperlink: then follow: "Federal Court Rules in Favor of the American Security Contractors Executed in Iraq" hyperlink)

plaintiffs, due to the fact that North Carolina permits pecuniary compensation in wrongful death suits.[230] The decision could also be taken as a victory for legal observers interested in clearing up some of the muddier legal questions surrounding the rights and obligations of overseas civilian contractors and their employers.

Before detailing the *Nordan* lawsuit, it is important to consider some of the possible reasons that many civilian contractors might be motivated to sign on to work for companies overseas, particularly in dangerous environments. Apart from fulfilling a sense of patriotism to the nation at war, in all probability a significant incentive rests in the increased pay that the civilian contractor can receive.[231] Not only do most companies pay danger premiums for work in hostile environments, but much of the pay earned overseas may be tax deductible.[232] For example, the U.S. Army allows contracting officers to negotiate increased amounts of pay when the employee operates in areas considered to be equivalent to a war-type environment.[233] For many civilians the increase in pay is a

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(internal quotations omitted) [hereinafter Callahan & Blaine].

230. Dalesio, *supra* note 225; *see also* Callahan & Blaine, *supra* note 229 (quoting Daniel J. Callahan, chief counsel to the plaintiffs, who claimed that the federal "court clearly found that the jurisdiction of this case rests with the state court, which paves the way for the court to hold Blackwater liable for its wrongful conduct, establish guidelines and accountability for the treatment of security contractors in Iraq, and send a message to other security contracting firms operating abroad.").

231. Hamill was paid "$16 to $18 per hour for a yearlong contract that would be worth about $75,000, all of which would be tax-free as long as [he] remained in Iraq for the full term of [the] contract." THOMAS HAMILL STORY, *supra* note 15, at 16; *see also* Bergner, *supra* note 16, at 34 (reporting that Americans, on average, make between $400 and $700 a day in Iraq, and sometimes more, depending on the amount of time they spend back in the United States, and most of this income is tax-free); Neff & Price, *supra* note 48 (noting that each of the contractors killed in Fallujah were induced by the offer of $600 per day for their labor and expertise); Bill Hendrick, *World's Most Dangerous Job; Iraq Duty Pays Well, and Halliburton Recruiters Find Many Ready to Roll the Dice*, ATLANTA J.-CONST., July 17, 2004, at 1A (describing Kellogg, Brown, & Root's generous pay and benefits that "prove[s] a siren call to many applicants, some of whom have been unemployed for years").

232. Hendrick, *supra* note 231, at 1A (noting that many workers are willing to brave the extreme elements and dangers of Iraq in order to earn up to $300,000 yearly). "The first $80,000 is tax-free after 330 days 'in country.'" *Id.*

233. *See* U.S. Army Forces Central Command, Guidance for Deployed Department of Army Emergency-Essential (E-E) Circular Employees and Supervisors (2005), http://www.arcent.army.mil/civempguide/index.asp#section III; Sandra Maday, *A City*

sufficient inducement to subject themselves to a hostile, even deadly work environment.

On the other hand, many companies seek to insulate themselves from any liability whatsoever by crafting language in the contract that leaves the contractor (or his heirs) with virtually no ability to sue the parent company. Again, the *Nordan* case is quite telling concerning the methodology of how the contractor company attempts to absolve itself of liability. A typical Blackwater contract related to employment duties in Iraq or Afghanistan contains a clause regarding contract performance during hostilities:

> Contractor agrees and acknowledges that the Services performed in the Duty Station . . . have been identified as being essential to BSC's [Blackwater] complete performance under the terms of the contract between BSC and the Customer [the United States] and notwithstanding the existence of hostilities or a state of war, whether declared or undeclared, Contractor agrees to perform his or her assigned duties until released from such duties by the Contractor's supervisor or the supervisor's designated representative.[234]

Next, the sample Blackwater contract has a clause headlined as "Contractor Acknowledgement, Release and Waiver."[235] Spelling out an assumption of the risk, the clause graphically reads:

> Contractor agrees and acknowledges that due to the hazardous nature of the Duty Station and the Services to be provided hereunder, Contractor hereby expressly and voluntarily agrees to assume any and all risks of personal injury including, without limitation, death and disability which may result from contractor providing Services pursuant to this Agreement. Contractor understands and acknowledges that the Duty Station [place where the contractor works] is volatile, hostile and extremely dangerous and in some instances,

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that Lives for Revenge, N.Y. TIMES, Apr. 29, 2004, at A25.

234. Blackwater Security Consulting IC Contract, para. 10 [hereinafter Blackwater Contract] (on file with Author), *available at* http://www.publicintegrity.org/docs/privatewarriors/PW_20041023_blackwater2.pdf. (last visted Feb. 5, 2006).

235. *Id.* para. 11.

> military forces may be conducting continuing military operations in the region.[236]

The assumption of the risk clause then continues with a lengthy list of the dangers and risks that the Contractor acknowledges and "voluntarily, expressly and irrevocably assum[es]."[237]

> Contractor understands and acknowledges that by voluntarily agreeing to participate in the Engagement [accompanying the military on a contingency operation or actual armed conflict], he is voluntarily, expressly and irrevocably assuming any and all known and unknown, anticipated and unanticipated risks which could result in physical or emotional injury, paralysis, death, or damage to himself, to his property, or to third parties, whether or not such injury or death is caused by other independent contractors to BSC, known and unknown domestic and foreign citizens or terrorist or U.S. governmental employees.[238]

In addition to the above exculpatory clauses, Blackwater further attempts to release liability for any acts of negligence on its part by including the following language in a clause entitled "Release:"[239]

> Contractor, on behalf of Contractor and Contractor's spouse, heirs, administrators, estate, personal representatives, successors and assigns (collectively referred to as "Contractor's Group"), hereby releases and forever discharges BSC . . . (collectively referred to

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236. *Id.*

237. *Id.*

238. *Id.* The clause then continues with a list of the risks:

> The risks include, among other things and without limitation, the undersigned being shot, permanently maimed and/or killed by a firearm or munitions, falling aircraft or helicopters, sniper fire, landmine, artillery fire, rocket propelled grenade, truck or car bomb, earthquake or other natural disaster, poisoning, civil uprising, terrorist activity, hand to hand combat, disease, poisoning, [poisoning is listed twice], etc., killed or maimed while a passenger in a helicopter or fixed wing aircraft, suffering hearing loss, eye injury or loss; inhalation or contact with biological or chemical contaminants (whether airborne or not) and or flying debris, etc.

Id.

239. *Id.* para. 11.2.

