The Hidden Costs of Contracting:

Private Law, Commercial Imperatives and the Privatized Military Industry

Rebecca Ulam Weiner, December 2008

On September 16, 2007, a group of contractors working for the firm Blackwater USA engaged in a chaotic and bloody firefight in Baghdad's Nisoour Square that left 17 Iraqi civilians dead, Blackwater's $500 million in government contracts in jeopardy and the future of the privatized security industry in question. What exactly happened in Nisoour Square remains in dispute. Blackwater alleges that its contractors came under small arms fire and lawfully engaged to stop the threat. The Iraqi government and the US military both argue that Blackwater opened fire unprovoked and used excessive force—including machine guns, grenade launchers and helicopter fire. The FBI, which is conducting a formal investigation into the shootings on behalf of the Department of Justice, argues that 14 of the 17 deaths were unjustified killings and finds no evidence, thus far, that Blackwater was justified in shooting at civilians.

The Nisoour Square incident was broadly proclaimed to be the final straw that would force the White House, Congress and the courts to come to terms with the complex and often fraught relationship between the U.S. military and the increasingly ubiquitous, increasingly interoperable private military contractors that it hires. [1] The FBI investigation marks the first time since the end of the Cold War that the US government is attempting to hold a private security company criminally liable for extraterritorial crimes committed in the course of a government contract.

However, while the episode has subjected the privatized military industry to heightened scrutiny from the Iraqi government, the US military, Congress, and the public, the Department of State and the Department of Justice contend that despite recent efforts to the close the legal loopholes through which private military contractors have slipped in the past,[2] there remain considerable, perhaps insurmountable, hurdles to prosecution.

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[1] The private military service provider industry consists of myriad types of companies, often referred to generally as Private Military Companies, or PMCs, some engaged in supplying logistics and support to troops, such as Halliburton's subsidiary, Kellogg, Brown and Root (KBR), Bechtel, or General Electric. Others, loosely dubbed Private Security Companies (PSCs), provide security, policing, training, consulting, interrogation and intelligence services, while others, such as the now-defunct South African firm Executive Outcomes and British firm Sandline, International, provided direct combat support and weapons to their clients. This paper will use the most common designation, Private Military Company, or PMC, to refer to the spectrum of private companies that perform services related to warfare. However, it will focus primarily on one particular subset of the industry: companies that provide services such as security, policing, training and consulting whose contractors are armed and who engage actively in defensive military operations. (See Deborah Avant, *The Market for Force,* New York: Cambridge University Press, 2005, at pg. 1, fn. 3, and Singer, P. W. *Corporate Warriors: The Rise of the Privatized Military Industry,* Ithaca and London: Cornell University Press, 2003, at 8).

[2] As will be discussed at greater length *infra*, due to their unique legal status, PMCs, as well as the contractors they hire, are difficult to prosecute. Due to their extraterritorial activities, private-sector status, and government contractor classification, most PMCs fall outside of the jurisdiction of most U.S. criminal statutes, and they have been granted immunity from Iraqi law.[2] In the absence of a formal declaration of war, the Uniform Code of Military Justice, which governs military criminal law, does not apply to civilians. The legal status of PMCs under international law is no more certain. PMCs have no clear place under the Geneva Convention framework, nor do they fit the anachronistic definitions that form the basis of international treaties and resolutions prohibiting

Meanwhile, at the time the grand jury investigation into the Nisour Square shootings was opened, a civil lawsuit was filed by the New York based Center for Constitutional Rights on behalf of the Iraqi families who lost loved ones in the incident. These families are suing Blackwater in tort, under causes of action including assault and battery, intentional and negligent infliction of emotional distress, negligent hiring and wrongful death. While the jurisdictional challenges faced by the Department of Justice may ensure that Blackwater never faces criminal liability, the barriers to entry for a civil suit are far lower. The Blackwater litigation is one of a handful of civil lawsuits that have been filed against private military contractors since the inception of the Iraq war, and it is one of the many ways that corporate law and commercial imperatives have begun to impact the conduct of war due to the burgeoning of the privatized military industry.

After all, private military companies are by definition products of the elaborate civil laws and regulatory structures that shape all corporations, and they are subject to corporate pressures that the military does not face. Accompanying the use of PMCs are costly externalities associated with their private-sector status—not only tort and contract liability to employees and shareholders, but also compliance with corporate statutes and regulations, insurance costs, and the incentive structure created by the government contracting regime. These constraints have begun to impose acute limitations, both financial and operational, on the PM industry—and by extension on its clients. In short, the government's use of PMCs has caused corporate and commercial law to profoundly affect the conduct of war, and the consequences remain unstudied.

This paper will apply a market-based analysis to the PM industry, focusing on PMCs not as rogue mercenaries, but as a case study in the unintended consequences of privatization. In particular, it will take up three structural constraints on the PMC-military relationship: the civil liability regime, the insurance regime, and the government contracting regime. While the conventional critique of the PM industry focuses on its lack of accountability, this paper will argue that the most significant liability of PMCs may turn out to be what is claimed as their primary advantage: efficiency.

After a brief introduction to the origins and organization of the privatized military (PM) industry, Part I of this paper presents an overview of the regulatory and prosecutorial challenges facing the legal system with regard to holding PMCs accountable for criminal misconduct. Part II takes up in turn each of the three primary structural constraints on the PMC-military relationship: the civil liability regime, the insurance regime, and the government contracting regime. Part III concludes with a series of steps that stakeholders might take to mitigate the operational and financial inefficiencies caused by these constraints while increasing accountability, in order that this increasingly common mode of conducting warfare may begin to safely and securely generate the advantages upon which it was predicated.

INTRODUCTION: ORIGINS AND ORGANIZATION OF THE PRIVATIZED MILITARY INDUSTRY

A: Origins of the PM industry

Despite a new aesthetic, a new name, and a new role, the Private Military Company is not an isolated organism, but is rather a point on a continuum of organizational styles of the state's use of force. Mercenaries, often highly evolved business operations not so dissimilar from

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mercenary activity. (Patel, Mayur, "The Legal Status of Coalition Forces in Iraq after the June 30 Handover," ASIL Insights, American Society of International Law, March 2004).

today's PMCs, have supplemented and supplanted public armies for thousands of years (their first known client was Pharaoh Ramses II in Egypt around 1500 B.C.)[3] In fact, historically, it is the assumption of the state's monopoly on violence that is the aberration, not the public-private partnership in the provision of force.

But on the spectrum of organizations, today's PMCs would align themselves more closely with management consultants such as McKinsey & Company than with the German Hessians and the Italian condottieri of the Renaissance era, or the legendary marauders of post-colonial Africa in the 1960s and 1970s.[4] In essence, they are commercial enterprises hired in support of government activities and are anxious to distinguish themselves from their mercenary forbears.

The modern PM industry is a product of the end of the Cold War, which generated both the supply and demand for its services. On the supply side, the Cold War left both poles with swollen defense budgets and manpower redundancies that were eliminated based on optimistic assessments of the windfalls to be gained from scaling down and sourcing out. The PM industry provided a remunerative extension to otherwise non-fungible careers in the armed forces, particularly for elite and desirable Special Operations Forces (SOFs). In the U.S., military end-strength declined from 2.1 million to 1.4 million between 1989 and 1999,[5] and military bases abroad declined from a peak of 115 in 1956 to 27 in 1995.[6] In the former USSR, experts estimate that up to 70% of the KGB have joined private military service providers since the end of the Cold War.[7]

Demand has been fueled in large part by changes in geopolitical circumstance since the end of the Cold War—in particular the frequent regional, ethnic and religious conflicts that flared up during the post-1989 thaw. The demise of the domino theory of national-interest ubiquity meant that many small states that the U.S. and the USSR had been sparring over were suddenly overlooked and ignored. When the assistance that these states had relied on could no longer be bargained for, they realized that it had to be bought.

While PMCs sustained a strong rate of growth initially by contracting with governments in unstable states such as Angola or Sierra Leone, the market's expansion is due to the huge surge in demand for contracts from the United States and the United Kingdom. Over the past two decades, the U.S. government's policy on PMCs has evolved from apprehension to agnosticism to acknowledged dependency. As a result, PMCs are now far less likely to be operating behind their headquartering state's back than with its permission, at its behest, or alongside it.

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[3] The first cited instance of mercenary use was in 401 B.C., recorded by Xenophon, who reported that Cyprus had employed 10,000 mercenaries to topple the Persian throne. The Greeks used them in the 4th c. B.C., as well as the Macedonian successors to Alexander the Great, and the Roman Empire, which hired Teutonic tribesmen as soldiers. The Grand Catalan Company of the Aragon region was the first "free company." Led by German Roger von Blum, it was initially hired by the Byzantine emperor to fight the Turks. In 1311, the Grand Catalan Company established its own ruling duchy which lasted for 63 years (Zarate, Juan Carlos, "The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder," *34 Stanford Journal of International Law 75* (Winter 1998), at 83.

[4] Which latter came to a vainglorious end trying to topple the government of the Seychelles in 1981, after having infiltrated dressed as a visiting beer-tasting team calling themselves "the Ancient Order of the Frothblowers." ("Mad Mike Comes in From the Cold," *The Economist*, February 16, 2002.)

[5] Bruner, Edward F. "Military Forces: What is the Appropriate Size for the United States?," *CRS Report for Congress*, Congressional Research Service: The Library of Congress, May 28, 2004.

[6] Silverstein, Ken. *Private Warrior* (New York: Verso, 2000) at 144.

[7] Singer, *Corporate Warriors*, at 53.

In the U.S., the proliferation of PMCs owes more to changes in policy than to changes in geopolitical circumstance. Here, the demand for outsourced force was driven by the coalescence of two philosophical and strategic trends in post Cold War statecraft and military policy.

The first was widespread downsizing of the government, which was motivated by the assumption that public-private partnerships can harness the efficiency of the market economy to improve even the most vital state functions, including the administration of violence. [8] Because the demand for military services fluctuates so drastically, the military was thought to be particularly well-suited to respond to the advantages of outsourcing.[9] According to proponents of military privatization, PMCs provide valuable "surge capacity" that makes it more efficient for the military to hire from a pool of temporary, highly trained experts in times of war, even at a cost premium, than to rely on a permanent standing army that drains resources in peacetime with pension plans, health insurance, education benefits and child care aid.[10]

The second is a series of dramatic changes in military technology, which some have termed a Revolution in Military Affairs.[11] By relying on surgical strikes by precision-guided munitions and stealth weaponry, and by focusing on joint-service operations that flatten and decentralize the command structure, the military has transformed warfare by using the tools of the information revolution.[12] As it has done so, it has relied increasingly upon civilian contractors for their technical expertise. [13] During the Iraq war, for instance, civilian contractors ran the computer programs that generated the tactical air picture for the Combined Air Operations Center, supported the data links that the Predator unmanned aerial vehicles (UAVs) used to transmit information, operated the guided missile systems on some naval brigs, and supervised the digital command-and-control systems of ground troops. Contractors continue to maintain the Army's Guardrail surveillance aircraft.[14]

Public-private partnerships of this sort have the tendency to become self-reinforcing: the insulation of expertise associated with use of sophisticated technologies ensures a continued need

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[8] See in particular Philip Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (New York: Anchor Books, 2002).

