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No More Nisour Squares: Legal Control of Private Security Contractors in Iraq and After

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As a Commissioner on the federal Commission on Wartime Contracting in Iraq and Afghanistan established by Congress in 2008,¹ I have been immersed in the issue of how to control the abuses and injuries of private security contractors. The key incident

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¹ Further information on the Commission may be found on its website, <http://www.wartimecontracting.gov>. The Commission has held a number of televised hearings and issued several reports. This Article represents the views of its author alone and not those of the Commission or any part thereof.

epitomizing this issue occurred in late 2007, when members of the Blackwater Worldwide (Blackwater) private security firm were escorting a convoy of State Department personnel through Baghdad. At Nisour Square, the Blackwater guards, some of whom claim they faced a threat, opened fire on civilians, killing seventeen Iraqis.² Public attention continued as five Blackwater employees were indicted in December 2008, and the case continued in 2009 until the court dismissed the charges due to improper prosecutorial use of the guards' statements.³ Negative Iraqi public perceptions of private security contractors continued from 2009 to 2010.⁴

As one commentator put it, "the fallout from the September 16 shooting by Blackwater guards in Baghdad was as publicly damaging to U.S. efforts in Iraq as was the My Lai massacre in Vietnam."⁵ Moreover, coverage reminded observers of previous incidents involving private contractors, such as Abu Ghraib.⁶

This Article analyzes and builds upon the somewhat successful steps taken by the Department of Defense and the Department of

² David H. Chen, Note, *Holding "Hired Guns" Accountable: The Legal Status of Private Security Contractors in Iraq*, 32 B.C. INT'L & COMP. L. REV. 101, 101 (2009).

³ See, e.g., Josh Meyer, *Blackwater Killings Called Unprovoked: Unsealed Papers Reveal Prosecutors' Claims that Guards Targeted Iraqis in 'Shocking' Attack*, HOUSTON CHRON., Dec. 9, 2008, at A1; Charlie Savage, *Charges Voided for Contractors in Iraq Killings*, N.Y. TIMES, Jan. 1, 2010, at A1.

⁴ Timothy Williams, *Iraqis Angered at Dropping of Blackwater Charges*, N.Y. TIMES, Jan. 2, 2010, at A4; Kevin Whitelaw, *Use of Private Security Grows in Iraq, Afghanistan*, NAT'L PUB. RADIO, Oct. 1, 2009, <http://www.npr.org/templates/story/story.php?storyId=113389274>.

⁵ ROGER D. CARSTENS ET AL., NEW AM. FOUND., CHANGING THE CULTURE OF PENTAGON CONTRACTING 9 (2008), available at http://www.newamerica.net/files/nafmigration/Changing_the_Culture_of_Pentagon_Contracting.pdf.

⁶ See generally Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751 (2005) (discussing how to deter atrocities, including those caused by privatized military companies); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549 (2005) (describing the allegations that contractor personnel were involved in the Abu Ghraib abuses and raising concerns about the outsourcing trend in the military); Marcy Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269 (2005) (discussing the Bush administration's disregard of international legal norms, including the Geneva Conventions); Mark W. Bina, Comment, *Private Military Contractor Liability and Accountability After Abu Ghraib*, 38 J. MARSHALL L. REV. 1237 (2005) (discussing current federal laws, international laws, and cases relevant to the Abu Ghraib scandal); Scott J. Borrowman, Comment, *Sosa v. Alvarez-Machain and Abu Ghraib—Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 BYU L. REV. 371.

State in 2008–2009 to manage the problem.⁷ Analyzing those steps shows a key strand consisting of what may be called the “contract law” approach. In the much-expanded form proposed in this Article, the “contract law” approach would use government contract requirements, contracting tools and sanctions, contract-related claims, and distinctive contract-related suits to both control and remedy private security abuses and injuries. This Article continues my prior studies as a professor of government contracting law⁸ with a specific interest in the Iraq war.⁹

In Part I, this Article lays out the issue and the previously proposed solutions. The problem of private security abuses and injuries¹⁰ is part of the broader trend toward the privatizing¹¹ of military effort.¹²

⁷ See Walter Pincus, *Fatal Shootings by Iraq Contractors Drop in 2008*, WASH. POST, Dec. 20, 2008, at A9.

⁸ See generally CHARLES TIEFER & WILLIAM A. SHOOK, GOVERNMENT CONTRACT LAW: CASES AND MATERIALS (2d ed. 2004 & Supp. 2006) (providing a broad case study of court findings on government contracts). For the press commentary, see *infra* notes 120–21.

⁹ See generally Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War*, 29 U. PA. J. INT'L L. 1 (2007) (discussing the significance of contracting); Charles Tiefer, *Can Appropriation Riders Speed Our Exit from Iraq?*, 42 STAN. J. INT'L L. 291 (2006) (discussing the potential impact of so-called “appropriation riders” on the war). Similar treatments of previous wars include, e.g., Charles Tiefer, *War Decisions in the Late 1990s by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1 (1999) [hereinafter Tiefer, *War Decisions*].

¹⁰ J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 186–200 (2005) (discussing deficiencies in the law).

¹¹ For the background of outsourcing and privatizing, see Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003), which gives contemporary examples of privatization and its implications for current constitutional doctrine; Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1212 (2003).

¹² For general discussions of the development of a role for contractors in privatized military support, see P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2003); Deven R. Desai, *Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies*, 39 U.S.F. L. REV. 825 (2005); Virginia Newell & Benedict Sheehy, *Corporate Militaries and States: Actors, Interactions, and Reactions*, 41 TEX. INT'L L.J. 67 (2006), which explores the interaction between private military firms and traditional state entities; Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004); Kristen Fricchione, Comment, *Casualties in Evolving Warfare: Impact of Private Military Firms' Proliferation on the International Community*, 23 WIS. INT'L L.J. 731 (2005), which discusses the legal and jurisdictional ramifications of the increased reliance on private forces; Ellen L. Frye, Note, *Private Military Firms in the New World Order: How Redefining “Mercenary” Can Tame the*

This privatization has produced accountability issues¹³ that reduce support for the U.S. government's efforts both in Iraq¹⁴ and in the world.¹⁵ Some observers discuss applying the Uniform Code of Military Justice (UCMJ) via its recent amendment covering private security employees.¹⁶ Others discuss applying the amended Military Extraterritorial Jurisdiction Act (MEJA).¹⁷ Yet others see the solution in civil suits under existing statutes.¹⁸

And Iraqi authorities could also impose sanctions, as shown by their failure to license Blackwater in 2009, obliging the firm to quickly wind down its operations.¹⁹ A 2003 edict of the Coalition

"*Dogs of War*," 73 *FORDHAM L. REV.* 2607 (2005), which proposes a more exact definition of "mercenary" as a mean of controlling unwanted nonmilitary behavior.

¹³ Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 *WM. & MARY L. REV.* 135, 161–63 (2005) (exploring alternative theories of international law to address the accountability problems of privatization); Keith Hartley, *The Economics of Military Outsourcing*, 11 *PUB. PROCUREMENT L. REV.* 287, 290 (2002); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 *B.C. L. REV.* 989, 989 (2005) (explaining that the lack of transparency in the use of private contractors has often led to high-profile scandals).

¹⁴ Private security plays a particularly important role in support of the United States's effort in Iraq, where troop ceilings and practical constraints on American forces created dependence on private security for protective roles.

¹⁵ E.L. Gaston, Note, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 *HARV. INT'L L.J.* 221, 228 (2008).

¹⁶ For analysis of the amendment applying the UCMJ to contractors, see Cara-Ann M. Hamaguchi, Recent Developments, *Between War and Peace: Exploring the Constitutionality of Subjecting Private Civilian Contractors to the Uniform Code of Military Justice During "Contingency Operations"*, 86 *N.C. L. REV.* 1047 (2008). For further background on the issue, see David A. Melson, *Military Jurisdiction over Civilian Contractors: A Historical Overview*, 52 *NAVAL L. REV.* 277 (2005); Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 *BYU L. REV.* 367.