> as "Releasees") from any and all claims, judgments, awards, actions and causes of action which may be asserted now or in the future by Contractor's Group for any liability whatsoever for accident, injury (including without limitation, death or disability), losses, loss of consortium, expenses, loss of income and other damages based upon or in any way arising from Contractor's performance of Services pursuant to this Agreement and the transportation of Contractor, including, without limitation, loss of life . . . *whether as a result of negligence, gross negligence, omissions or failure to guard or warn against dangerous conditions*, use, structure or activity, or any other cause, arising from Contractor's participation in the Engagement . . . even if such injury was caused in whole or in part by the negligence of Releases.[240]

To further reinforce the position that the company cannot be sued in civil court, the contract specifically spells out the following in a separate paragraph entitled "Covenant Not to Sue:"[241]

> Contractor further agrees and covenants not to file, prosecute, bring, maintain or in any way proceed on any claim, suit, civil action, complaint, arbitration or administrative action or proceeding of any kind in any municipal, state, federal agency, court, or tribunal against Releasees with respect [sic] any of the foregoing facts, occurrences, events, transactions, damages, injuries, claims, causes of action and other matters released in Section 11.2 [the "Release" clause set out above].[242]

Then, in a separate clause entitled, "Liquidated Damages,"[243] the Blackwater contract expressly sets out:

> The parties hereto expressly agree that in the event of Contractor's death or injury based upon or in any way arising from Contractor's performance of Services pursuant to this Agreement and the transportation of

240. *Id.* (emphasis added).

241. *Id.* para. 11.3.

242. *Id.*

243. *Id.* para. 11.4.

> Contractor, even if such injury was caused in whole or in part by the negligence of Releasees, Contractor's Group has no recourse whatsoever against BSC. Contractor understands and agrees that if he is hurt or killed during Contractor's performance of Services pursuant to this Agreement or the transportation of Contractor, Contractor has no recourse whatsoever against Releasees.[244]

Finally, at the end of the lengthy contract, the contractor employee agrees to a final waiver:

> By signing this document, Contractor acknowledges that if Contractor is hurt or his property is damaged while providing Services hereunder, the intent is that Contractor and Contractor's Group is bound by this Release and Indemnification and therefore will be found by a court of law to have waived his right to maintain a lawsuit against BSC on the basis of any claim from which Contractor has released them herein.[245]

Obviously, an employment contract such as the detailed Blackwater example serves as a formidable shield to any legal responsibility on the part of the parent company. Because many contracts are interpreted within the "four corners" of the contract, these iron clad provisions are generally viewed as binding, leaving contract personnel with little recourse against the company if he or she is harmed or killed.[246] Likewise, there appears to be little incentive for the company to take responsibility for its contractors as the contract language precludes the contractor from suing,[247] even for the company's negligent behavior.[248]

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244. *Id.*

245. *Id.* para. 20.16.

246. *See* 11 WILLISTON ON CONTRACTS § 32:5 (4th ed. 2005).

247. Blackwater Contract, *supra* note 234, para. 20. The Blackwater contract does contain a paragraph that the agreement "shall be governed by . . . the law[] of the State of North Carolina, applicable to contracts made and to be fully performed therein, excluding its conflict of laws principles." *Id.*

248. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 170 (5th ed. 1984) (describing negligence as "conduct which falls below a standard established by the law for the protection of others against unreasonable risk of harm. The idea of risk in this context necessarily involves a recognizable danger, based upon some knowledge of the existing facts, and some reasonable belief that harm may possibly

In response to the plaintiffs in *Nordan*, Blackwater can raise the following defenses: the contract specifically spelled out the dangers; the workers signed a release giving up most of their rights to sue Blackwater if something untoward happened to them; their families and their estates cannot sue either, even if the deaths were the result of Blackwater's negligence or gross negligence; and the contractors signed on willingly, were being paid a large sum of money, and were fully aware of all of the risks since all of them were military veterans.[249] Furthermore, Blackwater will argue that the Defense Base Act[250] is the contractor's remedy, particularly if the dependents of the contractors have already started to receive payments for the deaths of the contractors. However, if the court finds that the decedents were not employees, but rather independent contractors, then the applicability of the statute is brought into question. The test to determine whether the decedents were independent contractors will center on a number of factors to include: (1) the extent of control exercised over the work by the employer; (2) the presence of independent skills, knowledge, and training of the decedents; (3) the method of payment and taxes; (4) the length of time of employment; and (5) the provision of equipment.[251] Indeed, if the court finds that the relationship between the decedents and Blackwater was not that of employee/employer, then the Act will not bar recovery by the plaintiffs.[252]

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follow.").

249. *See* Neff & Price, *supra* note 48 (noting that all of the contractors were military veterans and likely knew of the inherent risks of working in Iraq; and if they weren't aware of those risks, the unequivocal language in the contract would get their attention).

250. 42 U.S.C. § 1651 (2000). Better known as the Defense Base Act, this legislation extends provisions of the Longshoremen's and Harbor Workers' Compensation Act to personal injuries and deaths suffered by employees of military bases overseas. *Id.* §§ 1651(a)(1)–(2), (6). In effect, the Act "established workers' compensation insurance for the employees of overseas government contractors." Neff & Price, *supra* note 48. One spokesman has already alluded to the possibility that Blackwater would use the Defense Base Act to bar the plaintiffs from collecting any damages from the company. *Id.* (arguing that "[t]he dependents . . . have begun receiving lifetime payments of $1,100 per week tax-free").

251. 41 AM. JUR. 2D *Independent Contractors* § 5 (2005).

252. 42 U.S.C. § 1651(a).

Aside from the relying on the contract provisions themselves, the parent contracting companies can also rely on a "Government Contract Defense" to further absolve themselves of responsibility. First raised in the context of a contractor's liability for a manufacturing defect, this defense is set out by the United States Supreme Court in *Boyle v. United Technologies*.[253] *Boyle* arose in the context of a tort claim asserting that a defense contractor had negligently designed a helicopter escape hatch resulting in the death of the pilot when the helicopter crashed.[254] The Court applied a three-prong test to determine whether the contractor was immune from suit. The Court concluded that the Government Contract Defense was applicable where: (1) the contractor has taken actions at the direction of agency officials exercising their discretionary authority; (2) the directions involved reasonably precise specifications created by the Government with which the contractor complied; and (3) the contractor did not fail to warn the Government of known dangers associated with the Government's design.[255] The contractor was immunized from tort liability for damages arising from the alleged helicopter design defects.[256]

Currently, the immunity arising under *Boyle* is a potentially valuable tool for those contract companies that provide a weapons system in a battlefield environment. Providing such equipment in a combat or contingency operation raises the stakes for all parties involved. This is true because the failure of a weapons system can have direct adverse consequences in terms of property damage and combat casualties.[257] Such adverse consequences could then give rise to potentially enormous financial liability to the contractor.[258]

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253. 487 U.S. 500 (1988).