[9] In 1992 Vice President Cheney's Pentagon paid U.S. contracting conglomerate Brown & Root Services (now owned by Halliburton and known as Kellogg, Brown and Root, or KBR) a total of $8.9 million to research and write a classified report describing how private companies could provide logistics to U.S. troops in future war zones. In 1995, a report of the Defense Science Board concluded that the Pentagon could save up to $6 billion per year by 2002 by privatizing all of its support functions that do not deal directly with combat provision. One of the results of the Defense Science Board study was the inception of the LOGCAP (Logistics Civil Augmentation Program), an enormous single source umbrella contract that is currently held by Kellogg, Brown & Root and governs all of the Army's logistics operations around the world. It is currently valued at over $12 billion. (

[10] See Frontline's "Private Warriors," http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/.

[11] Kamienski, Lucien, "The RMA and War Powers," *Strategic Insights*, Volume II, Issue 9 (September 2003).

[12] *Ibid.*

[13] The military's embrace of the tools of technology to increase efficiency and capability on the battlefield derives at least part from political expediency and the power struggle over war-making authority between Congress and the Executive Branch. The 1973 War Powers Resolution (WPR), passed over the veto of President Nixon, ostensibly strengthens the President's Congressional consultation and reporting obligations prior to commencing hostilities abroad. Inadvertently, however, the WPR succeeds in creating new emphasis on the speed with which operations are conducted and completed. In brief, the WPR gives the Commander-in-Chief a sixty-day window of near exclusive authority to conduct combat operations subject to consultation and reporting requirements before formal approval must be sought. The WPR thus has the ironic consequence of encouraging the use of entities and technologies that streamline and maximize the efficiency of force capabilities in order to avoid running afoul of its clock, aggrandizing rather than limiting executive power as it does so. (Kamienski, "The RMA and War Powers.")

[14] Isenberg, at 21.

for experts. Supplementing smaller forces with large numbers of contractors distorts accurate forecasts of what a particular deployment entails—contracting begets more contracting as PMCs become increasingly indispensable. As one expert points out, evidence of the increased saturation of contractors on the battlefield trend is striking: during the first Gulf war, the ratio between contractors and soldiers was 1 to 50; by the Bosnian war it had grown to 1 to 10.[15] In Iraq today, depending on who is counting, it is estimated to be about 1 to 6.[16]

B: Organization of the PM Industry

PMCs vary vastly in size, scope, quality and professionalism. Some are fly-by-night operations whose assets are limited to a handful of employees, a website and a bank account. Others, like Armorgroup, the British-based risk management and risk assessment corporation, Vinnell, the support service and training firm that trains the Saudi Arabian National Guard, or MPRI, the consulting and training corporation that helped train the Iraqi army, are publicly held, multinational corporations of thousands. Many PMCs are highly sophisticated entities that possess structured business models, extensive client networks, and attentive public relations. The industry possesses a growing number of advocacy groups, including the U.S.-based International Peace Operations Association (IPOA), the British Association of Private Security Companies (BAPSC), and the Private Security Associations of Iraq (PSAI).[17]

While to date there has not been a reliable count of the total number of non-Iraqi private contractors working Iraq, estimates range from 90,000 up to about 140,000, of which about 20,000 are armed security contractors. [18] Clients include the Departments of Defense, State, Interior, the CIA, foreign governments (most commonly, the United Kingdom), international organizations, NGOs, and reconstruction providers.

While the PM industry's typology is variegated and shifting, making strict definitions difficult to pin down as well as politically contested, there are three broad categories of military contractors: combat providers; support and logistics providers; and the providers of security, policing, training, intelligence, interrogation or consulting services, commonly known as Private Security Companies, or PSCs.[19]

Most closely aligned with traditional mercenary activity, the first category is disfavored and extremely limited. Notable combat service providers include the South African firm Executive Outcomes, which was disbanded in 1999 pursuant to a South African law prohibiting mercenary activity, and the British firm Sandline, International, that was dissolved in 2004 following inquiries regarding financial misconduct and tax evasion.[20] Because civilian direct engagement in direct combat contravenes the laws of war as well as international prohibitions on

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[15] Singer, Peter W. "Corporate Warriors: The Rise and Ramifications of the Privatized Military Industry," *International Security*, 26(3) Winter 2001/2002. Furthermore, between 1994 and 2000, the U.S. Department of Defense alone entered into about 3,000 contracts with PMCs, at a cost of more than $300 billion. (See ICIJ, *Making a Killing*, at 10).

[16] Assuming 20,000 private security contractors and 127,000 U.S. troops, as of June 26, 2006. See Frontline, "Private Warriors," http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/. See also O'Hanlon, Michael and Nina Kamp, "Iraq Index: Tracking the Variables of Reconstruction & Security in Post-Saddam Iraq," *Brookings Institute*, (www.brookings.edu/iraqindex), June 26, 2006.

[17] For more information, see: www.ipoaonline.org, http://www.**bapsc**.org.uk/, http://www.pscai.org/.

[18] Frontline, "Private Warriors," http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/, Brookings Iraq Index, www.brookings.edu/iraqindex.

[19] The term is Singer's, referring to "businesses that provide governments with services intricately related to warfare." (Singer, P.W. "Outsourcing War," *Foreign Affairs*, March 1, 2005)

[20] ICIJ, at 44.

mercenary activity, most contemporary security providers are careful to circumscribe their activities to avoid being considered combat providers.

On the opposite end of the spectrum, support and logistics service providers such as Kellogg, Brown and Root (KBR), Parsons, or Fluor build base camps, reconstruct pipelines, electricity grids, water treatment facilities and other infrastructure, run hospitals and mess halls, clean, cook and do laundry for troops, run supply convoys, drive trucks, etc. Logistics and support contractors are generally unarmed, and they do not engage in firefights or provide tactical support. Logistics and support providers comprise the largest subsection of the privatized military industry employed in combat zones and earn a concomitant share of the industry's profits.

The middle group, the security, policing, training, consulting and intelligence providers known collectively and loosely as Private Security Companies, or PSCs, are the primary focus of this paper. Well-known PSCs include Military Professional Resources, International (MPRI), Blackwater Security Ltd., Dyncorp, Triple Canopy, Custer Battles, or Aegis. PSCs are often highly skilled talent-concentrators, staffed by former special operations forces of the U.S. military and other highly trained soldiers, and offer their employees and independent contractors high remuneration in exchange for high risk. PSC contractors bear arms, occasionally wear uniforms, and although their mandate is to provide only defensive tactical and combat support, are often called upon to engage in combat operations.

In April 2004, for instance, eight employees of the security company Blackwater Security Consulting fended off an intense firefight by hundreds of Iraqi militia members on the U.S. headquarters in Najaf, sending in its own helicopters to remove a wounded Marine and replenish depleted ammunition.[21] That same week, employees of the security firm Triple Canopy repulsed a siege from the radical Shiite Mahdi Army at the CPA compound in the Iraqi city of Kut for over two days, protecting the CPA administrators who had been abandoned by the retreat of non-U.S. Coalition forces. They were ultimately evacuated when they ran out of ammunition—not by the U.S. Army, but by Kellogg, Brown and Root.[22]

While their share of the industry's overall revenue is relatively low (experts pin it at about $2 billion annually),[23] PSCs attract a significant share of the controversy and concern over the PM industry, due to the riskiness of their operations and the difficulty of maintaining appropriate oversight and accountability over their activities. For this reason, PSCs offer the most interesting point of departure for a study of the complexities entailed in the introduction of marketplace dynamics onto the battlefield.

PART I: THE LEGAL LACUNA

Even before the invasion and occupation of Iraq in March 2003, private military contractors had begun to take on increasingly "core" military functions, providing services ranging from security, strategic planning, operational support, technical skills, communications, intelligence, interrogation, battlefield training, to operational combat.[24] However, the Iraq war was a watershed moment for the industry, which grew vastly in size, scope and notoriety. PMCs

[21] Isenberg, at 31.
[22] Bergner, Daniel, "The Other Army," *The New York Times*, August 14, 2005.
[23] Conversation with Doug Brooks, March 23, 2006. Singer, however, uses an overall PM industry revenue figure of $100 billion. See Singer, P.W. *Corporate Warriors*: *The Rise of the Privatized Military Industry* (Ithaca: Cornell University Press, 2003), at 78.
[24] International Consortium of Investigative Journalists (ICIJ), *Making a Killing: the Business of War* (Public Integrity Books, 2003), at 31; Singer, P. W. *Corporate Warriors*, at 8.

have courted controversy and dodged the consequences on a number of occasions in recent years, leading to widespread and deeply-held criticisms that the industry sorely lacks accountability—public, political and legal.

Neither Congressionally mandated troop caps nor officially tallied casualty counts include PMC contractors. Thus, critics argue, the Pentagon's use of PMCs frustrates Congressional oversight and obscures the true human costs of war. PMCs are subject not to the chain of command, but rather to a convoluted chain of contracts among prime, sub and subordinate contractors across multiple government agencies, leaving no clear paper trail. For this reason, critics contend, contractors thwart executive oversight as well.[25]

But it is the legal murkiness characterizing the PMC operating environment that has attracted perhaps the most criticism. Military contractors operate beyond the jurisdiction of most legal regimes—including most U.S. criminal statutes, the Uniform Code of Military Justice, international law, and often, the legal regimes of their host-countries. As a result, a number of high-visibility incidents involving contractors have gone un-investigated and unresolved.