¹⁷ Ian W. Baldwin, Note, *Comrades in Arms: Using the Uniform Code of Military Justice and the Military Extraterritorial Jurisdiction Act to Prosecute Civilian-Contractor Misconduct*, 94 *IOWA L. REV.* 287 (2008); Ian Kierpaul, Comment, *The Mad Scramble of Congress, Lawyers, and Law Students After Abu Ghraib: The Rush to Bring Private Military Contractors to Justice*, 39 *U. TOL. L. REV.* 407, 412–23 (2008); Del Quentin Wilber, *Blackwater Guards Indicted in Deadly Baghdad Shooting*, *WASH. POST*, Dec. 6, 2008, at A3.

¹⁸ Ryan Micallef, Note, *Liability Laundering and Denial of Justice: Conflicts Between the Alien Tort Statute and the Government Contractor Defense*, 71 *BROOK. L. REV.* 1375, 1375–76 (2006).

¹⁹ Monte Morin, *Iraq Rescinds License for Blackwater Security Firm*, *L.A. TIMES*, Jan. 30, 2009, at A4.

Provision Authority (CPA)²⁰ immunizing the contractors had barred Iraq from imposing sanctions upon them, but this immunization ended with a Status of Forces Agreement (SOFA) in 2009.²¹

However, because of practical limitations,²² these alternatives, taken alone, may not provide the whole answer.

Part II addresses the contract law approach to controlling private security contracting abuses and injuries. Soon after the Nisour Square incident and continuing years later, the Departments of Defense and State implemented important reforms,²³ such as new and stricter contractual requirements, departmental monitoring of contractor performance, and department-wide regulations in July 2009.²⁴

More could be done to follow up on this contract law approach. Government contracting has impressive tools. Additional contractual requirements for private security firms can serve as “quality control”

²⁰ See *Coalition Laws and Transition Arrangements During Occupation of Iraq*, 98 AM. J. INT'L L. 601, 601–06 (Sean D. Murphy ed., 2004) [hereinafter *Coalition Laws*] (explaining how international law impacts American practice in areas such as court decisions, immunity, criminal law, and the use of force). For the significance of the CPA and its demise, see Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INT'L & COMP. L.Q. 27 (2005). For the establishment of the Joint Contracting Command in Iraq in 2004, see Jack L. Cunnane, *The Evolution of Contracting in Iraq March 2003–March 2005*, J. CONT. MGMT., Summer 2005, at 47 (2005). For a discussion of the legal challenges in legitimizing the U.S. occupation's approach, see Andrea Carcano, *End of the Occupation in 2004? The Status of the Multinational Force in Iraq After the Transfer of Sovereignty to the Interim Iraqi Government*, 11 J. CONFLICT & SECURITY L. 41, 49 (2006), which argues that only minimal legitimacy of the government was accomplished; Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 252–54 (2005), which points out the irony of the rhetoric adopted by the Security Council; Steven Wheatley, *The Security Council, Democratic Legitimacy and Regime Change in Iraq*, 17 EUR. J. INT'L L. 531 (2006). See generally Sujit Choudhry, Commentary, *Old Imperial Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multinational Polities*, 37 CONN. L. REV. 933 (2005) (discussing the connection between legitimacy and the right to “self-determination”).

²¹ See James Risen, *End of Immunity Worries U.S. Contractors in Iraq*, N.Y. TIMES, Dec. 1, 2008, at A14.

²² See, e.g., Heather Carney, Note, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 330–44 (2006).

²³ Michael J. Navarre, *Departments of State and Defense Sign MOA on Private Security Contractors*, PROCUREMENT LAW., Spring 2008, at 3, 3.

²⁴ Elizabeth Newell, *Pentagon Lays Out Detailed Regulations for Security Contractors*, GOV'T EXECUTIVE, July 17, 2009, <http://www.govexec.com/dailyfed/0709/071709e1.htm>. The government gave key tasks to the Defense Contract Management Agency (DCMA), which can deploy expert specialists to oversee private security contractor quality control. In short, several of the reforms took a distinctly contract-based approach. These steps made use of the contract aspects of private security firms and eschewed a focus solely on sanctioning individual employees.

specifications. The Departments of Defense and State may impose additional contractual requirements besides training and reporting that relate to the selection and assignment of employees,²⁵ postincident responsibilities,²⁶ and international licensing and accreditation. The government can treat incidents that cause the inappropriate harming of civilians, in addition to potentially prosecutable actions of individual employees, as both possible failures of “quality control” by the private security firms and occasions for scrutiny by an inspector general.²⁷

Among the category of tools for civilians that have been discussed by commentators are different kinds of claims and suits,²⁸ which

²⁵ Mark Calaguas, *Military Privatization: Efficiency or Anarchy?*, 6 CHI.-KENT J. INT’L & COMP. L. 58, 79 (2006).

²⁶ See generally Jeffrey F. Addicott, *Contractors on the “Battlefield”: Providing Adequate Protection, Anti-Terrorism Training, and Personnel Recovery for Civilian Contractors Accompanying the Military in Combat and Contingency Operations*, 28 HOUS. J. INT’L L. 323 (2006).

²⁷ Compare Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59 (1983) (discussing the constitutional and valuable status of independent inspectors general), with Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 681–82 (2005) (finding that such status impairs executive independence).

²⁸ The U.S. government has elaborate claims mechanisms for injury and damage abroad by the military; other foreign claims, in connection with the Status of Forces Agreements, include some valuable legal features. See generally Reetuparna Dutta, *Of Embassy Guards and Rock Stars: Why the Department of State Should Provide Compensation for Torts Committed by Embassy Guards Abroad*, 76 GEO. WASH. L. REV. 1279 (2008); Gregory A. McClelland, *The Problem of Jurisdiction over Civilians Accompanying the Forces Overseas—Still with Us*, 117 MIL. L. REV. 153 (1987); Aurel Sari, *Status of Forces and Status of Mission Agreements Under the ESDP: The EU’s Evolving Practice*, 19 EUR. J. INT’L L. 67 (2008); David P. Stephenson, *An Introduction to the Payment of Claims Under the Foreign and International Agreement Claims Act*, 37 A.F. L. REV. 191 (1994); Kateryna L. Rakowsky, Note, *Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan*, 2 STAN. J. C.R. & C.L. 365 (2006).

A related approach involves using the False Claims Act (FCA). Jeffrey S. Palmer, *Claims Encountered During an Operational Contingency*, 42 A.F. L. REV. 227, 231 (1997) (“The use of the FCA can be a genuinely effective tool to maintain good relations with the local population in which a military force is often immersed.”). For the use of the FCA generally in the Iraq War, see Abigail H. Avery, Commentary, *Weapons of Mass Construction: The Potential Liability of Halliburton Under the False Claims Act and the Implications to Defense Contracting*, 57 ALA. L. REV. 827 (2006); M.M. Harris, Commentary, *Patriots and Profiteers: Combating False Claims by Contractors in the Iraq War and Reconstruction*, 59 ALA. L. REV. 1227 (2008).

already apply to the military in Iraq²⁹ but apparently not to the contractors.³⁰ As for civil suits, most interestingly, the civilian victims of security incidents may be able to invoke such contract requirements as third-party beneficiaries under a contract law theory.³¹ The intricacies of third-party beneficiaries of government contracts³² may support an argument that civilians have rights as to security contractors in Iraq.³³

The Article's Conclusion will look at these issues in the context of critiques of global³⁴ privatization.³⁵ This draws on my prior work on legal aspects of wars, from serving as General Counsel of the House of Representatives for the investigation of the Iran-Contra affair³⁶ to conducting analyses of the Persian Gulf War³⁷ and other 1990s

²⁹ See generally Jerrett W. Dunlap, Jr., *The Economic Efficiency of the Army's Maneuver Damage Claims Program: Coase, but No Cigar*, 190/91 MIL. L. REV. 1 (2006/2007).

³⁰ See Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander's Emergency Response Program*, ARMY LAW., Feb. 2004, at 39; Jonathan Tracy, *Responsibility to Pay: Compensating Civilian Casualties of War*, HUM. RTS. BRIEF, Fall 2007, at 16.

³¹ See generally David M. Summers, Note, *Third Party Beneficiaries and the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 880 (1982) (discussing the legal theory and implications of the third-party beneficiary aspect of contract law).

³² Recent Case, *Martinez v. Socoma Companies, Inc., Cal., 1974*, 88 HARV. L. REV. 646 (1975); Robert S. Adelson, Note, *Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Governmental Intent*, 94 YALE L.J. 875, 875 (1985).