254. *See id.* at 502–03.

255. *See id.* at 512–14.

256. *See id.* at 512.

257. *See generally id.* at 511–13; *see also Threats and Responses*, N.Y. TIMES, Mar. 18, 2003, at A14.

258. *See generally* Malesko v. Correctional Servs. Corp., 229 F.3d 374, 382 (2d. Cir. 2000); Carley v. Wheeled Coach, 991 F.2d 1117, 1120–21 (3d Cir. 1993); Guillory v. Ree's Countract Serv., Inc., 872 F. Supp. 344, 346 (S.D. Miss. 1994); Lamb v. Martin Marietta Energy Sys., Inc., 835 F. Supp. 959, 966–67 (W.D. Ky. 1993).

While this scenario no doubt makes reliance on the *Boyle* defense a potentially important shield for contractors, it is important to note that *Boyle* involved a contract for production of a weapons system.[259] Currently, many overseas contractor efforts in support of contingency operations usually involve contracts for services. At least two federal district courts have undertaken detailed analyses of this issue, and both have held that the rationale for the defense outlined in *Boyle* and its progeny dictates that the defense is also available to civilian contractors performing service contracts, not just manufacturing.[260]

Another possible line of defense for a contracting company is the so-called "Government Agency Defense."[261] This defense basically holds that if a contractor engages in a valid legal activity in furtherance of the performance of a government contract he is immune from suit for that activity to the extent that the government would be immune if sued directly.[262] The treatment of this defense by federal courts in recent decades has been woefully inconsistent and, therefore, unfortunately provides little real guidance.[263]

Despite the rigid language of Blackwater-styled contracts and the above-mentioned defenses, plaintiffs (like those in

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259. *Boyle*, 487 U.S. at 500.

260. *See* Richland-Lexington Airport Dist. v. Atlas Properties, Inc., 854 F. Supp. 400, 422–23 (D.S.C. 1994); Askir v. Brown & Root Serv. Corp., No. 95-11008, 1997 WL 598587, at *5 (S.D.N.Y. Sept. 23, 1997).

261. *See* Yearsley v. W.A. Ross Const. Co., 309 U.S. 18, 20–21 (1940) (establishing the government agency defense); *see also* Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 739 (11th Cir. 1985) (explaining that under the government agency defense, the agent's actions are imputed to the government, so "the contractor could be deemed to share in federal sovereign immunity").

262. *See Yearsley*, 309 U.S. at 20–21 ("Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred.").

263. *See Shaw*, 778 F.2d at 740 (noting that the government contractor "defense is rarely invoked, and its elements are nowhere clearly stated"); *see also Richland-Lexington*, 854 F. Supp. at 421 n.14 (explaining that the government agency defense is actually a distinct subset of the more general government contractor defense; while rarely used, the government agency defense has been mislabeled and misapplied in other cases).

Nordan) may still be able to recover significant monetary damages even if they entered into an "iron-clad" contract. First, the claims will be filed in individual State courts and therefore the applicable State law may provide some relief, for example, under a wrongful death statute that allows for financial compensation or an expansive strict liability theory. Apart from the fact that the parent company may be held liable for intentional or reckless conduct, strict liability may prove to be a viable option.

The Second Restatement of Torts established strict liability for defendants who engage in ultrahazardous or abnormally dangerous activities.[264] Clearly, sending contractors into hostile combat zones would be considered an abnormally dangerous activity. Section 519 of the Restatement generally declares that "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."[265] Naturally, this section also limits the liability "to the kind of harm, the possibility of which makes the activity abnormally dangerous."[266]

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264. RESTATEMENT (SECOND) OF TORTS §§ 519–524A (1977).

265. *Id.* § 519(1). The Restatement does not explicitly define what qualifies as an abnormally dangerous activity, but the Reporters' Note lists a number of specific instances where courts have found the defendant to be engaged in an abnormally dangerous activity. *Id.* Such activities include, but are not limited to: (1) the collection of water in quantity in an inappropriate or dangerous location; (2) the use of explosives in an unsafe area; (3) the use of inflammable liquids or blasting in the middle of an urban area; (4) pile driving; (5) the escape of poisonous chemicals into the air; (6) the drilling of oil wells or the operation of refineries in highly populated areas; and (7) nuclear energy production. *Id.*

266. *Id.* § 519(2). To clarify, the comment for this subsection states that "[t]he rule of strict liability . . . applies only to harm that is within the scope of the abnormal risk that is the basis of the liability." *Id.* § 519 cmt. e; *see, e.g.*, Madsen v. East Jordan Irrigation Co., 125 P.2d 794, 795 (Utah 1942) (finding strict liability inapplicable where the defendant's nearby blasting operation disturbed a farmer's minks, who reacted by killing their offspring). In *Madsen*, the court found that strict liability was inappropriate, because the resulting harm was unforeseeable. *Id.* at 795–96; *see also* RESTATEMENT (SECOND) OF TORTS § 524A (1977) (explaining that a defendant engaged in an abnormally dangerous activity is not liable if the harm would not have occurred but for the abnormally sensitive nature of the plaintiff's activity); *see generally* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 543–56 (1972) (juxtaposing the defendant's imposition of an unreasonable risk of harm on plaintiffs

The subjective factors for determining whether or not an activity is abnormally dangerous are set out in § 520 of the Restatement.[267] These factors include: (1) the "existence of a high degree of risk of some harm to the person, land or chattels of others;"[268] (2) the "likelihood that the harm that results from it will be great;"[269] (3) the "inability to eliminate the risk by the exercise of reasonable care;"[270] (4) the "extent to which the activity is not a matter of common usage;"[271] (5) the "inappropriateness of the activity to the place where it is carried on;"[272] and (6) the "extent to which its value to the community is outweighed by its dangerous attributes."[273]

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with the reciprocal plaintiff's imposition of an unreasonable risk of liability on the defendant).

267. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

268. *Id.* § 520(a). "In determining whether there is . . . a major risk, it may therefore be necessary to take into account the place where the activity is conducted . . . ." *Id.* § 520 cmt. g.

269. *Id.* § 520(b). "The harm threatened must be major in degree, and sufficiently serious in its possible consequences to justify holding the defendant strictly responsible for subjecting others to an unusual risk." *Id.* § 520 cmt. g.