One of the most oft-cited examples of contractor abuse is the case of a sex-slavery and prostitution ring in the Balkans linked to 12 employees of the private policing provider Dyncorp. Two whistleblowers brought the ring to the U.S. Army's attention, were fired, filed suit, and won—a victory in the first case, and a settlement in the second.[26] However, although seven of the individuals implicated have since been fired, none were prosecuted, because both Bosnian and American lawyers thought that they lacked jurisdiction to do so.[27]

Civilian contractors employed by the private translation and interrogation firms Titan Corporation and CACI, International were accused of involvement in the alleged torture and abuse scandal at Abu Ghraib prison in Iraq.[28] To date, the Army has referred 19 cases of detainee abuse to the U.S. Attorney's Office for the Eastern District of Virginia, the designated office in charge of prosecuting prisoner abuse cases associated with the wars in Iraq and Afghanistan. No prosecutions have been commenced.[29]

In December 2005, a "trophy" video was posted to the website of the private security provider firm Aegis Defense Services. Shot through the rear window of an SUV, the video shows a security contractor strafing a series of civilian vehicles with machine gun fire on the road from Baghdad's airport into the city. Over the sounds of gunfire and the video's soundtrack (Elvis Presley's "Mystery Train"), an Anglophone accent can be heard intermittently.[30] After conducting a closed investigation, the U.S. Army Criminal Investigation Division concluded that there was no probable cause to believe that criminal activity had taken place.[31]

In June 2005, U.S Marines arrested 16 military contractors from the North Carolina-based security firm Zapata Engineering, detaining them for three days alongside suspected terrorist insurgents.[32] The Marines alleged that the contractors had illegally fired on a Marine

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[25] ICIJ, *Making a Killing: the Business of War*.
[26] Capps, Robert, "Sex-slave whistleblowers vindicated," *Salon.com*, August 2, 2002.
[27] Capps, Robert, "Crime without Punishment," *Salon.com*, June 27, 2002.
[28] Davidson, Osha Gray, "Contract to Torture," *Salon.com*, August 9, 2004.
[29] Benjamin, Mark, "No Justice for All," *Salon.com*, April 14, 2006.
[30] See the video on Google Video, at: http://video.google.com/videoplay?docid=4993996875456348 93&q=aegis+trophy+video
[31] Finer, Jonathan, "Contractors Cleared in Videotaped Attacks; Army Fails to Find 'Probable Cause' In Machine-Gunning of Cars in Iraq," *Washington Post*, June 11, 2006: A18.
[32] Phinney, David, "Marines Jail Contractors in Iraq," *Corpwatch.com*, June 7, 2005, at: http://www.corpwatch.org/article.php?id=12349.

convoy and on Iraqi civilians with weapons that they were not authorized to possess. The contractors, all of them ex-U.S. military and half of them ex-Marines, claimed that they had only fired a few warning shots at a truck that was blocking the road. Furthermore, they argued that their Marine captors abused them during their detention.[33] Charges were never brought against either party.

And during the investigation of the Nisour Square shooting, it came to light that Blackwater has been involved in numerous of shootings involving Iraqi civilians, none of which have been investigated.

By no means a closed list, these high-profile episodes emphasize the difficulty that law enforcement authorities have had in holding contractors legally accountable for their action. As will be discussed below, due to their hybrid nature contractors can avoid *ex ante* regulation and they are difficult to prosecute *ex post*. Regulatory and prosecutorial challenges will be addressed in turn.

A. Regulating PMCs through international law

As an initial matter, PMCs have no clear place in the Geneva Conventions framework: because they often carry weapons and operate on behalf of governments, contractors are not "noncombatants" under the 4th Geneva Convention. But because they do not answer directly to a military command hierarchy and rarely wear uniforms, nor are they "lawful combatants" under the 3rd Geneva Convention.[34]

Nor do they fit the unwieldy definitions of mercenaries contained in the various UN Conventions and resolutions that prohibit mercenary conduct, definitions written with a lone-marauder model of mercenaries in mind.

There are three principal agreements that set out the limits on state-involvement in mercenary activity, Article 47 of the First Additional Protocol to the Geneva Conventions,[35] the 1989 UN International Convention Against the Recruitment, Use, Financing and Training of Mercenaries ("UN Mercenary Convention"),[36] and the 1972 Organization for African Unity (OAU) Convention for the Elimination of Mercenaries in Africa.[37]

Both Article 47 and UN Mercenary Convention require, in relevant part, that mercenaries a) be specially recruited either locally or abroad in order to fight in an armed conflict; b) take a direct part in hostilities; c) be motivated essentially by the desire for private gain and be

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[33] *Ibid*.

[34] Kritsiotis, Dino, "Mercenaries and the Privatization of Warfare," *22-FALL Fletcher Forum of World Affairs 11* (Fall 1998) at 16. Some have argued that this likens their legal status to the "illegal enemy combatants" detained in Guantanamo Bay, but that theory has not been tried out in a courtroom yet. (See Carter, Phillip, "Hired Guns: What to do about military contractors run amok," *Slate*, April 9, 2004.)

[35] See: http://www.unhchr.ch/html/menu3/b/93.htm: "A*rticle 47.-Mercenaries*

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict; (b) Does, in fact, take a direct part in the hostilities; (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) Is not a member of the armed forces of a Party to the conflict; and (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces."

[36] http://www.ohchr.org/english/law/mercenaries.htm.

[37] O.A.U. Doc. CM/433/Rev.L, Annex 1(1972)

compensated substantially in excess of combatants of similar rank and functions in the armed services; d) neither be a national of a party to the conflict nor a resident of any territory controlled by a party to the conflict; e) not be a member of the armed forces of any party to the conflict; and f) not have been sent to the conflict by a state who is not party to the conflict as an official member of its armed forces.[38]

These provisions are cumulative, and most PMCs would not meet all of the requirements (in particular the *mens rea* prong, and, in the case of Iraq, the non-party national prong). Furthermore, even non-party national PMCs can acquire and have in the past acquired temporary status as members of the regular armed forces.[39] While it was adopted in 1989, the UN Mercenary Convention entered into force only in 2001, and it and remains unsigned by the United States.

The 1972 Organization for African Unity (OAU) Convention for the Elimination of Mercenaries in Africa takes a slightly different approach. Because the OAU was unable to get a mandate for outlawing mercenaries as such from its member nations—many of whom remain highly unstable and depend on external security support—the Convention sought to regulate mercenaries by curtailing access. On the demand side, the OAU allows only governments to hire mercenaries, and on the supply side, it prohibits any activity undertaken by non-nationals that seeks to a) overthrow the government of any OAU member, by force or other means; b) undermine the independence and territorial integrity of any OAU member; or c) block the activities of any liberation movement recognized by the OAU.[40]

It should be remembered that the drive to regulate mercenaries through the UN and government coalitions such as the OAU was in large part a response to the situation in postcolonial Africa, where mercenaries were instigating and exacerbating widespread instability in nascent and particularly vulnerable governments.[41] For many African governments, the goal was to preserve the state monopoly on violence without foreclosing the opportunity for external assistance from private parties, given the demonstrated reluctance on the part of the international community to become involved in many of these regional and ethnic conflicts. The hope was that African nations could maintain their lines of access to assistance from mercenaries while erecting a bulwark against exploitation by mercenaries.[42] Explains one scholar, by deliberately failing to regulate their own purchasing power, "States allow a black-market in military manpower to exist, which States can then exploit when necessary."[43] Derived from a different moment in history, a different set of entities, a different political climate and a different combat context, the mechanisms of public international law are simply outdated with regard to PMC activity.

Recently, there have been indications that the disconnect between the definitions and prohibitions contained in international treaties and resolutions and the realities on the battlefield may be changing. In August, 2005, the UN published its "Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of

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[38] http://www.ohchr.org/english/law/protocol1.htm.

[39] The government of Papua New Guinea, for instance, allowed Sandline employees to be given the status of "Special Constables." (UK Green Paper, at 7).

[40] UK Green Paper, at 7.

[41] See preamble, OAU Convention on the Elimination of Mercenaries.

[42] Milliard, Todd S., "Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies," *176 Military Law Review 1* (June, 2003).

[43] Sapone, Montgomery, "Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence," *30 California Western International Law Journal 1* (Fall 1999) at 16.

peoples to self-determination."[44] The report takes up the failure of the UN Mercenary Convention to deal effectively with the current private security climate and recommends the undertaking of a "substantive and comprehensive review of the legal definition of mercenaries."[45] Notably, the report explains that "Questions on what the role of the United Nations should be in situations where serious human rights violations are taking place and the difficulty the Organization has faced in the past in trying to stop such widespread violations, including genocide, should also be considered in light of the immediate assistance many private security companies can offer in such situations."[46]

The U.S.-based PM industry lobbying association IPOA has been urging the UN to use PMCs to supplement or supplant peacekeeping operations in unstable regions such as African nations for years, and thus far the UN has maintained its official refusal to do so.[47] The new report, however, sees a larger role for private industry to play, expressing the view that "The proposal for a uniform and industry-wide code of conduct put forward by a number of private companies and their intention to consider this matter further in the near future should be seen as a relevant development for the consideration of options for the United Nations in this regard."[48] The report concludes with a recommendation that the former definition of mercenarism be revisited and updated in light of the evolution of the PM industry.

However, since this report was published the post of Special Rapporteur has been abolished, and the UN's official policy on the use of security contractors remains unchanged.[49]

B. Regulating PMCs through U.S. export controls

Ostensibly, the PM industry should be regulated through the U.S. export control regime, which controls the international transfer of both goods and services relating to military conduct. Because U.S.-based PMCs export military services and often military goods abroad, they fall under the purview of the International Traffic in Arms Regulations (ITAR)[50] of the Arms Export Control Act (AECA).[51] Under the AECA, each specific PMC operation of a certain magnitude must be pre-approved by the State Department's Office of Defense Trade Controls, and contracts involving the export of military goods or services in excess of $50 million are subject to Congressional approval.[52]

However, many U.S. based PMCs sell their services under the Foreign Military Sales Program (FMS), which allows foreign governments seeking to employ them to operate through the Pentagon as a liaison. Under FMS, Pentagon negotiates the terms of the contracts and pays PMCs directly, and the foreign government reimburses the Pentagon—effectively short-

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[44] Shameen, Shaista, Special Rapporteur of the Commission on Human Rights, "Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination," United Nations General Assembly: A/60/263, August 2005.
[45] *Ibid*, at paragraph 60.
[46] *Ibid*, at paragraph 53.
[47] After receiving a bid from the South African firm Executive Outcomes to send contractors to Rwanda to help quell the genocide there, Kofi Annan famously said in 1998 "The world may not be ready to privatize peace." (Press Release Press Release SG/SM/6613 26 June 1998, at http://www.un.org/News/Press/docs/1998/19980626.sgsm6613.html).
[48] Shameen, at paragraph 53.
[49] Interview with UN spokesman, April 2006.
[50] 22 CFR 120-130. The provisions of the ITAR can be found at: http://www.pmdtc.org/itar_index.htm.
[51] 22 U.S.C. 2778 of the Arms Export Control Act (AECA). The provisions of the AECA can be found at: http://www.pmdtc.org/aeca.htm.
[52] 22 CFR § 123.15(a)(1).

circuiting the State Department.[53] The FMS program saves foreign governments as well as U.S. corporations time and expense by avoiding the export control regime, but at the cost of diminishing interagency and Congressional oversight over the government contracting process.

Similarly, due to their frequent business with the Department of Defense, many PMCs have been approved as General Service Administration vendors, enabling them to offer prospective clients prefabricated contracts with discounted labor and services.[54] The GSA does keep a list of companies who are barred from doing business with the government but the GSA does not perform interim oversight of the contracts that are granted through the program.[55]

Furthermore, as the details of PMC contracts are proprietary information, the public has only limited access to their details through the Freedom of Information Act (FOIA). While the AECA stipulates that the names of the client countries and the types of defense articles or services involved "'shall not be withheld from public disclosure unless the President determines that the release of such information would be contrary to the national interest,'" State Department counsel have construed that requirement to be both a floor and a ceiling on the amount of information that the public can request through FOIA, and in May 2002 the Department of Justice issued new guidelines that allow companies to challenge the release of information available to the public under FOIA.[56] As a practical matter, then, current U.S. export control laws are an inadequate means of regulating PMCs.