³³ This policy resembles the policy behind the "Iraqi First" program for giving more contract work to local contractors. Both use government contracting to build local goodwill. For a discussion of the "Iraqi First" program, see Bradley A. Cleveland, *The Last Shall Be First: The Use of Localized Socio-Economic Policies in Contingency Contracting Operations*, 197 MIL. L. REV. 103 (2008).

³⁴ See, e.g., Richard J. Pierce, Jr., *Outsourcing Is Not Our Only Problem*, 76 GEO. WASH. L. REV. 1216 (2008) (reviewing PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007)).

³⁵ See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569 (2001); Metzger, *supra* note 11.

³⁶ As Special Deputy Chief Counsel on the House's Iran-Contra Committee, the author cowrote the chapter in the committee report on the Boland Amendments. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 395 (1987). For a discussion drawing on that service, see George W. Van Cleve & Charles Tiefer, *Navigating the Shoals of "Use" Immunity and Secret International Enterprises in Major Congressional Investigations: Lessons of the Iran-Contra Affair*, 55 MO. L. REV. 43 (1990).

³⁷ See CHARLES TIEFER, *THE SEMI-SOVEREIGN PRESIDENCY: THE BUSH ADMINISTRATION'S STRATEGY FOR GOVERNING WITHOUT CONGRESS* 119-34 (1994)

conflicts.³⁸ The new problem of private security contractors encountered in Iraq represents a larger problem that will occur in the conflicts of the future, both American and other. Solutions worked out in Iraq, including the utilization of contract law tools, may serve in these future conflicts.

I

THE PROBLEM OF PRIVATE SECURITY FIRMS AND THE LIMITS OF OTHER PROPOSALS

A. Background

Peter W. Singer, the leading scholar of private military firms (PMFs), has chronicled the rapid global rise of PMFs in recent decades.³⁹ As he explains, PMFs differ from individuals practicing their trade either in the past or at present: “[I]t is the *corporatization* of military service provision that sets them apart.”⁴⁰ Moreover, one of the many trends in the 1990s that brought this industry to unprecedented levels consisted of a generally occurring “privatization revolution.” Private companies outsourced their security needs, and governments privatized some of the support for their militaries.⁴¹ This trend begins to suggest why solutions oriented toward individual employees, such as prosecution, might be usefully supplemented by government contracting tools. The government does not hire individuals to support its military, it hires a “corporatized” military service elaborately organized and structured to seek, obtain, and perform contracts as firms do.

As late as the Persian Gulf War of 1991, the U.S. military still made only limited use of contractors. Significant growth in their role

(stating that the Persian Gulf War marked a climax of the push-and-pull dynamic between Congress and the presidency during wartime).

³⁸ See Charles Tiefer, *Congressional Oversight of the Clinton Administration and Congressional Procedure*, 50 ADMIN. L. REV. 199 (1998) (examining congressional oversight of agencies since the passage of the Administrative Procedure Act). This oversight includes Bosnia, see generally Tiefer, *War Decisions*, *supra* note 9 (harmonizing the formalistic distaste toward “partial” declarations and the practical effect of such acts), and Kosovo, Charles Tiefer, Book Review, 96 AM J. INT’L L. 489 (2002) (reviewing MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* (2001)).

³⁹ SINGER, *supra* note 12, at 3–49; see also DEBORAH D. AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* 7–22 (2005).

⁴⁰ SINGER, *supra* note 12, at 45.

⁴¹ *Id.* at 66–70.

occurred in the next dozen years, but not evenly in all sectors. The greatest expansion of their role occurred in Iraq. Singer usefully divides contractors into the following groups: those that provide support, such as the KBR firm; those that provide consulting; and the “military provider firms” that provide, among other services, armed security. At the peak of their service, of the estimated 180,000 contractor employees serving in Iraq, up to 30,000 were armed security contractors “who carry guns and perform quasi-military roles.”⁴² For the State Department, the contractors’ work consists primarily of protective escort service for state officials and protective service for some offices away from Baghdad. For the Defense Department, their work includes protecting convoys, providing protective escort service for groups such as the Army Corps of Engineers, and providing some fixed-location protective service.

Some critics would describe the role of those 30,000 security contractors as holding down troop levels in Iraq—a role resulting from the determination of the U.S. government, notably former Secretary of Defense Donald Rumsfeld. That is, in order to keep down the number of troops needed, his solution was to hire security contractors to do some armed tasks that would otherwise have required troops.

Another way to describe the role of security contractors, which reflects their potential for future use, is that they perform tasks during a limited wartime period that would otherwise require undue permanent swelling of government employment. For example, elsewhere in the world, the State Department handles the limited need for protection of its officers by utilizing agents in the Diplomatic Security Service (DS). To do the same in Iraq would require a very large increase in the total number of agents in the DS. In 2003, the State Department would have found this very hard to arrange on short notice given the high standards of the DS, the challenge of recruitment, and the training of the agents. It would also create the problem of determining what to do with the additional DS agents, expanded during temporary wartime, once peace or disengagement comes in Iraq.⁴³

⁴² Jonathan Finan, Recent Developments, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT’L L. 259, 260 (2008).

⁴³ That is not to gainsay what legal commentators, including some with solid military credentials, have said about the downside of dependence upon private security, but the topic is beyond this Article’s scope. Whatever the scope of private security in the future,

B. Nisour Square Incident

The private contractor problem that developed in Iraq consisted of incidents during which private security killed or injured civilians. Although many such incidents occurred, the problem came to a dramatic peak in Nisour Square on September 16, 2007. In a congested intersection in Baghdad, contractors in one vehicle of a Blackwater convoy of four vehicles became convinced, probably mistakenly, that they were threatened. It is alleged that the private security in each of the four vehicles opened heavy fire with machine guns on the street filled with civilians, leaving seventeen Iraqis dead and more than twenty wounded.⁴⁴

The Nisour Square incident brought an outpouring of accumulated Iraqi anger at the United States's private security. It triggered a major diplomatic crisis between the U.S. and Iraqi governments. The diplomatic crisis persisted and became one of the components of a major and lengthy difficulty in concluding a SOFA to legalize U.S. forces' operations in Iraq going forward. A press firestorm ensued, as American and world journalists alike brought to light many controversial aspects of this incident and of previous private security incidents, highlighting many larger dimensions of the problem. A number of congressional hearings occurred, focusing attention on the inadequate legal tools for dealing with the problem.

Part of the U.S. government's response to the crisis consisted of investigating the Nisour Square incident for possible prosecution. However, as time went on without charges, increasing amounts of commentary emerged—in the press, in hearings, and ultimately in law reviews—about the legal difficulties of prosecution and how else to deal with the problem.

C. UCMJ, MEJA, and Iraqi Law

The UCMJ is the code and the criminal process by which the military itself, as distinct from private contractors, maintains discipline, including discipline for the wrongful killing of civilians.

the question remains how to deal with contractor abuses and injuries. *See, e.g.*, Thurnher, *infra* note 67.

⁴⁴ Sudarsan Raghavan, *Iraqi Probe Faults Blackwater Guards: 17 People Killed Without Provocation at Baghdad Square, Officials Conclude*, WASH. POST, Oct. 8, 2007, at A12. There are countless journalistic accounts. The account by the Iraqi government has significance both as a factual account and as an indication of the Iraqi government's reaction. *Id.*

The UCMJ governs courts-martial and military commissions. Until late 2006, the UCMJ did not even theoretically cover private security contractors in Iraq. UCMJ application received a narrow interpretation in light of the caution exhibited by the U.S. Supreme Court in extending the reach of courts-martial.⁴⁵ In particular during the Vietnam War, courts interpreted the UCMJ's application to civilians only in "time of war" as requiring a declaration of war.⁴⁶ When Congress enacted its authorization for the use of force in Iraq in 2002, the legislature legitimated almost all of what a declaration of war would. However, pursuant to judicial precedent, that authorization did not activate the UCMJ coverage of civilians that would accompany the force "in time of war."

Reacting to some of the pre-Nisour Square incidents, Senator Lindsey Graham (R-SC) proposed, and Congress enacted, an amendment to the UCMJ extending military jurisdiction, in time of a contingency operation or declared war, to persons accompanying or serving with an armed force in the field.⁴⁷ Constitutional challenges may occur in response to the trial of civilian contractors by courts-martial. But a careful study concluded that the courts would uphold the amendment.⁴⁸

Still, a number of practical problems stand in the way of applying the UCMJ, and the Department of Defense (DOD) has made little or no use of the new provision. The DOD did not seek the amendment. Military courts may find this particular exercise of their jurisdiction somewhat misaligned with the normal exercise.⁴⁹ Unlike troops, private security contractors are not under military discipline and are not ordinarily acting under the orders of combat commanders.