270. *Id.* § 520(c). "Most ordinary activities can be made entirely safe by the taking of all reasonable precautions; and when safety cannot be attained by the exercise of due care there is reason to regard the danger as an abnormal one." *Id.* §520 cmt. h. "The utility of [the defendant's] conduct may be such that he is socially justified in proceeding with his activity, but the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it." *Id.*

271. *Id.* § 520(d). Comment i of this section explains:

> An activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community. It does not cease to be so because it is carried on for a purpose peculiar to the individual who engages in it. Certain activities, notwithstanding their recognizable danger, are so generally carried on as to be regarded as customary.

Id. § 520 cmt. i. Stated generally, if the hazardous activity is rare and is not engaged in by the general public, it is more likely to be tagged as abnormally dangerous. *Id.*

272. *Id.* § 520(e). "In other words, the fact that the activity is inappropriate to the place where it is carried on is a factor of importance in determining whether the danger is an abnormal one." *Id.* at § 520 cmt. j.

273. RESTATEMENT (SECOND) OF TORTS § 520(f) (1977). "Even though the activity involves a serious risk of harm that cannot be eliminated with reasonable care and it is not a matter of common usage, its value to the community may be such that the danger will not be regarded as an abnormal one." *Id.* § 520 cmt. k. Generally, the activity will not be considered abnormally dangerous "when the community is largely devoted to the dangerous enterprise and its prosperity largely depends on it." *Id.*

In assessing each of the factors listed in § 520, it should be noted that none of them are dispositive, and it is not necessary to prove each of them in order to find that an activity qualifies as abnormally dangerous.[274] Moreover, none of the factors have to be given equal weight.[275] In short, the framers of the Restatement grant courts wide latitude in using these factors to determine the dangerousness of the activity.[276] Section 522 takes things a step further, imposing strict liability on a defendant engaged in an abnormally dangerous activity "for the resulting harm although it is caused by the unexpectable [1] innocent, negligent, or reckless conduct of a third person, or [2] action of an animal, or [3] operation of a force of nature."[277]

Applying all of these factors to the plaintiffs' claims in *Nordan*, it appears on the surface that a solid case for strict liability can certainly be made against the defendants. It is difficult, if not impossible, to argue that the defendant's

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274. *See id.* § 520 cmt. f. This comment further elaborates:

> In determining whether the danger is abnormal, the factors . . . are all to be considered, and are all of importance. Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily.

Id.

275. *Id.*

276. *See id.* Comment f sums up the appropriate way for courts to assess these factors:

> Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care. In other words, are its dangers and inappropriateness for the locality so great that, despite any usefulness it may have for the community, it should be required as a matter of law to pay for any harm it causes, without the need of a finding of negligence.

Id.

277. *Id.* § 522 (1977). The drafters explain their rationale behind this section, noting that "those who carry on abnormally dangerous activities . . . have for their own purposes created a risk that is not a usual incident of the ordinary life of the community." *Id.* § 522 cmt. a. "If the risk ripens into injury, it is immaterial that the harm occurs through the unexpectable action of a human being, an animal or a force of nature." *Id.*

business does not qualify as an abnormally dangerous activity. The representations made to the plaintiffs when they signed on with Blackwater to serve as security contractors certainly sent a message that their job would include specific hazards that required special equipment and training (to include AT training).[278] It also appears that most of the six factors listed in § 520 can be applied to the facts of the *Nordan* case. The first four factors are particularly applicable, as it is obvious that the situation the security contractors faced in Fallujah constituted "a high degree of risk of some harm . . . [to] others,"[279] with the likelihood that the resulting harm "will be great"[280] and could not be eliminated with "the exercise of reasonable care."[281] Moreover, it will be difficult for the defendants to demonstrate that the activity they hired the contractors to engage in was "a matter of common usage."[282]

Nevertheless, the last two factors are more problematic for the plaintiff. It is less likely that a court will find the defendants' activities in Fallujah to be inappropriate for that

278. *See* Nordan Complaint, *supra* note 218, para. 13 (stating various protections, tools, and information that Blackwater claimed the security contractors would be supplied within performing their job in Iraq). These resources that were promised by Blackwater included: (1) assurances that no security mission would be staffed with less than six team members; (2) guarantees that all missions would be conducted in armored vehicles; (3) promises that each security team would be equipped with no less than two armored vehicles, with three or more security contractors in each vehicle; (4) assurances that the tail gunner on each armored vehicle would have a heavy automatic weapon capable of firing up to 850 rounds per minute; (5) a pledge that security contractors would receive at least twenty-four hours notice before any mission; (6) promises that risk assessment reviews would be completed before the contractors embarked on any mission (including a caveat that if the threat level for any mission was too high, the contractors would have the option of not performing); (7) allowances for the contractors to review travel plans, gather intelligence and perform inspections of the route and general logistics prior to any mission; and (8) assurances that the security contractors would be given three weeks to acclimate themselves to the locale and determine the lay of the land and possible safe routes. *Id.* Although many of the promises made by Blackwater went unfulfilled, the amount and breadth of the arrangements would suggest to a reasonable contractor that this job would be unusually difficult and hazardous. *Id.*

279. RESTATEMENT (SECOND) OF TORTS § 520(a) (1977).

280. *Id.* § 520(b).

281. *Id.* § 520(c).

282. *Id.* § 520(d).

locale.[283] Fallujah was a well-known hostile zone where terrorists regularly operated.[284] Additionally, the court could subjectively find that the valuable service that the defendants supplied to the Iraqi civilian population and American troops in the Fallujah community outweighed the dangerous attributes of the activity itself.[285]

At the end of the day, of course, the Restatement grants the court the power to exercise a great amount of discretion in assessing these criteria. Accordingly, the formula the court would use to assign weight and persuasiveness to each of the factors makes prognostication nearly impossible. Still, § 519 of the Restatement reveals that a defendant can exercise the utmost care and still be liable for the harm that another suffers as a result of the defendant's abnormally dangerous activity.[286] As such, the precautions taken and the equipment supplied by Blackwater cannot shield them from strict liability for the harms that befell the plaintiffs in Fallujah on March 31, 2004. *A fortiori*, if the plaintiff can show that Blackwater was actually deficient in providing the proper equipment or AT training, the strict liability case becomes stronger.

On the other hand, it must be admitted that other factors make the imposition of strict liability on the defendants, based on their engagement in an abnormally dangerous activity, much more difficult. Most significantly, § 523 of the Restatement makes a "plaintiff's assumption of the risk of harm from an abnormally dangerous activity" an absolute bar from recovery.[287]

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283. *Id.* § 520(e).