C. Jurisdictional challenges to prosecuting PMCs

Adding to the problem of prospectively regulating contractors is the extreme difficulty of prosecuting them. Due to the corporate status and extraterritorial activities of PMCs, they are beyond the jurisdiction of most U.S. criminal law.[57] Only three statutes possess extraterritorial jurisdiction over PMCs, all of which remain untested in this context: the 1996 War Crimes Act (18 USCS § 2441), the 2000 Military Extraterritorial Jurisdiction Act (MEJA) (18 USCS § 3261), and Title 18, §7(9) of the U.S. Code, entitled "Special Maritime and Territorial Jurisdiction."

The 1996 U.S. War Crimes Act provides federal jurisdiction over cases involving either a U.S. victim or U.S. perpetrator of an alleged war crime, defined as any "grave breach" of the Geneva Conventions as well as any violation of Common Article 3 thereof. This includes torture, inhumane treatment, as well as "outrages upon personal dignity" and "humiliating and degrading

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[53] Department of Defense, Defense Security Cooperation Agency, http://www.dsca.mil/home/foreign_military_sales.htm.
[54] Department of Defense, General Services Administration, http://www.dsca.mil/home/foreign_military_sales.htm.
[55] ICIJ, at 17.
[56] *Ibid*.
[57] It is conceivable, although unlikely, that potential plaintiffs could invoke the state action doctrine to subject PMCs to the 5th and 14th amendments of the U.S. constitution. This would require that PMCs be determined to be acting "under color of law," which has typically necessitated substantial entanglement between the private entity and the government. Most successful applications of the state action doctrine have occurred in the realm of Civil Rights. Cases such as Lebron v. National Railroad Passengers Corporation (513 U.S. 374 (1995), which involved a claim that Amtrak's refusal to allow an artist to post his work in a train station constituted a violation of his First Amendment right to freedom of expression, are the exception rather than the rule. In Lebron, despite the fact that Congress had specifically declared Amtrak not to be considered an agency or establishment of the U.S. Government for purposes of procurement law, the Supreme Court held that for purposes of the Constitution, Amtrak would be regulated as a public entity. (For a treatment of the state action doctrine in practice, see in particular Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), Moose Lodge v. Irvis, 407 U.S. 163 (1972), Marsh v. Alabama, 326 U.S. 501 (1946), Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968).)

treatment."[58] Threshold for finding a grave breach is high, and the victims must be considered "protected persons" under the Geneva Conventions.[59]

More useful is the recently enacted Military Extraterritorial Jurisdiction Act, which was created primarily to protect U.S. soldiers and dependants stationed overseas from private contractors. MEJA allows individuals "employed by or accompanying the armed forces outside the United States" to be prosecuted in an Article III court for crimes that entail more than a year of prison time. [60] Until recently, MEJA applied only to contractors hired by the Department of Defense, but its ambit was expanded in January, 2005 to cover contractors with any federal agency, so long as they are "supporting the mission of the Department of Defense."[61] However, MEJA does not authorize jurisdiction over foreign nationals employed by U.S. PMCs or U.S. contractors employed by foreign governments or other international organizations.[62]

Title 18 USC §7(9) provides jurisdiction over the premises of military, consular or diplomatic missions of the U.S. government. It will be used to try former CIA contractor David Passaro, who has been accused of abusing a detainee in a prison in Afghanistan in 2004.[63] As of this writing, a trial date has not yet been set.[64]

The military's own legal code does not cover the contractors engaged in Iraq and Afghanistan either. As "persons serving with or accompanying an armed force in the field," contractors may only be court-martialed under the Uniform Code of Military Justice (UCMJ)[65] if there has been a formal declaration of war.

Finally, the default legal forum for crimes committed abroad is the law of the situs of the crime. But due to the nature of their work, PMCs often condition their contracts on being granted immunity or indemnification from host-country legal regimes. This was the case in Iraq under the CPA's June 2004 Order # 17, which defined contractor legal status as "'subject to the exclusive jurisdiction of their Sending States.'"[66]

While Order #17 provides some legal protection for contractors, until a Status of Forces Agreement is reached between the U.S. and Iraq, their legal status under Iraqi law will remain unclear.[67] Broadly speaking, SOFAs delineate the relationship between foreign forces and host governments, covering issues including criminal and civil jurisdiction over forces, force entry

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[58] Human Rights Watch, "Q&A."

[59] Isenberg, at 64.

[60] [60] Human Rights Watch, "Q&A: Private Military Contractors and the Law" (at http://www.hrw.org/english/docs/2004/05/05/ iraq8547_txt.htm).

[61] "Contractor Accountability Act," H.R. 4387, introduced May 18, 2004 (at http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.+4387). For this reason, in the recent trial of a CIA contractor accused of committing acts of torture in Afghanistan, the court was forced to assert jurisdiction under Title 18, USC §7(9)(A), which extends federal jurisdiction to U.S. "diplomatic, consular, military or other U.S. government missions or entities in foreign states."

[62] See Public Law 108-375, discussed supra, which will expand the jurisdiction of the MEJA.

[63] If this case were brought to today, it would likely be brought under MEJA, but it predated MEJA's expansion.

[64] Human Rights Watch, "Q&A: Private Military Contractors and the Law" (at http://www.hrw.org/english/docs/2004/05/05/ iraq8547_txt.htm).

[65] Uniform Code of Military Justice §802.2(a)(10).

[66] CPA Order #17 initially provided that private contractors be granted immunity until the January, 2005 elections (subject to parent-state waiver), however to this date Order #17 still stands. ("Status of the Coalition Provision Authority, MNF–Iraq," http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf)

[67] Patel, Mayur, "The Legal Status of Coalition Forces in Iraq after the June 30 Handover," *ASIL Insights*, American Society of International Law, March 2004.

and exit rights, claim-compensation, and taxes.[68] Typically, SOFAs grant foreign state-jurisdiction over crimes committed either against other foreign personnel or in the line of duty, and they grant host-state jurisdiction over domestic law violations committed outside of the scope of official duty.[69] Until a SOFA is reached, troops and contractors may be subject to Iraqi law, because the default norm of territorial jurisdiction persists unless waived by the host state.[70]

The PM industry has become increasingly concerned about the absence of a SOFA. As private actors who lack any clear legal treatment of their status, they are more vulnerable to being hauled into Iraqi prison than are military personnel. While the command structure and court martial system allow the U.S. military to argue for jurisdiction over their personnel, due to the absence of alternative fora in which to prosecute contractors, the Iraqi government has a stronger claim for local jurisdiction over all potential contractor crimes. Recognizing this, many members of the PM industry have been vociferously pushing for regulation. As one industry representative has said repeatedly, "Draw us a box, and we'll get in it."[71] As many PMCs know full well, acting in the absence of a rulebook does not mean that there are no rules to obey. The parties most endangered by their legal indeterminacy may turn out to be PMCs themselves.

PART II: THE HIDDEN COSTS OF CONTRACTING
STRUCTURAL REGIMES THAT CONSTRAIN CONTRACTORS AND THEIR CLIENTS

While PMCs are free from many of the strictures of the U.S. government's rules and operate outside of the U.S. military's command structure, they are also accountable to an important set of legal and financial dictates due to their corporate form. PMCs bring with them to the battlefield not only individuals, services, and supplies, but also the kinds of rules and policies that shape the activities of all corporations—such as tort liability, employment law, insurance requirements, and contract law. What this means, put simply, is that due to the presence of PMCs, trial lawyers in North Carolina or California, insurance providers in Delaware, or shareholders in London or New York have an indirect influence over combat tactics in Iraq and Afghanistan. Accordingly, the use of PMCs does not simply force a tradeoff between accountability and efficiency, as most critics contend, but it is far from proven that it is efficient.

This section will take up three of the most important, least understood consequences of the use of PMCs: the impact of the civil liability regime, the insurance regime, and the government contracting regime on the industry and its clients.

A: The Civil Liability Regime

The "first wave" of civil litigation involving the activities of PMCs in Iraq is about to crest, with the outcomes of three vanguard cases expected in the next few months, and one that was decided recently. As these cases demonstrate, military contractors operate neither "above" nor "beyond" the law, but instead are subject to a set of legal tools that are accompanied by a set of costly and complex externalities. Soldiers cannot sue the military for injuries or deaths sustained in combat, while contractors can sue their employers. When soldiers engage in misconduct on the job, they

[68] *Ibid*.
[69] *Ibid*.
[70] Some scholars suggest that the absence of a SOFA could lead to ICC jurisdiction, although this is far more tenuous—the ICC does not possess original jurisdiction, only appellate, and additionally the U.N. Security Council has repeatedly made annual requests that for one year that the ICC not pursue investigations involving missions that it has authorized. (See Patel, "Legal Status of Coalition Forces").
[71] Joe Mayo, formerly spokesman for Triple Canopy, now with EODT.

can be court-martialed or otherwise disciplined within the military justice system. When contractors break the law, the best option at present is a civil suit, which is often lengthy, sometimes inadequate, and nearly always costly. In the absence of effective regulation or coherent legislation, these civil suits are redefining the relationship between the military and its contractors in wartime. As such, not only will they create repercussions throughout the PM industry now, but they may guide military policy, strategy and tactics into the future. Each of these four cases will be taken up in some detail.