Turning to MEJA, Congress enacted this statute in 2000 specifically to bring overseas military contractor employees under the criminal jurisdiction of U.S. courts, after a scandal during the military

⁴⁵ See *Reid v. Covert*, 354 U.S. 1 (1957).

⁴⁶ *United States v. Averette*, 19 C.M.A. 363, 365 (1970).

⁴⁷ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (codified as amended at 10 U.S.C. § 802(a)(10) (2006)).

⁴⁸ Hamaguchi, *supra* note 16, at 1064–66.

⁴⁹ It is true that security employees performing personal security details often formerly served in the U.S. armed forces and that the charges could be similar to the types brought against soldiers. However, an important part of courts-martial for misconduct in the employment of force consists of maintaining military discipline and obedience to the orders of combat commanders.

intervention in the Balkans.⁵⁰ After Abu Ghraib, it became apparent that the statute did not apply to contractors that were not technically hired under a DOD contract, even when they performed work with the military and the non-DOD contract was just a technicality.⁵¹ So, Congress amended the law to reach contractors “supporting the mission of the DOD.”⁵² The Defense Department issued proposed regulations for implementing MEJA as to that department.⁵³

Practical problems hinder the pursuit of cases under MEJA also. No department other than the DOD adopted implementing regulations. The Nisour Square incident involved a State Department contractor, not a DOD contractor.⁵⁴ On the other hand, the Department of Justice secured an indictment of five Blackwater guards in the Nisour Square incident pursuant to MEJA.⁵⁵

Whatever the technical issues of applying MEJA to non-DOD contractors, criminal indictments under MEJA seem unlikely to become common. It is true that even a small number of successful prosecutions can have a strong deterrent effect, as well as propitiating the local indignation about abuses. Still, there are enormous practical and legal problems with bringing so many criminal prosecutions in federal courts about actions in a war zone that will shape corporate behavior.⁵⁶

⁵⁰ Some employees of the contractor then holding the Logistics Augmentation Program (LOGCAP) contract, Dyncorp International (one of the three contractors later providing security for the State Department in Iraq), were involved in sex trafficking. However, they were outside federal criminal jurisdiction. In response, Congress enacted the original MEJA. Kierpaul, *supra* note 17, at 416–17.

⁵¹ Fredrick A. Stein, *Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act*, 27 HOUS. J. INT’L L. 579, 598–602 (2005).

⁵² Kierpaul, *supra* note 17, at 417.

⁵³ Criminal Jurisdiction over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Service Members, and Former Service Members, 70 Fed. Reg. 75,998 (Dec. 22, 2005) (codified at 32 C.F.R. pt. 153 (2009)).

⁵⁴ There was some doubt about how to interpret the phrase “supporting the mission of the DOD”; although the State Department and the Defense Department ostensibly have common goals in Iraq, a State Department contractor in Iraq, it was asserted, did not support the DOD’s mission. A general counsel opinion determined that such State Department contractors did not support the DOD’s mission.

⁵⁵ Tara Lee, *MESA for Street Crimes, Not War Crimes*, DEPAUL RULE L.J., Aug. 2009, at 6.

⁵⁶ Even years after MEJA, it appeared that only one successful prosecution of a DOD contractor occurred under the law, and that action had nothing to do with private security. *See id.* at 5–6.

As for Iraqi laws, these were blocked from use by an edict of the CPA.⁵⁷ This block remained in effect from 2003, when it was adopted by the CPA⁵⁸ at the moment when a U.N. Security Council resolution backed the transition to a sovereign Iraqi government,⁵⁹ until 2009, when the Iraqi government adopted a new agreement with the United States.⁶⁰ Application of Iraq's laws represented something of a wild card in the potential for criminal prosecution of individual contractor employees.⁶¹ And the first Iraqi action was to oust Blackwater by denying it a license, as discussed above.

In any event, it is suggested that the application of Iraq's laws has its limitations. The Iraqi courts could attempt prosecutions against individual contractor employees. Those prosecutions certainly matter, but full-scale reform of corporate action requires something different.⁶² Very likely the Iraqi courts will have more interest in criminal prosecutions that provide visible retribution and punishment than in civil cases—particularly slow, elaborate ones—to dissect and reform corporate conduct.⁶³

In sum, without denying that there can be merit in each of these approaches, they need supplementation. They apply much more potently to employees than to the security contracting firms. These approaches attempt to treat a contracting problem without using contract law tools. This Article now turns to those tools.

⁵⁷ *Coalition Laws*, *supra* note 20, at 601–02.

⁵⁸ *See id.* at 602.

⁵⁹ *Id.* at 603–04.

⁶⁰ Risen, *supra* note 21.

⁶¹ On the one hand, the Iraqi desire for justice stemming from incidents of abuse by contractor employees, who behaved as though above the law, can be understood. The Iraqi government pressed hard in the negotiations over the agreement to end immunity for contractors, reflecting general Iraqi sentiment. On the other hand, contractor employees must, by their contractual assignment, sometimes use deadly force in defensive measures against Iraqi insurgents who attack those whom the contractors protect. Such employees may have concerns that an Iraqi court will not act objectively when civilians get caught in cross fire, even in legitimately handled defensive incidents.

⁶² Iraqi courts will not likely attempt to try civil cases, with the aspects and nuances of such cases, by using the American style of delving into the inner planning and arrangements of contractor firms. The contractor firms have extensive resources for responding to such suits.

⁶³ And the Iraqi courts will lack the leverage of the class action mechanism, the potential for expansive remedies, and discovery pursuant to the Federal Rules of Civil Procedure regarding the roles of firms in not preventing incidents.

II

CONTROLLING PRIVATE SECURITY CONTRACTORS

When the firestorm broke in the press after the Nisour Square incident, the Departments of Defense and State took action concerning government contracting; action that has gone largely unanalyzed legally. This Article turns to the thus far unused or underutilized tools of controlling government contracting after considering the steps taken by the Departments of Defense and State.

A. Steps Taken by the Department of Defense and the State Department

After the Nisour Square incident and other incidents publicized in its wake, a worldwide press firestorm ensued. In fact, the Iraqi government itself took such umbrage at these incidents that it would not complete the process of issuing a license to Blackwater, and the issue became a significant problem in the talks with the United States over a SOFA. The Iraqi reaction exemplifies the reason why the United States pursues its policy of restraining private security contractors from harming Iraqi civilians.⁶⁴ Only by benefiting Iraqi civilians can the U.S. government accomplish its objective—to prevent or reduce the intense anticontractor and anti-U.S. reactions undermining the government’s counterinsurgency efforts.

In October 2007, the State Department’s “Kennedy Panel” provided the government with a report (Kennedy Report) containing recommendations about the Nisour Square incident.⁶⁵ The ensuing developments were reviewed in a report by the Government Accountability Office (GAO Report).⁶⁶ Before then, in the early years of the Iraq conflict, the State Department had taken only limited

⁶⁴ *U.S. Congress and Administration Consider Responses to Excessive Uses of Force by U.S. Security Firms*, 102 AM. J. INT’L L. 161, 161–62 (John R. Crook ed., 2008).

⁶⁵ U.S. DEP’T OF STATE, REPORT OF THE SECRETARY OF STATE’S PANEL ON PERSONAL PROTECTIVE SERVICES IN IRAQ (2007) [hereinafter KENNEDY REPORT], available at <http://www.expose-the-war-profiteers.org/archive/government/2007-2/20071023.pdf>. The panel credited with authoring the report was chaired by Patrick F. Kennedy, subsequently Under Secretary of State for Administration. For a discussion of the Kennedy Report, see Navarre, *supra* note 23, at 3.