284. *See* Sandra Mackey, *A City That Lives for Revenge*, N.Y. TIMES, Apr. 29, 2004, at A25 (noting Fallujah's connection to the tribes of central Iraq and their longtime resistance to any outside authority, whether Baathist or American). Fallujah was ultimately cleared of the terrorists in late 2004 by American and Iraq forces.

285. *See* RESTATEMENT (SECOND) OF TORTS § 520(f) (1997).

286. *Id.* § 519.

287. *Id.* § 523. "[T]he ordinary contributory negligence of the plaintiff in failing to discover an abnormally dangerous activity or to take precautions against it is not a defense to the strict liability of the actor who carries it on, [but] the plaintiff's voluntary acceptance of the abnormal risk is a defense." *Id.* § 523 cmt. b. However, the plaintiff does not assume risk without knowledge of its existence. *Id.* § 523 cmt. c. "The risk inseparable from the great majority of abnormally dangerous activities is . . . a matter of such common knowledge and general notoriety that in the absence of special

The defendants are likely to argue the plaintiff was aware of all of the dangers associated with the job and still signed an employment contract that specifically informed them of the risks, which they assumed.[288] If the court finds this argument to be credible, it could prove fatal to the plaintiffs' claims of strict liability based on the exercise of an abnormally dangerous activity. Nevertheless, many courts view assumption of the risk language to be calculated risks that do not automatically bind contractor-employees, particularly when viewed in the light of any promises made by the parent contracting company.[289]

Faced with the assumption of the risk obstacle, which is included as boilerplate contract language for all of the contracting companies, the plaintiffs could still use some of the strict liability elements to buttress their negligence claims.[290] As counterintuitive as it might appear, in arguing for imposition of strict liability, plaintiffs could cite the amount of increased training they were required to undertake as evidence of the abnormal and hazardous nature of the activity. As more often is

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circumstances . . . a plaintiff may often be found to have the knowledge notwithstanding his own denial." *Id.*

288. Without looking at the employment contract signed by the plaintiffs, it is difficult to accurately speculate whether the assumption of risk defense will be successful. However, it will even more difficult for the plaintiffs to argue that they were not aware of the risk inherent with their jobs, even before they left for Iraq. After all, media coverage of the second Gulf War has consistently emphasized the everyday perils faced by coalition troops and contractors in Iraq. *See* Kirk Semple, *Deployed: Dangerous Patrol; New York Nerve, Tested on Meanest Streets,* N.Y. TIMES, Mar. 4, 2005, at B1 (detailing the dangers faced and fears overcome by New York City's "Fighting 69th" battalion, part of the National Guard's 42nd Infantry Division); *see also* Qassim Mohammed & Susannah A. Nesmith, *Suicide Bombing Kills 116 in Iraq: The Attack, on Military and Police Recruits, was the Deadliest Since the Fall of Hussein in 2003*, PHILA. INQUIRER, Mar. 1, 2005, at A1 (discussing the worst insurgent attack in Iraq in nearly two years and noting Sunni insurgents' success in driving up the body count); Eric Schmitt, *The Few and the Proud Fret About the 'Few,'* N.Y. TIMES, Feb. 25, 2005, at A19 (noting Marine recruiter concerns that "the 'Falluja effect'—a steady drumbeat of military casualties from Iraq, punctuated by graphic televised images of urban combat—[has] sear[ed] an image into the public eye" that has strongly impacted public opinion and military recruitment numbers).

289. *See* RESTATEMENT (SECOND) OF TORTS § 416 (1965). *See also* Jonathan Finer, *Security Contracts in Iraq Under Scrutiny After Shootings*, WASH. POST, Sept. 10, 2005, at A1.

290. *See infra* notes 302–06 and accompanying text.

the case, in arguing a strict liability or negligence theory of recovery the plaintiffs would argue that they received no extensive AT training and therefore were more likely to suffer the harms that they did, in fact, suffer. Thus, since they were not provided proper AT training they could not form the required level of understanding to appreciate the dangers they were waiving. In other words, the injuries the plaintiffs suffered were directly attributable to the lack of information and AT training offered by the parent contracting company. Indeed, inadequate and nonexistent training has been cited frequently by contractors in Iraq as an ongoing and potentially dangerous problem.[291]

In addition, plaintiffs can claim, as in *Nordan*, that they relied on the defendant's promises of proper AT training and force protection in making their decision to sign the subject contract. In *Nordan*, the four men could allege that the parent company neglected their duty to provide AT training and force protection, or engaged in intentional fraud (perhaps in the interest of greater profits) to induce the plaintiffs to enter the contract. Stated specifically, fraud in the inducement applies when the defendant knowingly makes a false representation of a material fact, intending that action to be acted upon.[292] Additionally, the plaintiff must have incurred damages in its reasonable reliance and action upon the false representation.[293] In the event that fraud in the inducement of a contract is found, the court orders rescission of the entire contract. In short, the so-called "iron clad" contract is gone.

At the end of the day, the repercussions of any lawsuit to the parent contracting company can extend far beyond compensatory or even punitive damages. The injury to reputation can impact negatively on developing new business contacts and cause difficulty in recruiting new hires.

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291. *See* THOMAS HAMILL STORY, *supra* note 15, at 31–32.

292. *See* RESTATEMENT (SECOND) OF TORTS § 525 (1977).

293. *Id.*

VI. PERSONNEL RECOVERY

Preserving the lives and well-being of... contractors placed in danger of being isolated, beleaguered, detained, captured or having to evade while participating in U.S.-sponsored activities or missions is one of the highest priorities of the Department of Defense.[294]

DOD Instruction 1300.23

As stated, contractors who have "fallen into the power of the enemy" during an international armed conflict are considered POWs and are to be afforded all the protections of the Geneva Conventions.[295] As such, during captivity the contractor is now a POW and must receive adequate food, water, shelter, and clothing.[296] Following the cessation of active hostilities between the two warring parties, the contractor must be released.[297] Toward this end, DOD policy requires that:

> Before entering a theater of operation or an area of responsibility, identified [DOD] civilian employees, [DOD] contractors (under the terms of the contract), and other designated personnel shall know their personal legal status under the Geneva Conventions. Knowledge of their personal legal status shall assist those who become captured or isolated to apply properly the rights and privileges afforded to them under international law.[298]

Ironically, DOD issued this broad-reaching Instruction on August 20, 2003,[299] more than three months after the cessation of the international armed conflict in Iraq and almost three

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294. DOD INST. NO. 1300.23, *supra* note 35, para. 4.1.

295. *See* Geneva Convention of August 12, 1949, Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. For POW status to attach, contractors must "have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card . . . ." *Id.*

296. *Id.* arts. 25–27.