The most divisive of the vanguard civil suits involving contractors in Iraq is Nordan v. Blackwater Security Consulting,[72] as it pits PMCs against the contractors that they hire. Nordan arises from the brutal killing of four security contractors employed by Blackwater Security Consulting in Fallujah, in March of 2004. The four men were attacked while providing security for a catering convoy traveling from the Iraqi city of Taji to Camp Ridgeway, a U.S. Army base located outside Fallujah. The convoy got lost and drove through the city of Fallujah, where it was ambushed by insurgents.[73] After shooting the four men at point blank range, the insurgents dragged their bodies from the vehicles, lit them on fire, and strung up two of the four corpses from a bridge over the Euphrates River.[74] The families of the four deceased contractors filed a wrongful death suit against Blackwater in North Carolina state court in January, 2005.[75]

The plaintiffs allege that Blackwater willfully and knowingly sent the four men into harm's way, violating a series of contractually obligated safety protocols insodoing.[76] The team consisted of only four men, whereas the contract required six; they were sent in an unarmored vehicle, when the contract specified that armored vehicles would be used; they lacked a rear gunner, also required in the contract; they carried only semi-automatic rifles rather than the heavy machine guns specified in the contract; and the *ex ante* risk assessment that the contract required was never conducted.[77]

Blackwater's defense rests on a form of preemption, coupled with the fact that the men had signed comprehensive assumption of risk agreements, called Independent Contractor Service Agreements. Individuals who work for military contractors are required to be insured under the Defense Base Act (DBA), a regulatory scheme that dates to the 1940s and limits tort liability for government contractors, instead creating an exclusive remedial scheme for policy-holders through the Department of Labor, which oversees claim payouts, hears appeals, and issues agency orders. It will be discussed in further detail below. Blackwater petitioned to remove the case to federal court and submit a motion to dismiss, arguing that plaintiffs' claims were completely preempted by the DBA system. In the alternative, Blackwater argued that the case concerned a "'unique federal interest' in the remedies available to individuals working in support of national defense or war-zone efforts."[78]

Plaintiffs maintained that the men had been fraudulently induced into signing the Independent Contractor Service Agreements by the existence of the protocols which were not observed. They urged that it is not clear that the DBA extends to intentionally tortious conduct of

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[72] Nordan v. Blackwater Security Consulting, 382 F. Supp. 2d 801 (2005).
[73] Nordan, 382 F. Supp. 2d. at 805.
[74] Nordan, 382 F. Supp. 2d. at 805.
[75] Nordan, 382 F. Supp. 2d, at 803.
[76] Nordan, 382 F. Supp. 2d., at 804.
[77] Nordan, 382 F. Supp. 2d. at 805.
[78] Nordan, 382 F. Supp. 2d. at 807.

the sort that they allege.[79] They seek compensatory damages for the wrongful death, rescission of the Independent Contractor Service Agreements, and punitive damages.[80]

In August, 2005, the Eastern District Court of North Carolina remanded the case to state court, finding that it lacked subject matter jurisdiction. Because the DBA does not create a pre-existing federal cause of action that can be brought in district court, the court held, it does not completely preempt the state law claims.[81] Thus while the DBA might preempt state law claims for the purposes of defensive preemption, it does not confer federal subject matter removal jurisdiction through complete preemption.[82] The court also rejected Blackwater's argument that the case raised issues of a "unique federal interest," holding that such a premise "assumes the very conclusion which this court lacks jurisdiction to reach, namely that the decedents in this case are covered as employees under the DBA."[83]

In March, 2006 Blackwater appealed the decision to remand to the Fourth District Court of Appeals, arguing that a state court is ill-equipped to deal with a case involving substantial national security implications. The three judge panel's decision on the venue transfer is expected soon.[84]

Jurisdictional ping-pong aside, Nordan is being been watched closely by stakeholders on all sides of the debate over military outsourcing. Depending on the outcome of the venue dispute, in addition to whatever compensatory and punitive damages Blackwater would be forced to pay if the firm is found liable by a state court, a finding against Blackwater is likely to invite similar suits, in different jurisdictions, on behalf at least some of the estimated 350 plus civilian contractors who've been killed in Iraq alone.[85] The result is likely to be extremely expensive for the industry, adding to the already high costs of DBA coverage that they will nonetheless remain required to purchase for their contractors. These costs will be passed along to the industry's clients (and indirectly to taxpayers) as PMCs begin to price the actual and potential costs of tort litigation into their (often cost-plus) contracts.

If, on the other hand, Blackwater wins the case and the DBA is found to preempt state tort claims against PMCs by the contractors that they hire, the insulation that PMCs already enjoy from legal recourse will be even thicker.

While Nordan may provoke the most internal discord within the PM industry, the cases with the greatest potential financial impact on the industry are the twin suits Saleh v. Titan Corporation [86] and Ibrahim v. Titan Corporation,[87] which emerged out of the Abu Ghraib prison torture and abuse scandal of May 2004. Saleh v. Titan, a class action, was filed in San Diego federal District Court in June, 2004. Ibrahim v. Titan was filed in D.C. District Court one month later.

Plaintiffs in Saleh are over one thousand Iraqi nationals who allege that they were tortured and abused at Abu Ghraib and other military detention facilities in Iraq. They are represented by a New York-based civil rights organization called the Center for Constitutional

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[79] Nordan, 382 F. Supp. 2d., 806.
[80] *Ibid.*
[81] Nordan, 382 F. Supp. 2d. at 809.
[82] Nordan, 382 F. Supp. 2d. at 810.
[83] Nordan, 382 F. Supp. 2d. at 813.
[84] Cambell, Tom, "Venue disputed in wrongful death case," *The Richmond Times Dispatch*, March 16, 2006: B-7.
[85] The Brookings Institution has attempted to maintain current figures for contractor casualties in Iraq, working from company records, Department of Labor death benefit claim filings, and press reports.
[86] Saleh v. Titan Corporation, 353 F. Supp. 2d 1087.
[87] Ibrahim v. Titan Corporation, 391 F. Supp. 2d 10 (D.D.C. 2005).

Rights, and the Philadelphia-based law firm Burke & Pyle, LLC. The case names as defendants Titan and CACI as corporations as well as three private contractors mentioned in the so-called "Taguba Report," the U.S. Army's initial investigation into the allegations of torture and abuse at the Abu Ghraib prison: Stephen Stephanowicz of CACI, Inc., Adel Nahkla of Titan Corporation, and Titan subcontractor John Israel. [88]

In addition to compensatory and punitive damages, plaintiffs seek an injunction against CACI's performance of its existing contracts in Iraq–in mid-August 2004, only four months after the Abu Ghraib story broke, CACI was able to successfully renew its $293 million blanket-purchase, no-bid contract in Iraq, officially granted for "inventory control and other routine services."[89] They allege that the defendants, acting under color of state law, tortured and mistreated over one thousand class members at Abu Ghraib and other detention facilities in Iraq in the course of conducting interrogations. In particular, they claim torture, extrajudicial killing, cruel, inhuman or degrading treatment, war crimes, and crimes against humanity under the Alien Tort Claims Act. They also claim various common law tort violations, including wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent hiring. Finally, they allege that this torture and abuse constituted an "ongoing pattern of abuse" under the Racketeer and Influenced Corrupt Organizations Act (RICO), which allows for harsher sanctions, including treble damages.[90]

In the second case, Ibrahim v. Titan Corporation,[91] brought in D.C. District Court by a consortium of trial lawyers from across the United States known as the Iraqi Torture Victim Group (ITVG), seven Iraqis claim to have been the victims of acts of murder, torture and abuse at Abu Ghraib, also naming Titan and CACI as defendants.[92] Similar to Saleh, the ITVG bring their claims of torture and abuse under the Alien Torts Statute and allege an "ongoing pattern of abuse" under RICO. Their specific allegations are also similar to those at issue in Saleh—the Ibrahim plaintiffs assert that defendants beat them, refused them food and water, subjected them to excessive noise for extended periods, threatened to shoot them and attack them with dogs, deprived them of sleep, urinated on them, forced them to witness sexual abuse of other prisoners, taunted them sexually, wiped feces and menstrual blood on them, and more. Plaintiffs also claim common law assault and battery, wrongful death, false imprisonment, intentional infliction of emotional distress, conversion, and negligence.[93]

In a defensive move that is similar, though not identical, to that made by Blackwater Nordan, Titan and CACI have argued in both cases that litigation is preempted on the basis of the "government contractor defense." Under the government contractor defense, first articulated in Boyle v. United Technologies Corporation,[94] contractors may be shielded from tort liability when they provide supplies or services in accordance with a specific request of the government.[95] The defense rests on the assumption that certain issues constitute "uniquely federal interests" with which the application of state law would "significantly conflict." Courts use a three-pronged test to determine whether contractors are acting in accordance with a specific

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[88] Army Major General Antonio M. Taguba, "Article15-6 Investigation of the 800th Military Police Brigade," which can be found here: http://news.findlaw.com/cnn/docs/iraq/tagubarpt.html
[89] Isenberg, at 53.
[90] Davidson, Osha Gray, "Contract to Torture," Salon.com, August 9, 2004.
[91] Ibrahim v. Titan Corporation, et al, 391 F. Supp. 2d 10.
[92] *Ibid*.
[93] Ibrahim, 391 F. Supp. 2d. 10, 14.
[94] Boyle v. United Technologies Corp., 487 U.S. 500 (1988).
[95] See in particular Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

request of the government, asking: 1) whether the government's directions were "reasonably precise," 2) whether the service or supply conformed with the specifications, and 3) in a products liability context, whether the contractor put the U.S. on notice about any possible dangers that were known to the contractor but not to the United States.[96]

If the government contractor defense is found to apply, even if plaintiffs' allegations are found to be true, they may be barred.[97]

Like Nordan, Saleh and Ibrahim have had their fair share of jurisdictional and procedural complexity. While filed separately, the cases became entangled in late 2004, when the prosecution team for Saleh moved to enjoin the Ibrahim case from proceeding, pending class certification, arguing that the Ibrahim plaintiffs were putative class members. Citing the somewhat arcane "All Writs Act" (which allows a district court, in some circumstances, to issue injunctions against federal litigation in other districts),[98] and the "first-to-file" rule, a doctrine of federal comity,[99] the Saleh prosecution argued that the injunction would avoid wasting judicial resources or inconveniencing plaintiffs with inconsistent holdings, as well as offer the Ibrahim plaintiffs appropriate notice of the class action in case they sought to exercise their opt-out rights.[100]

In December, 2004, however, the 9th Circuit Court of Appeals denied the injunction,[101] and in March 2005 defendants in Saleh moved to remand their case to the 4th Circuit, in Virginia, where it is currently pending. Meanwhile, in August 2005, the D.C. District Court reached an initial verdict in Ibrahim, dismissing plaintiffs' claims under the ATS and RICO, while allowing their common law tort claims to proceed.

A handful of scholars have raised the possibility that the Alien Tort Statute (ATS) could be used to extend jurisdiction to the extraterritorial activity of PMCs.[102] The ATS states that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Supreme Court has ruled that the ATS is both a jurisdiction-granting statute and, in certain strictly delimited cases involving widely-held norms under international law, an action-granting statute. It requires 1) an alien 2) to allege a tort that was 3) committed in violation of a treaty or the law of nations.[103] Allegations of torture are theoretically actionable under both prongs—torture is a

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[96] Ibrahim, 391 F. Supp. 2d 10, 17.

[97] Ibrahim, 391 F. Supp. 2d 10, 16-17.

[98] 28 U.S.C. § 1651. "Courts have, on occasion, invoked the All Writs Act when enjoining an action filed in another federal forum where "necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained. . . ." United States v. New York Tel. Co., 434 U.S. 159, 172, 54 L. Ed. 2d 376, 98 S. Ct. 364 (1977). (Saleh v. Titan Corp., 353 F. Supp. 2d 1087, 1095 (D. Cal. 2004)).

[99] "Like the All Writs Act, the "first-to-file" rule has, on occasion, been employed as a basis for enjoining an action in a federal forum." (Saleh v. Titan Corp., 353 F. Supp. 2d 1087, 1089-1090 (D. Cal. 2004)).

[100] (Saleh v. Titan Corp., 353 F. Supp. 2d 1087, 1089 (D. Cal. 2004)).