⁶⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-966, REBUILDING IRAQ: DOD AND STATE DEPARTMENT HAVE IMPROVED OVERSIGHT AND COORDINATION OF PRIVATE SECURITY CONTRACTORS IN IRAQ, BUT FURTHER ACTIONS ARE NEEDED TO SUSTAIN IMPROVEMENTS (2008) [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/d08966.pdf>.

steps to revise its operating procedures to account for the role of private security contractors.⁶⁷ By December 2007, the State Department formally implemented new procedures based on the Kennedy Report through a series of directives.⁶⁸

The Kennedy Report's recommendations included that "[w]hen the FBI investigation into the September 16, 2007, incident is completed, the Embassy should submit its recommendation as to whether the continued services of the contractor involved [i.e., Blackwater] is consistent with the accomplishment of the overall United States mission in Iraq."⁶⁹ In essence, this is perhaps the most classic of government contract law approaches—to consider, after the criminal investigation is done, terminating the contract.

In the period of 2004 to 2007, the DOD had already taken steps to revise its contract rules to match the new reality of a large supporting role by private security contractors.⁷⁰ Nisour Square kicked that effort into a much higher gear. The DOD implemented new procedures, through a formal military order (DOD Order),⁷¹ and the State Department and the DOD entered into a memorandum of agreement.⁷² As the GAO Report explained, the post-Nisour Square DOD Order emphasizes the role of the contracting officer representative,⁷³ who is traditionally responsible for the contract law approach of monitoring how the contractor performs a contract. "The order further states that contracting officers are responsible for monitoring PSC [Private Security Contractor] performance and ensuring PSC compliance with contractual requirements."⁷⁴

Also, the Under Secretary of the DOD responsible for procurement delegated authority to Iraq's military contracting command to be "responsible for all contract administration for the DOD's security contracts in Iraq."⁷⁵ In turn, "[i]n Iraq, [the Joint Contracting

⁶⁷ Jeffrey S. Thurnher, *Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts*, ARMY LAW., July 2008, at 64, 78–79.

⁶⁸ GAO REPORT, *supra* note 66, at 19.

⁶⁹ KENNEDY REPORT, *supra* note 65, at 8.

⁷⁰ Thurnher, *supra* note 67, at 73–75.

⁷¹ Specifically, this is Fragmentary Order 07-428. GAO REPORT, *supra* note 66, at 12.

⁷² *Id.* at 19–20.

⁷³ *Id.* at 14.

⁷⁴ *Id.*

⁷⁵ *Id.* at 15. The precise terminology is that the Under Secretary of Defense, Acquisition Technology and Logistics delegated this authority to the Joint Contracting Command–Iraq/Afghanistan. *Id.*

Command-Iraq/Afghanistan] has delegated to DCMA [the Defense Contract Management Agency] the responsibility to provide contract administration over private security contracts.”⁷⁶

This had strong implications for what this Article has previously described as the “quality assurance” aspects of private security contracting. “DCMA officials told us that this approach . . . includes developing a quality assurance framework, a key component of which is the agency’s development of a series of quality assurance checklists for PSCs.”⁷⁷ This allows the DOD to audit the contracting firms not merely as to finances, but as to any and all contractual requirements placed upon them to prevent, mitigate, or compensate for abuses and injuries, such as inappropriately harming civilians. It creates the administrative structure for the contract law approach to private security contracting. In detail, officials of the DCMA indicated that

the checklists have been developed by incorporating requirements from the statements of work in PSC contracts and current MNF-I [coalition command] guidance and fragmentary orders and translating these requirements into objective measurable standards intended to enable the agency to conduct regular and unbiased inspections of contracting personnel, known as surveillance audits. According to DCMA officials, these checklists are intended to ensure that PSCs are meeting contract requirements and that DOD is providing appropriate oversight over the contracts. The checklists translate security contract requirements into an audit document.⁷⁸

The DOD and the State Department also implemented other significant steps to address the problem, some unrelated to contract law, some indirectly related. For example, the DOD created an Armed Contractor Oversight Division and an incident review board. These organizations would mostly implement practical measures unrelated to contract law, such as gathering information about what certain contractors did, where they were, and what incidents occurred. Some of the other significant steps, however, could work indirectly through contracting. The new organizations could arrange additional rules, which would then be implemented through contract law and administration.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* For the sake of completeness, the GAO expressed doubt that the DCMA had enough personnel to carry out this procedure for long. *See id.* at 16–17.

The importance of this approach, as a basis for a contract law concept, should not be underestimated. This approach works through contract-based rules, through contract-based monitoring and auditing, and, at least potentially, through contract-based sanctioning. Moreover, this approach supplements whatever interactions occur that involve individual security employees who act wrongly with an elaborate contract-based web of interactions between government contract managers and the contracting firms. Such an institutional approach has great potential to prevent, mitigate, and compensate for abuses and injuries by obliging contracting firms to improve their operations, rather than just punishing individuals.

B. Using Contract Law Tools

The DOD used its new contract law tools to impose important training and reporting requirements.⁷⁹ More could be done to follow up this key approach.⁸⁰ Additional contractual requirements for private security firms could serve as a “quality control” specification, an increasingly important aspect of government contracting.⁸¹ For example, these requirements could relate to the selection and assignment of employees⁸² and the international vetting and licensing of the firms.⁸³

The private security field has both a range of employee backgrounds and a range of duties. Some employees formerly worked for special forces units in the military, with good records. Some formerly worked for regular units in the military or for domestic police forces, with good records. Some may not have such good records. Vetting the third-party nationals who work in such firms is much more complex.⁸⁴ And, increasingly in recent years, Iraqis themselves have been potential hires. Conversely, the duties

⁷⁹ See Thumher, *supra* note 67, at 82–83.

⁸⁰ See CARSTENS ET AL., *supra* note 5, at 7 (“[T]he government should also . . . [i]mprove training for security contractors and the vetting of third-country nationals [and] [e]ncourage third-party accreditation of all security contractors . . .”).

⁸¹ See, e.g., Thomas J. Kelleher, Jr. & Veronica J. Cherniak, *Inspection Under Fixed-Price Construction Contracts/Edition II*, BRIEFING PAPERS, June 1996, at 1, 7.

⁸² See Calaguas, *supra* note 25, at 79.

⁸³ See Thumher, *supra* note 67, at 88.

⁸⁴ CARSTENS ET AL., *supra* note 5, at 11 (“The government should . . . [i]nstitute better vetting procedures regarding third-country and local-country nationals to ensure that those with criminal pasts (and particularly those guilty of human rights abuses) are prevented from serving as security contractors . . .”).

for these employees range from providing security for high-value targets (e.g., American officials) in challenging urban areas to convoy duty to static protection duty, particularly in relatively quiet locales.

Contract law offers different methods to obtain additional qualities. These methods could be mandated as requirements. For example, to perform the highest level of duties, the rules incorporated in the contract could require particular sets of backgrounds for selected contractors.

Alternatively, the government could evaluate the firm's additional attributes when deciding upon awarding contracts or task orders. Ordinarily, such awards may occur on a basis that does not fully gauge or reward quality, such as a lowest price offer that is technically acceptable. Instead, awards could occur on a basis that does gauge and reward quality. Awards could occur on a "best value" basis with a trade-off that puts the most weight on quality criteria and puts only limited weight on cost.⁸⁵ Moreover, as successive awards of such contracts occur, the government could give weight in the later awards to the "past performance" on the early awards. Private security contractors may well argue that it is a hard challenge to avoid casualties to everyone under their protection, while at the same time completely avoiding casualties to local civilians. Counting "past performance" would reward those contractors who perform the best at those double challenges.

Similarly, a contract law approach may deal with postincident responsibilities.⁸⁶ For example, the government could require firms to transfer individual employees involved in any incidents to less-demanding duties (e.g., from mobile convoy duty to static perimeter duty, either temporarily or for the duration of the contract). This could occur for individual employees implicated either in dubious judgment significantly below the criminal level or in multiple instances of near-dubious judgment.

Apart from stepping up the requirements and the basis for awarding contracts, the government has powerful tools that it could employ for dealing with contractor shortfalls. Both Defense and State Departments have inspectors general (IGs) that could follow up

⁸⁵ 2 STEVEN W. FELDMAN, GOVERNMENT CONTRACT AWARDS: NEGOTIATION AND SEALED BIDDING § 12:4 (perm. ed., rev. vol. 2009).