297. *Id.* art. 118. Article 118 states, "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." *Id.*

298. DOD INST. NO. 1300.23, *supra* note 35, para. 4.3.

299. *Id.*

years after the beginning of the international armed conflict in Afghanistan.[300] Still, since most of the contractor casualties in the War on Terror have not occurred during the rather brief periods of international armed conflict against totalitarian regimes,[301] international law of war protections are not applicable.

The vast majority of contractor deaths, kidnappings, and woundings have occurred during MOOTW missions,[302] particularly in the context of the ongoing terror attacks by al-Qa'eda, insurgents, and other criminals. In contingency operations, civilians accompanying the force represent easy targets for enemy forces set on hostage-taking.[303] There is no question that the terrorists recognize the propaganda value of exploiting the media and sensationalizing the kidnappings.[304] Because contractors are typically unarmed, have little knowledge of, or training in evasion techniques (that is, no AT training), and may receive only incidental protection from combatant personnel, the risk of capture is often high.[305] Once captured, many are viciously tortured and murdered.[306]

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300. *See* Steven Lee Myers & Thom Shanker, *A Nation Challenged: Military; Large U.S. Force Is Assembling as Bush Decides How to Strike*, N.Y. TIMES, Sept. 30, 2001, at B1 (describing preparations for war in Afghanistan); *Threats and Responses: Bush's Speech on Iraq: 'Saddam Hussein and His Sons Must Leave'*, N.Y. TIMES, Mar. 18, 2003, at A14 (warning of impending military action against Iraq).

301. *See supra* notes 109–10 and accompanying text.

302. *See State Department Issues Travel Warning on Columbia*, U.S FED NEWS, Jan. 18, 2006 (noting the fact that Marxist rebels in Colombia kidnap American contractors as well as tourists).

303. According to the Iraq Coalition Casualty Count, a website which maintains a comprehensive list of combatant and noncombatant statistics including the numbers of contractors killed and missing in Iraq, at least 14 contractors currently have the status "missing." Many more have been killed. *See* Iraq Coalition Casualty Count, *available at* http://icasualties.org/oif/Civ.aspx (last visited Feb. 5, 2006) (on file with Author) (site now reflects current number missing).

304. *See* Rod Nordland, *In Fear Ridden Baghdad, No Place is Safe*, NEWSWEEK, Oct. 4, 2004, at 30. Not only are Americans targeted, but foreigners have been taken hostage in Iraq and murdered as well. *Id.* at 31.

305. *See generally supra* Part III.

306. *See, e.g.*, Steven Fainaru & Karl Vick, *British Hostage's Beheading Confirmed by Family, Video; Insurgents in Iraq Had Killed Engineer's Colleagues*, WASH. POST, Oct. 10, 2004, at A12 (describing when Iraqi terrorists abducted contractors Kenneth Bigley, Jack Hensely, and Eugene "Jack" Armstrong in September 2004—all of whom

Although the terrorist attacks are not considered to be under the umbrella of any international set of rules, the distinction has little meaning to al-Qa'eda-like terror groups who have no regard for any civilized rules regulating armed conflict. Terrorists, insurgents, and criminal gangs who prey upon contractors do not subscribe to the law of war or civilized behavior, thereby making the protections afforded by any rule of law hollow, with little practical or perceived value.[307] Considering the prospect of torture and other violence likely to befall the captured civilian contractor, the issue of personnel recovery is a pressing matter.[308]

While a primary purpose of AT training is to provide contractors with the skills necessary to avoid capture, it is also concerned with providing skills to allow them to cope with possible capture and return to U.S. control.[309] Thus, AT training should always be viewed as a venue for SERE training. The very purpose of AT training is to avoid potential threats.

> It is DOD policy: that [p]reserving the lives and well-being of U.S. military, [DOD] civilian and contract service employees placed in danger of being isolated, beleaguered, detained, captured or having to evade while participating in a U.S.-sponsored activity or mission is one of the highest priorities of the Department of Defense. The Department of Defense has a moral obligation to protect its personnel, prevent exploitation of its personnel by adversaries, and reduce the potential for captured personnel being used as leverage against the United States.[310]

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were later brutally murdered by their captors).

307. *See* 9/11 REPORT, *supra* note 27, at xvi (recognizing that the radical Islamic terrorists make "no distinction between military and civilian targets").

308. *See* Roxana Tiron, *Pentagon Seeks Joint Doctrine, Training for Personnel Recovery*, NAT'L DEF., Nov. 2004, *available at* http://www.nationaldefensemagazine.org/issues/2004/Nov/JointDoctrine.htm (noting that the usual stakes inherent in personnel recovery have heightened in light of the increasingly common abduction of civilian contractors in Iraq).

309. *See id.* The use of the contract to delineate the scope and amount of contractor training (or lack thereof) is not limited to personnel recovery. *See* AT Training, *supra* Part IV.

310. U.S. DEP'T OF DEFENSE, DIRECTIVE NO. 2310.2, *supra* note 3, para. 4.

Nevertheless, it is no secret that personnel recovery matters are fragmented and a National Security Presidential Directive is sorely needed.[311] Although the military has attempted to recover captured contractors in Iraq,[312] whether such a rescue attempt is made may not only be limited by operational constraints (for instance, a lack of intelligence as to the location of the contractor),[313] but also due to a lack of clear, high-level guidance.[314] Each military service plan for individual operations, the training/preparation for such operations[315] and even the terminology is defined differently. Indeed, the term "personnel recovery" is defined differently within the military establishment.[316] One source defines personnel recovery as follows:

> [A]ggregation of military, civil, and political efforts to recover captured, detained, evading, isolated or missing personnel from uncertain or hostile environments and denied areas. Personnel recovery may occur through military action, action by non-governmental organizations, other U.S. Government-approved action, and diplomatic initiatives, or through any combination of these options.[317]

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311. *See IDA Report*, *supra* note 23.

312. *See, e.g.*, Mark Sage, *Iraq: The Aftermath: US Troops in Two Failed Attempts to Save Bigley*, INDEP. (London), Oct. 13, 2004, at 5 (detailing two unsuccessful attempts by American soldiers to find and free civilian contractors Kenneth Bigley, Jack Hensley, and Eugene Armstrong before their deaths).

313. *See* Tiron, *supra* note 308 (noting that the urban environment in Iraq makes it easy for terrorists to hide kidnapped personnel).

314. *See IDA Report*, *supra* note 23, at 8.