[101] The court held, in relevant part that: "This court does not have the authority to enjoin putative class members [**24] from pursuing a subsequently-filed non-class action in another federal forum where (1) the present action has not yet been certified as a class action and, therefore, there has been no opportunity for the putative class members to opt out; (2) the putative class members do not have minimum contacts with the forum so as to subject them to [*1095] jurisdiction; and (3) there is no basis for concluding that the putative class members have consented to this court's jurisdiction.," (Saleh v. Titan Corp., 353 F. Supp. 2d 1087, 1089-1090 (D. Cal. 2004))

[102] See in particular, Garmon, Tina, "Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act," *11 Tulane Journal of International and Comparative Law 325* (Spring 2003).

[103] Filartiga v. Pena-Irala 577 F.Supp. 860 (D.C.N.Y.,1984); Sosa v. Alvarez-Machain 124 S.Ct. 2739 (U.S., 2004). When determining whether a claim violates the law of nations, courts should limit action-granting claims to those

violation of the law of nations,[104] and the U.S. has ratified the Torture Victims Protection Act (TVPA), 28 U.S.C.S. § 1350.

Further, the ATS can be applied individually and collectively under direct theories of liability, as well as to corporations under secondary theories of liability (contributory or vicarious liability), regardless of the national origin of either the alleged perpetrator or the purported victim (so long, of course, as the victim is not American). To apply direct liability, a court would have to find that contractors were acting "under color of state law," a standard similar to that used to state action. To apply secondary liability, courts would use one of two tests, the "aiding and abetting test" or the "joint action test."[105]

The Ibrahim plaintiffs did not claim that defendants were acting under color of the state's authority when they engaged in the alleged acts of torture, but nor did they claim that the two firms were secondarily liable. Instead, they unhinged the illegal activity from the contracting relationship, arguing that Titan and CACIs' actions independently violated the law of nations and the TVPA.

The court found, however, that because law of nations does not apply to private actors, acts of official torture are covered under the ATS while acts of unofficial torture are not.[106]

The RICO claims failed because the plaintiffs lacked standing—under RICO, plaintiffs must allege damage to business or property, not merely personal injury, and the Ibrahim plaintiffs alleged only personal injury.[107]

The court left unresolved the question of whether the government contractor defense applied to Titan and CACI, in which case even plaintiffs' common law tort claims will be barred. Finding that the treatment of prisoners during wartime does present "uniquely federal interests," the court must now determine whether the contractors in Abu Ghraib could be considered to be "soldiers in all but name."[108] If so, so long as Titan and CACI meet their evidentiary burdens, the government contractor defense will be available to them.

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that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the recognized 18th-century paradigms." (Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (U.S. 2004)).

104 See Filartiga v. Pena-Irala, "Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980)

[105] Garmon, Tina, "Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act," *11 Tulane Journal of International and Comparative Law 325, at 353* (Spring 2003). The "aiding and abetting test" requires that the accused's actions knowingly, directly and substantially contribute to the commission of the unlawful offense, such as through practical assistance, moral support, or encouragement. The *mens rea* component of the test is fairly broad: when combined with an affirmative act, mere "knowing participation" is sufficient to confer motivation, even if it does not extend to knowledge of the precise crime at issue (Mehinovic v. Vuckovic 198 F. Supp. 2d 1322, 1355-56 & n.60 (N.D. Ga. 2002). The "joint action" test is similar to the state action test, requiring 1) a substantial degree of cooperation between the corporation and the state that is 2) accompanied by sufficient knowledge of the state's conduct on the part of the individual. (Wiwa v. Royal Dutch Petroleum Co. 2004 WL 2801740 (5th Cir. (Tex. (C.A.5 (Tex.), 2004)). According to Garmon, because it focuses on the degree of cooperation rather than the intent of the parties, the joint action test requires a lower threshold finding.

[106]"The Supreme Court has not answered that question…but in the D.C. Circuit the answer is no." Ibrahim, 391 F. Supp. 2d 10,14.

[107] Ibrahim, 391 F. Supp. 2d 10, 19.

[108] "State law regulation of combat activity would present a 'significant conflict' with this federal interest in unfettered military action."(Ibrahim, 391 F. Supp. 2d 10, 23.) Admittedly, even a finding that the government

The somewhat disorienting result of the Ibrahim opinion is that it is possible that the contractors at issue will be found to be acting both as "soldiers in all but name" for purposes of the government contractor defense, but not "under color of the law" for purposes of the Alien Tort Statute.

The Saleh plaintiffs seek to distinguish their ATS claims by arguing that Titan and CACI's actions occurred "under the color of the United States' authority," although in direct contravention of the United States' express policy against torture."[109] They attempt to distinguish their RICO claims from those dismissed by in the Ibrahim opinion by arguing that a) Titan and CACI earned "millions of dollars more than they would have earned in the absence of illegal activity,"[110] and that the class suffered sufficient business and property damages to support a finding of standing.[111]

Even more than Nordan, Ibrahim and Saleh have the potential to subject the PM industry and its clients to potentially exorbitant damage awards—particularly if the RICO claims survive in Saleh. Creating a precedent for civilian contractors to be sued by third party nationals in U.S. court for their actions in combat zones abroad could result in a tremendous number of future lawsuits. Ultimately, as the court noted in Ibrahim, "the government will eventually end up paying for increased liability through higher contracting prices (or through an inability to find contractors willing to take on certain tasks)."

The fourth example of the civil litigation regime taking on the policing of the PM industry is in the realm of government contract fraud. While some members of Congress have sought to choke off the PM industry's air supply through funding cuts and reporting requirements, these efforts are slow-going and have not led to marked results.[112] Civil litigation, and particularly the intrusive discovery process that it entails, is proving to be arguably more effective at exposing some of the financial hijinks that military contractors have been playing in Iraq.

In 2004, the private security provider Custer Battles was sued by Robert Isakson, the managing director of one of its subcontractors, DRC Inc., along with a former Custer Battles employee, William "Pete" Baldwin.[113] Plaintiffs claim that Custer Battles knowingly submitted at total of $50 million in false claims to the CPA under two contracts. The first was a $20 million contract to provide security and heavy equipment to support the creation of a new currency exchange (the Iraqi Currency Exchange, or ICE contract), and the second was a $16 million contract to provide security services to the Baghdad International Airport (the BIAP contract).

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contractor defense applied wouldn't reach many contractors who do not hold contracts directly with U.S. government agencies, but are rather sub or subordinate contractors for other private parties.

[109] Saleh v. Titan, Third Amended Class Action Complaint, Case No. 1:05-cv-1165, § 195 at 47. (See http://www.ccr-ny.org/v2/gac/legal_article.asp?ObjID=8tzsXQmAh2&Content=423).
[110] *Ibid*, §318 at 63.
[111] *Ibid*, §325 at 63.
[112] See "Contractor Accountability Act of 2004," H.R. 4387 (introduced by Congressman Meehan of Massachusetts in the House of Representatives,) Sections 362, 864, 865, 867, 1021, and 1081of the Ronald W. Reagan National Defense Authorization Act of 2005," S. 2400, "Transparency and Accountability in Security Contracting Act," H.R. 2011 (introduced by Congressman Price of North Carolina in the House of Representatives), and recent amendments to the Defense Federal Acquisition Regulation Supplements, or DFARs, 48 CFR Parts 207, 212, 225 and 252 (Federal Register, Vol. 70, No. 86, May 5, 2005).
[113] United States ex rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 624 (D. Va. 2005).

The men brought suit under the federal False Claims Act (FCA), which provides *qui tam*, or whistleblower, protection to private individuals who bring suit against corporations on the government's behalf and allows plaintiffs to recover up to 30% of the proceeds of the suit.

While the FCA may be invoked against any PMC that is paid by the U.S. Government, Custer Battles argued in a motion for summary judgment that the Coalition Provisional Authority (CPA) was not a U.S. Government entity and therefore was not subject to FCA jurisdiction. The novel question raised by the Custer Battles case was whether the FCA could be applied to funds disbursed by the Coalition Provisional Authority (CPA), given that the legal status of the CPA was never settled.[114]

The CPA operated with four types of funds: Appropriated Funds, which were appropriated by Congress and the general revenue of the United States, Vested Funds, which were Iraqi funds confiscated by the President and vested in the U.S. Treasury,[115] Seized Funds, namely currency and other negotiable instruments and state assets seized by Coalition Forces, and funds from the Development Fund for Iraq (DFI).[116] In July, 2005, the Eastern District Court of Virginia held that FCA jurisdiction covered Vested Funds and Seized Funds but did not extend to funds originating from the DFI.[117]

As a result, while the entirety of the $16 million BIAP contract was paid out of Seized and Vested Funds, and was therefore actionable, only the first $3 million of the $20 million paid under the ICE contract was actionable—the rest was paid out of DFI funds.[118]

The case involving the ICE contract went to trial soon after the jurisdictional question was determined, and the decision was handed down in March 2006, finding Custer Battles guilty and ordering the firm to pay over $10 million in damages. The court found that Custer Battles had ordered 37 false claims under the ICE contract, such as creating shell companies headquartered in the Cayman Islands, manufacturing false, inflated "invoices" from these companies that were submitted to the CPA, writing fictitious leases, and fraudulently billing for services and supplies never rendered or purchased.[119] In one cited example, Custer Battles wrote a fake invoice for $176,000 —on a cost-plus contract—for a helipad whose true building cost was $96,000. Litigation on the larger BIAP contract is likely to begin this summer.[120]

The False Claims Act has been seized upon by scholars and lawyers as a particularly helpful tool in holding contractors accountable legally.[121] Alan Grayson, the prominent Florida trial attorney who headed the Custer Battles prosecution, has filed dozens of fraud suits against military contractors in Iraq. There are fifty cases that are currently pending against military contractors that are based on the False Claims Act. However, it is possible that only the Custer Battles case will see the light of day. Under the False Claims Act, cases are automatically sealed

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[114] "The parties understandably devote much of their argument to the nature and genesis of the CPA, for if it were an American agency, then the FCA question would be largely resolved. Yet, in the end, the parties' efforts in this regard are largely unavailing inasmuch as the essential nature of the CPA is shrouded with ambiguity." United States ex rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 619-620 (D. Va. 2005).

[115] United States ex rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 624 (D. Va. 2005).

[116] United States ex rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 623 (D. Va. 2005).

[117] "Ultimately, from the facts in the record, it appears that defendants' liability will be limited to money or property requested or demanded from Seized and Vested Funds, and will not extend to money requested or paid out from the Development Fund for Iraq." United States ex rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 649 (D. Va. 2005)

[118] United States ex rel. DRC, Inc. v. Custer Battles, LLC, 2006 U.S. Dist. Lexis 6399 (E.D. Va., 2006).

[119] See the amended complaint, at http://www.taf.org/custerbattles.pdf.

[120] Starkman, Dean, "Operation Iraqi Free Ride," *The Washington Monthly*, July/August 2006.