⁸⁶ See generally Addicott, *supra* note 26.

security incidents by auditing or investigating private security firms for flawed quality control.⁸⁷

Before Nisour Square, and to some extent even after the event, some IGs did not see private contractor incidents as involving contract law issues. IGs could determine that incidents warranted some scrutiny by a criminal investigator but, apart from that, IGs had little or no role. However, the contract law approach lays the foundation for a much larger role for IGs. Now, the DOD would be rendering quality assurance requirements subject to audit. By creating much fuller incident reporting requirements, a contract law approach can establish a paper trail to monitor contractors, simultaneously with interview and other live evidence, to determine the actual quality of the firms' employees. This partly concerns whether IGs see the subject in all its seriousness. They must not leave private security quality control to the DCMA after dangerous incidents have occurred. IG involvement sends a powerful message that is hard to send through other means, much like the message sent within police departments when weapon discharge incidents are investigated seriously. Contractors disinclined to take reporting requirements seriously would view the matter very differently when IGs scrutinize failures to make full disclosures or otherwise cooperate fully in inquiries.

Moreover, IGs should have a degree of independence that others in the particular department may lack. For example, it is common, and perhaps natural, that officials working with a particular security contracting firm come to bond with it.⁸⁸ Natural as that bonding is, it does not make for an independent judgment of whether the contractor has fulfilled all requirements, including those relating to sparing local civilians from injury. An independent IG has a better chance of making an independent judgment.

Furthermore, an IG investigation could justify serious legal sanctions, contestable by the contractors if they so choose. These could include nonrenewing contractual option terms or partially or wholly terminating a contract for convenience. That, in itself, would not preclude the contractor from seeking more contracts. However, the sanctions in the most serious cases could go further, starting with

⁸⁷ See sources cited *supra* note 27.

⁸⁸ After all, the contractor employees provide both security and an atmosphere of protection that are vital to the protected individuals' sense of security. Moreover, the contractor employees may repeatedly risk their own lives to provide that protection. The "customers" naturally develop loyalty to the employees of a particular security firm.

adding negative ratings for past performance to the contractor's record and, much more seriously, terminating a contract for default.⁸⁹

These steps do make it harder, sometimes much harder, for the contractor to seek more contracts. The steps may even constitute a substantial threat to a firm's existence if it has nowhere else, other than the U.S. government, to turn to sell its services. But, these tools should be available in case an investigation uncovers a particularly bad problem. Moreover, contract law can reduce the impact on the government of an interruption of the provision of services when the government terminates a contract. Even under existing law, the government can take control of subcontracts and of work in progress during the termination of a contract. It would not be much of an extension for private security in a country like Iraq to provide via contract provisions or applicable orders that, during termination of a contract, the government has full authority to order the shifting of firm employees in the theater of combat to a different contractor (subject to the employees' choice rights), similar to the process when the government shifts subcontracts.

An adjustment process would then address any further necessary changes. Issues that may arise during this process could include government doubts about particular retained employees who worked under the terminated contract, objections made by retained employees to continue working for the new contractor, or claims by the terminated contractor that the government owes it equitable adjustments for its expenditures to recruit and train the retained employees. Just as the procedures for contract termination have traditionally been undertaken,⁹⁰ such contract tools would deal with the major problem encountered in this context of actual or perceived dependence upon particular security contractors by the government. A procedure for a new contractor retaining the terminated contract's employees would respect loyalty,⁹¹ without dependence.

⁸⁹ For a discussion of these termination steps, see TIEFER & SHOOK, *supra* note 8.

⁹⁰ For an introduction to the management of contract terminations, see Paul J. Seidman & David J. Seidman, *Maximizing Termination for Convenience Settlements/Edtion II-Part I*, BRIEFING PAPERS, Feb. 2008, at 1.

⁹¹ Many military and civilian personnel naturally feel strong loyalty to the particular security employees who serve and protect them, sometimes at risk to the employees' lives. But that loyalty goes to the guards individually or as a group, not to the entity of the private contracting firm.

C. Private Claims and Suits

1. The ATCA

Wrongfully harmed civilians can file private suits in U.S. courts. Several victims of abuse involving contractors at Abu Ghraib filed such suits. Commentators have understandably seen an important role for such suits, particularly when filed under the Alien Tort Claims Act (ATCA).⁹² Such suits have real potential for application to the conflict in Iraq following the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*,⁹³ which found federal court jurisdiction existed for suits by aliens involving conduct in a foreign country.⁹⁴ The use of the political question doctrine by contractors as a defense has not proved a grave problem.⁹⁵ While contractors do have the government contractor defense available to them, that too is not insuperable.⁹⁶

On the other hand, the ATCA only applies to violations of the law of nations,⁹⁷ a level beyond a substantial fraction of the incidents involving private security contractors. More important, when a plaintiff actually brought a claim under the ATCA, a federal court dismissed the case because the court felt the Act applies only to state actors, not private contractors.⁹⁸ The same or similar problems plague other bases for suit, such as the Federal Tort Claims Act and so-called *Bivens* actions.⁹⁹

There are counterarguments that such statutes or approaches do provide a remedy for the most serious incidents, such as Nisour Square or, if they do not provide a remedy, that they should be

⁹² See generally Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105 (2005); Borrowman, *supra* note 6; Laura N. Pennelle, Comment, *The Guantanamo Gap: Can Foreign Nationals Obtain Redress for Prolonged Arbitrary Detention and Torture Suffered Outside the United States?*, 36 CAL. W. INT'L L.J. 303 (2006); Atif Rehman, Note, *The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraib Torture Through the Alien Tort Claims Act*, 16 IND. INT'L & COMP. L. REV. 493 (2006).

⁹³ 542 U.S. 692 (2004).

⁹⁴ *Id.* at 714.

⁹⁵ See *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 16 (D.D.C. 2005).

⁹⁶ See Rakowsky, *supra* note 28, at 389–98.

⁹⁷ *Sosa*, 542 U.S. at 699.

⁹⁸ *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 56 (D.D.C. 2006).

⁹⁹ Borrowman, *supra* note 6, at 423–25 (discussing these difficulties and the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*).

broadened.¹⁰⁰ A federal lawsuit can provide a great deal.¹⁰¹ However, whatever the potential for such suits, these actions could use, like prosecutions, supplementation by a contract law approach. They face major legal barriers, they proceed slowly, and they do not apply to occasions involving injuries to civilians without wrongful abuse, such as incidents during which civilians are shot in cross fire by contractors legitimately protecting officials from real and deadly insurgent attacks.¹⁰²

2. *Claims*

The United States already has elaborate statutory mechanisms for processing claims for injury or damage by the military. This scheme has operated throughout the world, particularly with the worldwide system of military units stationed in bases, which began during the Cold War, producing claims as a result of everything from traffic accidents to the incidental effects of military maneuvers. This claims system has actually operated in Iraq, principally for claims arising under the Foreign Claims Act (FCA). As of 2006, 19,000 claims had been resolved in Iraq, with a payout of over \$19 million. Individuals, such as Iraqi civilians, with injuries or damage caused by the U.S. military file claims with or without local Iraqi legal assistance. Military units have Judge Advocates General to resolve the claims.

Traditionally and significantly, claims are resolved locally and under local law—not in the United States, and not under U.S. law. Also, payment of a claim does not require a finding of abuse or fault by the military personnel; it suffices that injury or damage is caused by them, without the need to find fault with how they acted. At its best, these rules produce a sense in the local population of equity and fairness concerning the handling of claims, eliminating, or at least mitigating, what could otherwise become a major source of ill will against the United States. An Iraqi civilian or family member could file a claim simply with evidence of injury caused by American

¹⁰⁰ *See id.* at 424.

¹⁰¹ That includes authoritative judicial rulings that make binding law for the future, discovery pursuant to the Federal Rules of Civil Procedure regarding the roles of firms in not preventing incidents, the class action mechanism, and the potential for expansive remedies.

¹⁰² Moreover, whatever the potential for such suits—particularly when the government does not take reforming steps—the contract law approach serves as a supplement with very powerful tools available to the government but not the courts, such as the adoption of new rules and orders implemented through contractual provisions.

contractors and, perhaps, with a written statement or affidavit to show the alleged victim was not regarded as an insurgent. The claimant would not need to allege culpability in the matter, but simply injury.¹⁰³

The claims system has its flaws. Jonathan Tracy, who served in the Army as a Judge Advocate General from 2002 to 2005, offered a powerful criticism. The FCA, by its terms, only allows claims for “noncombat” activity.¹⁰⁴ As the United States has done in past conflicts since Vietnam, it implemented an additional payment program. In Iraq, those payments came as “condolence payments” from the Commander’s Emergency Response Program (CERP) fund, but were sometimes treated as low priority and kept small.¹⁰⁵

Currently, the claims system addresses claims against the United States and its personnel, not private contractors. There have been published reports about offers of condolence payments in some contractor incidents, but not systematically. As another alternative, there could also be a bilateral U.S.-Iraqi claims commission in the wake of the SOFA. Regardless of these alternatives, it is worth describing how a contract law-based claims system would have functioned with incidents from 2003 onward.