315. There exists no dedicated military force for personnel recovery; in fact, ongoing combat operations in Iraq and Afghanistan have spread current recovery forces perilously thin. *See* Tiron, *supra* note 308 (noting that the War on Terror places an emphasis in "primary combat tasks").

316. *See IDA Report*, *supra* note 23, at 4 (proposing the definition of personnel recovery: "the sum of military, diplomatic, and civil efforts to prepare for and execute the recovery of U.S. military, Government civilians, and Government contractors who become isolated from friendly control while participating in U.S. sponsored activities abroad, and of other persons designated by the President"). Note that this definition is broad, as the term "U.S. sponsored activities" is not limited to the battlefield. *See supra* note 3 (defining personnel recovery).

317. U.S. DEP'T OF DEFENSE, DIRECTIVE NO. 2310.2, *supra* note 3, para. 3 (Note that the word "contractor" is rarely included in this pre-War on Terror instruction).

In effect, the term "personnel recovery" is an umbrella term that envisions a combination of military, civil, and political efforts united to obtain the immediate release of those detained against their will or isolated from a hostile environment either via coordinated negotiation or forcible recovery.[318]

Given the current high-risk environments of not only Iraq and Afghanistan, but also of places like Colombia and other hostile zones around the globe, one might conclude that all personnel recovery operations will be conducted by either the Air Force or Special Operations Forces (SOF).[319] This is not the case. While SOF forces provide flexibility as well as the unique knowledge and equipment required for high-risk, personnel recovery missions,[320] there is no "dedicated" personnel recovery force. Based on each case, the Combatant Commander will rely on a combination of assets to form a rescue mission. The much-publicized April 2003 rescue of Jessica Lynch does not represent the model for recovery operations,[321] although in that personnel recovery operation SOF soldiers successfully rescued Private Jessica Lynch from an Iraqi hospital during a nighttime raid without suffering a single American casualty.[322]

The use of the military to conduct personnel recovery missions is defined, in part, by the DOD policy on Non-Conventional Assisted Recovery, which covers not only U.S. military personnel but also "DOD civilian employees, contractors and other designated personnel isolated during military

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318. *See* Tiron, *supra* note 308.

319. *See generally* Jeffrey F. Addicott, *The Role of Special Operations Forces in the War on Terror, in* THE GLOBAL WAR ON TERRORISM 158 (John Davis ed., 2004). Congress created the United States Special Operations Command in 1987 to function as a separate unified command for all the services' special operation forces. *Id.* "Often operating in secret, these uniquely selected and extremely well trained fighters are tasked to perform unique wartime and peacetime missions . . . ." *Id.*

320. *See* Linda Robinson, *The Silent Warriors*, U.S. NEWS & WORLD REP., Apr. 14, 2003, at 28.

321. *See* Keith B. Richburg, *Iraqis Say Lynch Raid Faced No Resistance*, WASH. POST, Apr. 15, 2003, at A17. Jessica Lynch, a supply clerk in the Army's 507th Maintenance Company, was kidnapped on March 23, 2003 by Iraqi forces. *Id.*

322. *See* Robert Wall, *Rescue of a POW*, AVIATION WK. & SPACE TECH., Apr. 14, 2003, at 29 (describing the sophisticated and well-coordinated personnel recovery mission that included the use of aircraft not only to create a diversion, but also to provide close air support).

operations or as a direct result of developing or ongoing crisis prior to U.S. military intervention."[323] The significance of this DOD Instruction cannot be overstated for two reasons. First, the DOD Instruction specifically includes, by its terms, "contractors" as a covered entity without limitations or qualification (that is, under the terms of the contract).[324] Second, the DOD Instruction's applicability is broad—arguably, by using the term "military operations," the policy accounts for personnel recovery operations in both war and MOOTW.[325] As such, Non-Conventional Assisted Recovery (NAR) encompasses:

> All forms of personnel recovery conducted by an entity, group of entities, or organizations that are trained and directed to contact, authenticate, support, move and exfiltrate U.S. military and other designated personnel from enemy-held or hostile areas to friendly control through established infrastructure procedures. NAR includes unconventional assisted recovery.[326]

Though frequently the result of hostilities, personnel recovery options are not limited to hostilities per se:

> The scope of persons for whom the United States will undertake Personnel Recovery is not limited to situations involving hostile action or circumstances suggestive of hostile action. Personnel Recovery measures may be initiated for personnel (U.S., allied, or coalition) who become unaccounted for as a result of training exercises, operations other than war wherein hostile action is not involved and operational environments not involving hostile action.[327]

Individuals who become missing as a result of nonhostile action do not automatically gain the benefits of personnel recovery operations initiated on their behalf.[328] DOD policy

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323. U.S. DEP'T OF DEFENSE, INST. NO. 2310.6, NON-CONVENTIONAL ASSISTED RECOVERY IN THE DEPARTMENT OF DEFENSE, para. 1 (2000).

324. *Id.*

325. *See id.*

326. *Id.* para. 3. Unconventional Assisted Recovery is NAR conducted by Special Operations Forces. *Id.*

327. U.S. DEP'T OF DEFENSE, INST. NO. 2310.5, ACCOUNTING FOR MISSING PERSONS para. E3.1.6 (2000).

328. *Id.*

provides that "the specific persons for whom Personnel Recovery may be initiated will vary based upon the circumstances unique to each situation."[329]

While the implementing regulations are the province of DOD, Congress has provided the statutory framework within which DOD conceptualizes and formulates personnel recovery policy specifically and missing person policy more generally. The Secretary of Defense established the Defense Prisoner of War/Missing Personnel Office pursuant to 10 U.S.C. § 1501:

> The Secretary of Defense shall establish within the Office of the Secretary of Defense an office to have responsibility for Department of Defense Policy relating to missing persons . . . . Subject to the authority, direction, and control of the Secretary of Defense, the responsibilities of the office shall include . . . policy, control, and oversight . . . of the entire process for investigation and recovery related to missing persons (including matters related to search, rescue, escape, and evasion) . . . .[330]

The Defense Prisoner of War/Missing Personnel Office (DPMO) is charged with coordinating the full range of policy issues associated with personnel recovery throughout DOD and the interagency community.[331]

Perhaps more significantly for the civilian contractor, Congress defines the term "missing person" to mean:

> [A] member of the armed forces on active duty who is in a missing status; or a civilian employee of the Department of Defense or an employee of a contractor of the Department of Defense who serves in direct support of, or accompanies, the armed forces in the field under orders and who is in a missing status.[332]

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329. *Id.*

330. 10 U.S.C. § 1501 (2000).