[121] Dreazan, Yochi J., "Attorney Pursues Iraq Contractor Fraud," *The Wall Street Journal*, April 19, 2006.

until the federal government makes a formal decision as to whether or not to join them. (The Bush Administration did not join the Custer Battles suit.) Aside from Custer Battles, which it declined to join, the Justice Department has taken no action on any of them—despite the fact that theoretically, the government is the one being wronged by any fraud that its military contractors conducts.[122]

However, there are other means of ferreting out government contracting fraud, and the Custer Battles suit has been in some part responsible for strengthening these. In recent months, the PM industry has been subject to increasingly vigilant auditing by a handful of bodies. The Special Inspector General for Iraq Reconstruction (SIGIR), which took over from the CPA's Inspector General in October 2004 and is led by Stuart W. Bowen, Jr., has conducted numerous, rigorous audits pursuant to allegations of waste and abuse associated with the Iraq Reconstruction and Relief Fund. The Government Accountability Office (GAO), the Defense Contracting Audit Agency (DCAA), and the Defense Contracting Management Agency (DCMA), have also conducted a number of audits of major contractors such as Halliburton's subsidiary KBR, Titan, Parsons, and others. It appears, then, as though the policing of private military contracts will be more vigilant than the policing of private military contractors.[123]

Civil liability is an important tool in holding PMCs accountable to the contractors they hire, their shareholders and employees, the third parties that they encounter, and to their clients. However, it is highly imperfect, and civil courts are not designed to be policymaking bodies. In the absence of effective, comprehensive regulation operating alongside tort suits and contract disputes, this method of holding contractors accountable could generate substantial expense while failing to generate a coherent policy on how the military should best use its contractors.

Worse, it may end up driving many of the more fly-by-night PMCs offshore. After the U.S. government banned Custer Battles from bidding on new contracts or continuing its existing contract performance pending the fraud investigation, in January 2005 the company sold all of its

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[122] *Ibid*.

[123] In an interesting side-note that has not yet been litigated, PMCs could also find themselves running afoul of certain provisions of U.S. labor law, subjecting them to fines, and, in certain cases, litigation. Since 1997, the Defense Federal Acquisition Regulations Supplement (DFARS) entitled "Compliance with Local Labor Laws (Overseas)," requires contractors to comply with local laws, regulations, and labor union agreements that govern work hours, as well as collective bargaining agreements, worker's compensation, working conditions, fringe benefits, and labor standards or labor contract matters. (Davidson, Michael J., "Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield," *29 Pub. Cont. L. J. 233*, at 260). U.S. antidiscrimination statutes such as Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA), also possess transnational application, and are likely to present conflicts with local laws, particularly in Muslim countries. According to the safe harbor exception in Title VII that is also found in the ADEA and the ADA, given a conflict between U.S. law and local law, local law governs. (Davidson, at 261).

However, Congress has been unclear as to what constitutes a foreign "law" sufficient to provide access to the safe harbor for private companies that violate U.S. antidiscrimination statues in order to comply with local laws—in some cases under Shar'ia, law can only be divinely inspired, and sub-legal regulations govern day to day existence. It is conceivable that a U.S. court might find that these sub-legal promulgations do not rise to the level of formality sufficient to justify abrogating the anti-discrimination scheme. (*Ibid*).U.S. courts might, for instance, find that the custom of limiting female compensation or hours in the workplace, or requiring women to wear head scarves or robes, is insufficiently formal to justify being internalized into PMC company policy. Compliance with local custom would thus violate U.S. antidiscrimination statutes, but the safe harbor would be foreclosed because the customs would not rise to the level of formal law. In the same vein, private contractors clearly may not make hiring or firing decisions on the basis of sexual orientation, unlike the U.S. military.

assets to a Romanian company called Danubia, Global, in exchange for one U.S. dollar. The Romanian company worked out of Custer Battles' makeshift offices in Baghdad, absorbed many of its employees and one senior executive, and paid them out of Custer Battles' bank accounts. The link between Custer Battles and Danubia is currently the subject of an independent federal criminal investigation.[124] If this investigation concludes that Danubia was essentially a shell created to sidestep the ban on Custer Battles, executives of Danubia could be sued independently for fraudulently obtaining multi-million contracts to which they were not entitled.[125] Custer Battles often treated by the industry and its clients as an outlier and a black sheep, but policymakers would be well served to explore the risk that rogue PMCs will simply reincorporate in foreign jurisdictions to avoid being shut down in the United States.

B. The Insurance Regime

Another surprisingly significant constraint on the PM industry, as well as its clients, is insurance coverage. As mentioned above, PMCs are statutorily required to purchase insurance coverage from U.S. providers for their non-local employees as a prerequisite for bidding for government contracts in combat zones. [126] The statute that governs this regime is the 1941 Defense Base Act (DBA), which was passed during WWII to protect civilians who were hired to build U.S. military bases abroad.[127]

Historically, the market for DBA coverage has been rather small. However, given the increased numbers of contractors doing business in Iraq, it has exploded. In 2003, for instance, contractors claimed 23 deaths and 132 serious injuries in Iraq; by November, 2004 private contractors had already filed claims for 157 deaths and 516 serious injuries for the year, according to the U.S. Labor Department.[128]

Special DBA policies have in many cases proven prohibitively expensive to acquire. In the weeks leading up to the invasion of Iraq, rates increased by upwards of 500%, pricing some PMCs out of the market and leading to breaches of contract. These last-minute withdrawals left many soldiers in dangerous areas temporarily without food, proper shelter, or water. In a few extreme cases, soldiers were reported to resort to hydrating themselves from the IV bags in their medical kits.[129] Since the commencement of hostilities, premiums have jumped by over 400%, and now account for an average of 20 cents per dollar of payroll. [130] This has led to no-shows and contract breaches—in one notable case forcing a group of soldiers to drink the water from their IV bags for hydration because the logistics suppliers tasked with delivering their food and water were unable to purchase insurance.[131]

There is an intuitive logic to the fact that insurance premiums are so high—combat zones are characterized by above-average risk for all contractors, most of all for security details.

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[124] Dreazen, Yochi J., "Employees of contractor barred from Iraq resurrect business," *The Wall Street Journal*, June 20, 2006.
[125] *Ibid*.
[126] http://www.export.gov/iraq/bus_climate/dba.html. Waivers may be requested from the Department of Labor for local workers, who are ostensibly covered under their own worker's compensation schemes—but if these local schemes are absent or in disarray, the Department of Labor is free to reject the waiver request even for local national employees.
[127] Miller, T. Christian, "Army, Insurer in Iraq at Odds," Los Angeles Times, June 13, 2005.
[128] Capaccio, Tony, "Contractor Deaths Grow in Iraq," *Bloomberg News*, November 21, 2004.
[129] "Bechtel Benefits as Iraq Contractors Struggle to Get Insurance," *Bloomberg.com*, November 21, 2003 (http://quote.bloomberg.com/apps/news?pid=nifea&&sid=aviqx1uyGJh0).
[130] "Bechtel Benefits."
[131] "Bechtel Benefits."

However, insurance providers do not assume this risk. Due to an idiosyncrasy in the statutory regime that governs military contractors, providers pass along the extraordinary risk associated with combat-related deaths and injuries (as well as 15% of the administrative fees associated with these costs) to the U.S. government.[132] Under the War Hazards Compensation Act (WHCA), which is administered alongside the DBA, the Department of Labor reinsures providers for any claims paid due to war hazards—including but not limited to injuries or deaths due to roadside bombs, IEDS, or insurgency attacks.[133] The logic of the system is to keep premium prices down: in the absence of such a reinsurance scheme, due to the volatility and potential financial exposure that accompany war hazard risk, providers might either refuse to issue coverage, or demand prohibitively expensive rates. Under the logic of the statute, because the government assumes the extra risk, insurers should not price it into premiums.

Yet the evidence suggests that providers are doing just that.[134] Due to three entangled structural effects, premium prices have spiked over the course of the Iraq war: lack of regulation, high concentration, and inflated purchasing power due to cost-plus government contracting.[135]

While states regulate the provision of many types of insurance, DBA providers are not subject to rate caps or other forms of regulation. Furthermore, only four major providers offer war-related insurance to military contractors under the DBA—AIG, ACE-USA, CNA and Chubb. These four providers serve an enormous market, with upwards of 50,000 non-Iraqi contractors, and an increasing number of Iraqi national contractors for whom waivers may not always be granted.[136] Of these four providers, as of June 2005, AIG had filed some 80% of the 2732 claims for deaths and injuries in Iraq and Afghanistan, and ACE had filed another 10%.[137] The distorting impact of the large, cost-plus contracts that have proliferated in Iraq only compounds this effect, as employers understand that they can incorporate rising insurance costs into their contracts without squeezing their own margins. The result is that DBA insurance is very much a seller's market.

Furthermore, the upshot for the U.S. government is that it is effectively paying twice: initially as PMCs price insurance premiums into contracts (or refuse to take on particularly risky tasks), and additionally as the Department of Labor reimburses providers for claims paid out due to war hazards. Given that combat-related death claims routinely reach the $1.2 million to $1.8 million range, U.S. taxpayers are likely to pay well over $500 million in reimbursements to DBA insurance providers for contractor deaths in Iraq, with over 350 contractor casualties to date.[138]

To staunch this hemorrhage, in October 2003 the Department of Defense tried to negotiate blanket coverage for its contractors through the Army Corps of Engineers, whereby a single company would insure all Army Corps contracts. [139] A similar system is in place at both the Department of State and USAID, and it has resulted in far lower fees. Rather than the $15-$23 dollars of payroll estimated to be spent on average for DBA policies, contractors for USAID pay an average of $2.15 per $100 of payroll costs for insurance, and contractors for the

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[132] Miller, "Army, Insurer in Iraq at Odds."
[133] See http://www.dol.gov/esa/owcp/dlhwc/whca.htm.
[134] Miller, "Army, Insurer in Iraq at Odds."
[135] For a helpful explanation of these factors, see *Contractors on the Battlefield: Exploration of Unique Liability and Human Relations Issues*, Volume I: Human Relations and Insurance Issues in the Battlefield (American Bar Association, Section of Public Contract Law: 2004).
[136] See http://www.dol.gov/esa/owcp/dlhwc/whca.htm.
[137] Miller, "Army, Insurer in Iraq at Odds."
[138] http://www.brookings.edu/fp/saban/iraq/index.pdf.
[139] Miller, T. Christian, "Army, Insurer in Iraq at Odds," *Los Angeles Times*: June 13, 2005.