The U.S. government could implement a contractor claims system with regulations, orders, and contract provisions, requiring contractors to participate. This system could authorize the relevant Judge Advocate to receive and to resolve claims by Iraqi civilians against contractors. As with Foreign Claims Act claims, the Judge Advocate would decide these claims locally, under local law, and without the need to find abuse or fault.¹⁰⁶

¹⁰³ For example, the civilian would be entitled to payment even if the injury resulted from a shooting by a contractor made in reasonable action during an exchange of fire with insurgents. The decision on a claim would be separate from any internal government decision regarding whether the shooting nevertheless reflected contractor flaws. The gravamen of the claim is injury without regard to wrongful abuse.

¹⁰⁴ 10 U.S.C. § 2734 (2006).

¹⁰⁵ Tracy noted several problems, including: “payments for every death, injury, or property damage incident are limited to \$2,500,” which was so low that it “leaves survivors bitter and frustrated with the United States[,] . . . [c]ommanders prioritize CERP funds for reconstruction projects . . . at the expense of condolence payments[,] . . . [and] the rules governing condolence payments are ad hoc.” Tracy, *supra* note 30, at 18.

¹⁰⁶ An interesting question, which need not be resolved, concerns when or under what circumstances a private security firm with a cost-plus contract could receive reimbursement for claims payments—a type of question that often arises about traffic offenses in domestic contracts.

An important doctrinal difference between FCA and contractor claims concerns the FCA's barrier for "combat" claims. For claims against the military, this barrier has been eased and lowered in various ways, such as condolence payments out of CERP funds. However, for contractors, it makes sense to eliminate the barrier almost altogether.¹⁰⁷ The definition of private contractors' objectives is intended to keep what the contractors do out of the definition of "hostilities." For reasons of international law and local relations, the U.S. government prefers both to label what private security does as protective activity that involves the use of force only for defense and not to consider such purely defensive action as "combat."¹⁰⁸

A claims system founded on a contract law approach accomplishes many important objectives. First, it helps complete the contract law plan. Contractual provisions concerning training, selection, accreditation, and so forth seek to prevent incidents. When incidents occur, contractual provisions trigger reporting requirements and claims procedures. All of these produce audit and investigation trails and affect the future use of the contractor, similar to other kinds of quality control for contractors in other situations. The claims procedure occurs neutrally and independently and avoids leaving either the quality of contract performance or the amount of claim payment to the self-interested private security firm.

D. Third-Party Beneficiary

As noted, for all that the claim procedure accomplishes, an important role may still remain for private suits in U.S. courts. Major reforming lawsuits can sometimes do what simple individual claims by locals cannot: provide discovery regarding the roles of private security firms in not preventing incidents, activate the class action mechanism, provide authoritative judicial rulings, and open up expansive remedies. Moreover, even the public attention from a lawsuit in the United States may produce pressure for reform.

Once the contract law approach operates, civil suits by victims have a whole new potential. The U.S. government's agencies may, or

¹⁰⁷ In the few instances when contractors do get drawn into joining with military units under a combat commander, it may make sense to treat claims the way claims against those military units are treated. However, this situation is rare compared to the common occurrence of contractor incidents without any involvement of military units.

¹⁰⁸ Other approaches require the U.S. government to walk too fine a line and water down what should remain strong distinctions between what combat troops do and what private security does.

may not, vigorously implement the contractual requirements. If an agency fails to do so, a private security firm may trigger incidents with victims by failing to fulfill its contractual duties. Then, a victim's suit could provide the mechanism to challenge the company for failing to live up to those contractual duties. This issue matters not only in Iraq, but even more for the future of the contract law approach to private security contracting. As discussed later, the contract law approach achieves its fullest potential if, besides the government overseeing those contract law provisions, those injured can invoke the courts to operate as overseers. Injured civilians and their lawyers, including lawyers specializing in human rights cases, change the situation from one of helpless occupation to one in which there is a kind of accountability for security firms' abuses.¹⁰⁹

So, it is of high interest to many parties whether the class of those injured by faults of contracting firms, e.g., by breach of hiring and training provisions, may use contract law tools in private suits. This leads to the inquiry of whether those injured persons constitute a class of third-party beneficiaries for the contract provisions previously discussed, e.g., contractual requirements for vetting and training of the armed contractor employees.

The law of third-party beneficiaries merits a brief reprise. As commentators explain, "[a] third party beneficiary contract arises when two parties enter into an agreement for the benefit of a third person."¹¹⁰ Traditionally, contract law restricted third-party beneficiary rights. This relaxed as the twentieth century began and continued relaxing from the first *Restatement of Contracts* to the *Restatement (Second) of Contracts*.¹¹¹ It has become second nature that the quality standards in an ordinary contract, e.g., a contract for the purchase of a car, may apply to "third-party beneficiaries" who are personally injured. Namely, someone injured by a car made with defective brakes or other defective safety features can sue the manufacturer. The victim sues as the third-party beneficiary of the applicable warranties in the contract of sale for the car.

Aside from the general doctrines for third-party beneficiaries, special rules have developed for these beneficiaries of government contracts. The *Restatement (Second) of Contracts* codified these

¹⁰⁹ Oversight and pressure for reforms of firms' practices can occur, preferably with, but even without, the government making its own effort.

¹¹⁰ Summers, *supra* note 31, at 880.

¹¹¹ *Id.* at 880–81.

separate rules in section 313: “The rules stated in this Chapter apply to contracts with a government or governmental agency *except to the extent that application would contravene the policy of the law* authorizing the contract or prescribing remedies for its breach.”¹¹² There is also a subsection, section 313(2), devoted to the specific issue of consequential damages.¹¹³

Several initial aspects of section 313 support considering injured civilians (primarily, in this instance, Iraqis) as third-party beneficiaries of the provisions in private security contracts, such as those providing for training for security employees. First, section 313 starts by applying the regular third-party beneficiary analysis to government contracting.¹¹⁴ Furthermore, the *Restatement’s* illustrations 3¹¹⁵ and 5¹¹⁶ for this section support expansive third-party beneficiary status in the instances of personal injury, precisely the issue in Iraq.¹¹⁷

¹¹² RESTATEMENT (SECOND) OF CONTRACTS § 313(1) (1981) (emphasis added).

¹¹³ In particular, a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless (a) the terms of the promise provide for such liability; or (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.

Id. § 313(2).

¹¹⁴ Arguments against applying the regular rule are treated as an exception: “The rules . . . apply . . . except to the extent that application would contravene.” *Id.* § 313(1). Moreover, it is hornbook law that “the status of [parties] as third-party beneficiaries is not defeated by the fact that they are not specifically named in the [c]ontracts, since they are identified at the time performance is due.” *Holbrook v. Pitt*, 643 F.2d 1261, 1273 n.23 (7th Cir. 1981).

¹¹⁵ A, a municipality, enters into a contract with B, by which B promises to build a subway and to pay damages directly to any person who may be injured by the work of construction. Because of the work done in the construction of the subway, C’s house is injured by the settling of the land on which it stands. D suffers personal injuries from the blasting of rock during the construction. B is under a contractual duty to C and D.

RESTATEMENT (SECOND) OF CONTRACTS § 313 cmt. c, illus. 3.

¹¹⁶ A, a municipality, owes a duty to the public to keep its streets in repair. B, a street railway company, contracts to keep a portion of these streets in repair but fails to do so. C, a member of the public, is injured thereby. He may bring actions against A and B and can recover judgment against each of them.

Id. § 313 cmt. c, illus. 5.

¹¹⁷ Illustration 3 in particular drives home this point. That illustration shows that a contractor who injures bystanders in either their person or property is liable for damages.