331. *See* DPMO, *supra* note 3 (click on "DOD and DOS Cooperation on Personnel Recovery"); DPMO-Mission, http://www.dtic.mil/dpmo/leadership/mission.htm (last visited Feb. 5, 2006).

332. 10 U.S.C. §§ 1513(1)(a)–(b) (2002). The term "missing status" is defined as "the status of a missing person who is determined to be absent in a category of any one of the following: [missing, missing in action, interned in a foreign country, captured, beleaguered, besieged, detained in a foreign country against that person's will.]" *Id.*

Contractors are also considered "covered persons" for the purposes of DOD action to investigate the circumstances of their absence and, possibly, to evaluate and implement personnel recovery options.[333] As a result, 10 § U.S.C 1502 states:

> After receiving information that the whereabouts and status of a [covered] person. . .is uncertain and that the absence of the person may be involuntary, the commander of the unit, facility, or area to or in which the person is assigned shall make a preliminary assessment of the circumstances. If, as a result of that assessment, the commander concludes that the person is missing, the commander shall . . . recommend that the person be placed in missing status[ ] and . . . transmit a report containing that recommendation to the Secretary concerned . . . .[334]

The application of the statute to personnel recovery provides some overarching bright-lines and the opportunity for Congressional supervision, but does not limit or preclude the need for more clarification of personnel recovery vis-à-vis the specific and increasingly important role of the contractor.[335]

VII. CONCLUSION

We have yet to know the full extent of contractor activity across the interagency in high-risk overseas locations around the world on any given day.[336]

IDA Report

There can be no doubt that the use of civilian contractors by the modern U.S. military is an absolute necessity for successful mission accomplishment. This is certainly true in the context of the War on Terror, but also in other contingency operations from South America to the Far East. Unfortunately, "the regulatory

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§ 1513(2).

333. *Id.* § 1501(c)(2).

334. *Id.* § 1502.

335. *See* DFARS, *supra* note 51, § 252.225-7040(n) (setting out the duties of the parent contracting company to notify next of kin in the event a contractor dies or is "missing, captured, or abducted").

336. *IDA Report*, *supra* note 23, at F-5.

scheme governing civilians accompanying the force is in a rapid state of flux"[337] and DOD lacks a "comprehensive policy to ensure that contractors are adequately protected . . . or that the risks to them are adequately managed in high-threat, overseas locations."[338] In fact, most of the regulatory guidance dealing with civilians accompanying the military was written prior to the War on Terror.[339]

At the time of writing this article, the U.S. House of Representatives has recognized a number of the shortcomings in the areas of civilian contractors and personnel recovery, and have taken steps to address some of these gaps with House Bill 1815.[340] In a military appropriations bill introduced by Representative Duncan Hunter of California on April 26, 2005, one section of the bill recognizes the necessity of contractor support on the battlefield and offers clarification and definition of the roles of contractors and the military in light of current exigencies. Section 1603 provides much needed definitions of terms such as "contractor[s] accompanying the force"[341] and "contractor[s] not accompanying the force."[342] Additionally, the bill orders the Secretary of Defense to work closely with commanders of combatant command to determine the proper protection levels needed to protect all types of battlefield contractors.[343] Moreover, the bill sets up a communication and

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337. LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOL. I, CENTER FOR LAW AND MILITARY OPERATIONS 172 (2004); *see also* Jonathan Finer, *Security Contractors in Iraq Under Scrutiny After Shootings*, WASH. POST, Sept. 10, 2005, at A1 (discussing the increasing scrutiny over the actions of security contractors in Iraq after a number of incidents involving "indiscriminate shootings and other recklessness [that] have given rise to charges of inadequate oversight"). For example, Brig. Gen. Karl R. Horst, the deputy commander of the Third Infantry Division, noted that "there's no authority over [security contractors], so you can't come down on them hard when they escalate force." *Id.* One hopes that a more clearly defined regulatory scheme will benefit both the military, who will no longer have to futilely police the actions of contractors outside of their realm of authority, and contractors in Iraq, who have grown increasingly restless in the wake of violence against contractors in the last two years in Iraq.

338. *IDA Report*, *supra* note 23, at F-1.

339. *See supra* note 11 and accompanying text.

340. H.R. 1815 109th Cong. (2005).

341. *See* H.R. 1815, 109th Cong. §§ 1603(a)(1)–(2).

342. *Id.*

343. *See* H.R. 1815, 109th Cong. § 1604(a)(1).

intelligence-sharing framework between military command and contractors to ensure that all parties are aware of, and prepared for, all threats and contingencies that arise in a war zone.[344] The bill even empowers the Secretary of Defense to enact regulations that govern civilian contractors' ability to carry and use certain weapons for self-defense and while performing contract work.[345] The proposals enumerated in the bill are all positive steps in the right direction; however, there is far more that needs to be done. As one commentator recently noted, House Bill 1815 "merely creates an accounting of private contractors—not accountability for private contractors and their parent companies."[346]

Another encouraging development in terms of advancing the issues associated with civilian contractors is the June 2005 DFARS.[347] This DFARS addresses questions regarding governmental responsibility to contractors deployed on contingency operations overseas, defining their duties in relation to DOD and setting out specific required language in all such contracts.[348] Likewise, the October 2005 DOD Instruction 3020.41 created a comprehensive source for the DOD procedures dealing with CDF.[349] This dialogue is encouraging, but more needs to be done.

Mitigating the risk of capture or injury to civilian contractors is a shared responsibility of the United States and the parent contracting company. Not only does DOD need to fully develop an institutional approach to contractor force protection, it is imperative that parent contracting companies develop a better system of providing the necessary AT training to their employees that are sent to high-risk overseas locations. Until the government develops a systemic approach[350] (that is,

344. *Id.*

345. *See* H.R. 1815, 109th Cong. § 1605(a).

346. Marc P. Miles, Speech Given at the Contractors on the Battlefield Conference, San Antonio, Texas (June 28, 2005) (on file with Author).

347. *See* DFARS, *supra* note 51.

348. *See id.*

349. *See* DOD INST. 3020.41, *supra* note 17, at para. 6.

350. *See generally* Kahn & Schwartz, *supra* note 165 (discussing the lack of a systemic manner to deal with the growing violence in Iraq); Finer, *supra* note 289 (reporting on the growing concern that lack of oversight is leading to recklessness and lawlessness by certain security contractors in Iraq).

providing the full range of force protection training at military pre-deployment sites), the prudent parent contracting company will ensure that their personnel have the necessary information to prepare them for the exigencies of their overseas assignments. At a minimum this means that the parent company should include an appropriate level of AT training so that contractors are better able to avoid or survive capture and/or injury when operating in high-risk environments.