Above all, the “exception” language in section 313 of the *Restatement (Second) of Contracts* causes the analysis to turn on the “policy of the law authorizing the contract or prescribing remedies for its breach.”¹¹⁸ So, the question as to third-party beneficiaries of post-Nisour Square “quality control” contract provisions, such as those concerning training or accreditation, turns on what the “policy” of the law is. Contractors would argue that, as with provisions of U.S. government contracts in general, the provisions exist of, by, and for the U.S. government. Moreover, the government has its own internal remedies for enforcement. Whether the government actually resorts to strong remedies such as termination for default by private security firms, these firms would argue, is irrelevant.¹¹⁹

The better arguments indicate that the policy behind the “quality control” contract provisions is meant to reduce harm to civilians. This does support considering injured civilians as third-party beneficiaries. Above all, the policy reason for instituting these rules after Nisour Square has been, and continues to be, limiting the alienation of the local population from the United States. Training and so forth has as its *raison d’être* to protect civilians; in other words, protecting civilians is not merely some unintended and incidental benefit.

As a classic law review casenote put it, a right of action is favored “when there is evidence that existing remedies are inadequate and that additional remedies would increase the likelihood of compliance and afford direct relief to a class which the legislature wished to protect.”¹²⁰ And this third-party beneficiary status does not amount to opening the floodgates of private litigation against government contractors.¹²¹ Conversely, the argument that such suits would

This is to be expected. A bystander who sues without being injured typically argues a right to receive a benefit in the government contracting context. This bystander’s case is less compelling than a bystander who is injured and has suffered, without having done wrong, not merely the denial of a benefit but the infliction of a loss—and a personal injury loss at that.

¹¹⁸ *Id.* § 313(1).

¹¹⁹ Lawsuits, they would argue, would disturb the delicate balance and discretion of the government’s contracting officers and other contract overseers.

¹²⁰ Recent Case, *supra* note 32, at 653.

¹²¹ Relatively few features of government contractors match the particular record underlying contract provisions to protect Iraqi civilians. While some new government contracts do arise from major incidents or scandals, these very rarely concern injured civilians, as the private security contracts do, but usually concern incidents or problems in contract award, modification, finance, etc.

interfere with the government's own internal remedies does not match reality. The government's overseers of these contracts are sometimes overwhelmed by the scale of their many tasks. Budget considerations limit their numbers, particularly in the theater of war. These government overseers have rarely gone through the full procedures to impose the strongest remedy, termination, for default. Private suits on behalf of injured civilians supplement the internal overseers, not hinder them.

CONCLUSION

The rise of the global private military industry has elicited extensive and diverse positions in legal literature. Some writers argue a total incompatibility between the emerging private military and something fundamental. Perhaps, they argue, sovereignty itself, defined as the state's monopoly on the use of force, clashes with the emerging private military.¹²² Or perhaps the established international law, such as the Geneva Conventions on the limited war role of contractors, clashes with the emerging private military.

On the other hand, some writers posit solutions to the problems created by the private military industry along the lines of, loosely speaking, new international humanitarian law¹²³ or criminal or tort lawsuits. Those supporting criminal prosecution solutions look to a larger role for MEJA or the UCMJ. Others support civil lawsuits based on norms such as the law of nations, pursuant to the ATCA.

This Article does not dispute the importance of international, criminal, or tort law perspectives on the emerging, global private military industry. On the contrary, it views such perspectives as very possibly having validity. Nevertheless, the contract law approach brings distinct advantages. First, it applies to the private military firms, rather than to their employees. The firms have the resources and status, which their individual employees alone do not, to initiate and improve major programs for preventing injuries or abuses—programs such as accreditation, training, and vetting of new hires. Second, the contract law approach uses, and conforms to, the main thrust of government contracting law and its apparatus, which is the

¹²² See, e.g., Scott M. Sullivan, *Private Force/Public Goods*, 42 CONN. L. REV. 853, 861–62.

¹²³ See Gaston, *supra* note 15, at 243–45.

system that purchases private military services and oversees the implementation of that purchase.¹²⁴

Generalizing further, contract law tools in this context and in related ones may produce a virtuous cycle. Commentators on international law have tended to expect a “top-down” effect—that international agreements or principles on private security will bring about individual state regulation.¹²⁵ Top-down international law may work. But, as a supplement, the elaboration of contract law tools by the United States in the context of the conflicts in Iraq and Afghanistan may affect both future U.S. action and action by other nations. For example, when the United States sets accreditation and training standards, both U.S. firms and third-country firms will seek to meet them. It then becomes simpler for other countries, such as those in the European Community, to institute similar standards; once the United States adopts standards, European firms that do business with the United States develop familiarity with, and a record of meeting, those standards.

The role of contract law tools in this context might serve as a model in other contexts. For example, government contracting firms often play important environmental roles. They may clean up, store, process, or dispose of waste. Criminal suit, civil suit, administrative action, international law, and other methods for dealing with problems with these firms may well work. Still, as a supplement, government contracting firms should come to comply with contract provisions on such matters and may be part of developing standards as to further provisions and strengthened contract oversight. This approach supplements, without supplanting, the other approaches.

Doubters may raise some legitimate questions. Above all, the contract law tools depend on the government departments making the contracts actually taking active oversight roles, rather than depending on neutral bodies like courts or international agencies or on private lawsuits. For many reasons, departments may not rush to do so.¹²⁶ In

¹²⁴ Criminal cases and tort suits have their usefulness, but government contracting law operates largely in channels that do not depend on these actions. Instead, government contract law uses contract provisions and oversight from contracting officers, agencies that assist them, other agencies like inspectors general, and, under specific circumstances, third-party beneficiary activity.

¹²⁵ See generally Gaston, *supra* note 15; Shawn McCormack, Note, *Private Security Contractors in Iraq Violate Laws of War*, 31 SUFFOLK TRANSNAT'L L. REV. 75 (2007).

¹²⁶ The departments may have loyalty to private security firms for reasons ranging from gratitude for their services to an entrenched interest among strong supporters of contemporary policy on a war. Quite apart from such loyalty, officials may have a high

any event, whether from inertia, capture, or sincere views of national interest, departmental officials themselves may not rush to exercise their contract law tools.¹²⁷

These serious doubts may explain the limited uses of contract law tools before Nisour Square. However, the significant steps taken after Nisour Square tell a different story.¹²⁸ The increasingly used contract law tools, such as provisions requiring training and incident reporting, represented advances. Expanding that use did not require intervention by a neutral body, like a court or an international organization. Rather, the force of the public reaction—from Iraqis, Americans, and people of other countries—sufficed.¹²⁹

Moreover, time brings congressional attention and new administrations into office. The limits that one administration imposes on its action, Congress or a successor administration may move beyond. Much of the history of government contracting, including advances in response to incidents or scandals, involves the use of contract law tools pushed by Congress or new administrations.¹³⁰

Private security contractors represent an important new type of nonstate institutions and are becoming increasingly important in national security and international affairs. As organizations that exist by contracts, they represent an opportunity for reform through the contract law approach. How that approach works with the reality of

awareness of the need to rely on the firms and a reluctance to tamper with the terms for obtaining what the officials need.

¹²⁷ Doubts may also arise regarding whether many of the countries that resort to private military firms, particularly third-world countries, nondemocracies, or both will follow the United States by imposing or enforcing restraints on such firms. The indirect influence of U.S. contract tools may constrain major countries from operating very differently elsewhere. Moreover, for some users of private military, no approach may work—not civil suits, international organizations, nor the indirect influence of U.S. contract tools. Still, controlling problems in the United States and some other countries, even if not worldwide, would represent a major advance.

¹²⁸ To be sure, there were limits on the administrative reaction after the incident. The contract with Blackwater was not terminated; in fact, the State Department initially exercised its option to continue the contract.

¹²⁹ See Ginger Thompson & Katherine Zoepf, *Lawyers Say U.S. Reckless in Charges for 5 Guards*, N.Y. TIMES, Dec. 7, 2008, at A28 (“[I]mmunity for security contractors became a major issue recently in negotiations of the security pact that lays the ground rules for American troops’ continuing presence in Iraq.”).

¹³⁰ For example, in the early 1960s, the new administration of President Kennedy and Congress invoked those tools, in response to scandals during the 1950s, to have greater disclosure of contractor pricing information and greater controls on ethics issues, such as revolving doors in employment.

private security in Iraq and Afghanistan will provide guidance for the future of dealing with such institutions.