Department of State pay an average of $3.87-$5.00 per $100 of payroll costs on insurance.[140] Given the high concentration among the provider market, as well as the current favorable economic climate that providers have been enjoying, it is no surprise that the Army Corps proposal was met with strong, sustained protest. As a result, barring Congressional action, for the foreseeable future the DBA market will remain unregulated, concentrated, and inflated—and the U.S. government will continue to suffer the financial consequences.[141]

C. The Government Contracting Regime

While the civil liability and the insurance regime impose exogenous constraints on the PM industry and its clients, the internal structure of the government contracting regime creates significant endogenous constraints on the industry. At the level of the prime contractor, until the Iraq war the PMC market was highly concentrated and possessed significant barriers to entry, due to three factors: (1) the limited number of service providers, (2) the limited client-pool available for solicitation, and (3) the preference for large "umbrella" contracts that are bundled into large compound portfolios whose winner takes on the responsibility of breaking them down into multiple layers of sub- and subordinate contracts.[142]

The run-up to the Iraq war created a sharp spike in demand for PMC services, and to fill that demand quickly, a number of large contracts were granted on a no-bid basis. The sudden explosion of contracts at the prime contract level in turn created a vacuum at the sub and subordinate contract levels, which has driven the recent proliferation of private security providers.[143] In order to meet the surge, however, sub and subordinate contractors have not been uniformly capable of maintaining vetting and quality control measures.[144] As a result, the market that has emerged is highly segmented, possessing reinforced concentration and homogeneity at the prime level, and considerable heterogeneity and segmentation at the sub and subordinate level.

One possible solution to the problem is further commercialization—namely, reducing the barriers to entry, promotion of industry development, and solicitation of private (nongovernmental) clients. Many PMCs have been taking these routes—diversifying into non-combat activities such as training, risk consulting, research, intelligence, product development, and trying to break into the peacekeeping and development markets. But while growing the industry might help free the market and drive down the cost of contracting, it does assume and require that demand for contractors' services grows apace—leading to more conflict, many worry, not less.

Compounding these structural problems and market dynamics is the nature of the contracting instrument itself. By opting for maximal flexibility in creating and adjusting contracts on a contingency basis, the government may be sacrificing cost savings. Pre-established umbrella contracts administered through programs like the Army's Logistics Civil

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[140] Wong, Raymond J.M., "The Cost Treatment of Employee-Related Insurance for Contractor Employees in the Battlefield," *Contractors on the Battlefield: Exploration of Unique Liability and Human Relations Issues,* American Bar Association Section of Public Contract Law, Monday, August 2, 2004.

[141] "Bechtel Benefits as Iraq Contractors Struggle to Get Insurance," *Bloomberg.com*, November 21, 2003.

[142] *Ibid*.

[143] Aegis is a prime example of the effects of this vacuum. The neophyte British security provider, nominally an anti-piracy firm, was relatively unknown at the time that the Pentagon awarded it a $293 million contract to coordinate security services in Iraq—a contract estimated to have reached $430 million in December of 2005.

[144] See Ibrahim et al v. Titan, 391 F. Supp. 2d 10, alleging that Titan was forced to suspend its vetting mechanisms in order to meet the sharp spikes in demand for personnel due to its Iraq contracts.

Augmentation Program (LOGCAP) have become increasingly popular since their inception in 1992.[145] LOGCAP and similar programs allow for centrally managed, worldwide planning and services contracts to be created as the need arises, and unfettered by the time-consuming process of prospective open and competitive bids for each task order. Many of these contracts are "indefinite-delivery-indefinite-quantity" (IDIQ) vehicles, to be specified as the need arises, and many of them are cost-plus. This means that in essence, PMCs are treated as if they are on retainer to their clients: they are meant to respond quickly when they are needed, provide whatever service is desired, and send the bill for the costs outlaid when the work is done, adding a 1-9% profit on top.

Paying contractors retrospectively for costs incurred rather than negotiating fees prospectively often results in higher price.[146] Moreover, because executive agencies are provided fees for furnishing these all-purpose contracts, their incentive to decrease costs is reduced. The result, as one expert puts it, is that "The task-order regime resembles a self-replicating virus, without checks or controls. Program personnel favor these fast and all-too often invisible contracts, which sponsoring agencies gladly provide for a fee, and so the virus spreads."[147] Meanwhile, with each stage of decentralization and remove, the accounting process becomes more difficult.

Open-ended contracts have more immediate implications as well: the CACI interrogators implicated in the torture and abuse scandal at Abu Ghraib were hired not for interrogation, but for "inventory control and other routine services," and because the contract was initially awarded through the Department of the Interior, CPA administrators as well as the U.S. Army have claimed that they were not aware of the firm's presence in the prison. The specific details of these contracts have surfaced in large part due to the Army's formal investigation and the Ibrahim and Saleh civil suits.[148]

The marketplace dynamics that result from the government contracting regime are consequences not merely of law, tactics or policy. Rather, they are symptoms of the inherent constraints on public-private partnerships in the provision of force, signs of the mal-adaptation of the defense sector to a systemic approach to governance what one expert has referred to as the "governance/accountability model."

According to the governance/accountability model, governing through a mixture of public, private and civil society institutions generates efficiency gains by replacing regulation with a combination of modern management and social science techniques that align public and third-party interests. Incentive-based contracting ties bonuses to performance benchmarks; principal-agent theory holds contractors accountable as agents to their government-principals, and political stakeholders and business competitors are mobilized through competition to police the relationships between government and contractors internally, under the norm of widespread financial and administrative transparency.[149] By employing private sector actors to perform and enforce solutions to public sector problems, then, the market operates in a quasi-legislative,

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[145] Davidson, at 237.
[146] Vernon, at 380.
[147] Schooner, Steven L. "Iraq Contracting: Predictable Lessons Learned," *Statement before the United States Senate Democratic Policy Committee*, September 10, 2004.
[148] See Guttman, Dan, "Outsourcing the Pentagon," Center for Public Integrity (http://www.publicintegrity.org/pns/report.aspx?aid=386).
[149] Guttman, Dan. "Governance by Contract: Constitutional Visions; Time for Reflection and Choice." *33 Pub. Cont. L. J.* 321, at 341.

quasi-executive, quasi-judicial capacity according to this model. The anticipated result is that competition will drive down prices, increase competence and provide choice, all while preserving accountability.

However, it is difficult to apply these management and social science techniques to the PM industry, due to the market imperfections described above. Incentive or performance-based contracting, as one scholar notes, depends on "(1) a purchaser with the ability to not only understand, but also to articulate or specify its performance objectives; (2) the possibility of meaningful performance measures or metrics being identified, agreed upon, correlated to incentive schemes, and operationalized; (3) the existence of resources to oversee and monitor performance; and (4) the practical ability to take action, including replacing the contractor, where performance proves unsatisfactory."[150]

In the context of a rapidly evolving battlespace, performance objectives are often difficult to specify, making meaningful performance metrics difficult to quantify. Even if such measures are articulated, recent history has made clear that the resources to engage in more effective oversight are lacking.[151] The limited market for defense services suggests that the government will be unwilling to penalize poor performance given sharp surges in the demand military services that the military is increasingly unable to meet.

Moreover, the preference for no-bid or limited bid contracting, the industry's high concentration and barriers to entry, and the close ties between PMC management and the U.S. military all undermine the notion that business competitors will police the industry in the contest for market share, creating a virtuous cycle of improved performance. While it is arguable that firms might be willing to use public norms like transparency and compliance with "best practices" as leverage to win contracts, and while examples of private enforcement and voluntary codes of conduct do exist, they are the exception rather than the rule.[152]

Finally, lack of transparency has been a significant problem for the industry, and the true nature and extent of PM contracting is essentially unknown either within or beyond government walls. High-level officials are often unaware of their contractor subordinates, and lower-level officials are often unaware of their contractor co-workers. Agency directories do not include contractors; public databases, which are rarely kept up to date, do not disclose subcontractors; and contractor work product is often identified as official government work product. FOIA requests on contractors are limited, due to the proprietary content of private contracts, and the decentralized, disaggregated nature of the contracting process undermines oversight. While great strides in increasing transparency have been made by SIGIR, the GAO, the DCAA and the DCMA—along with the discovery process accompanying civil litigation—significant work remains.

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[150] Guttman, at 341.

[151] In addition to lack of financial resources to engage in oversight, the number of contracting officers responsible for overseeing contracts in Iraq, for instance, is far smaller than many experts estimate are needed. See Schooner, "Iraq Contracting: Predictable Lessons Learned," at 4-6.

[152] The Custer Battles and Dyncorp whistleblower suits are useful examples of this principle at work, as was Dyncorp's formal protest of the awarding of the Aegis grant by the CPA. See also IPOA's voluntary code of conduct, at www.ipoaonline.org. However, the contracting process complicates self-policing by denying standing to protest bid awards to third parties. The Office of Management and Budget, which administers hearings for government contractors, allows only the government agency and the second-best private entity losers of a competitive sourcing bid to have standing to protest formally. (See Paul Verkuil, "Public Law Limitations on Privatization of Government Functions," 84 N.C.L. Rev. 397, 452-455).

Some of these market imperfections will self-correct as the industry matures and new companies forged in Iraq either evolve into lasting, viable market participants or disappear. Others could easily be fixed.

The high costs of PMC insurance, for instance, are less due to structural flaws in the Defense Base Act statutory scheme than due to the fact that providers are unregulated. Increased oversight of the four primary DBA providers could keep these costs in check by ensuring that providers do not price war hazards risk into insurance premiums if they receive reimbursement from the Department of Labor under the War Hazards Compensation Act. A Congressionally mandated negotiated rate cap or partial indemnification plan could achieve the same end.

Opening up the contract bidding process, even under an expedited schedule modeled on the GSA, would also help to check the costs of contracting. When the industry was young and limited, no-bid and limited bid contracts were unavoidable considering the limited size of the qualified pool of providers and the urgent demand for their services. Since the industry's Iraq-induced growth spurt, however, the pool of competent companies has grown sufficiently to allow for open bidding in all the but the most exigent circumstance. Related to this, cost-plus contracting, which grossly favors vendors by reducing their incentives to estimate, and cut, costs, should be replaced by fixed price contracting as the default contracting vehicle of choice.

The Office of Management and Budget, which oversees government contracting, could contribute to making the industry more transparent by granting limited third party standing to protest bid awards. Not only would third party standing increase industry self-policing, it could lead to more rigorous *ex ante* cost projections on the part of PMCs.[153]

The creation of the Reconstruction Operations Center (ROC) in Iraq in October 2004 has helped to organize and coordinate contractors on the ground and manage the PMC-military interface. Contributing more resources to centralization, and in particular adding contracting officers to the ground would help to manage contracts on the implementation side—a seemingly straightforward measure that some experts have been urging for years without sufficient government response.[154]

Finally, as one expert notes, the language of the contracts themselves could be used to generate accountability.[155] Contracts could require pre-deployment training in human rights law and international law, they could include specific performance benchmarks, or heightened whistleblower protection and third-party beneficiary standing for civil suits, and they could possess graduated termination provisions in case of non-performance or malfeasance.[156] Using contracting vehicles to strengthen accountability over contractors in this way is perhaps the most promising suggestion that's currently on the table, because it does not require Congressional action, DOD deliberation or international consensus. Moreover, it does not rely on an overburdened and costly judiciary or create a cumbersome administrative process.[157]

There is a model for this type of contracting vehicle, the U.S. State Department's Worldwide Personal Protective Services contract, or WPPS. The WPPS contract, which was

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[153] Verkuil, Paul R., "Public Law Limitations on Privatization of Government Functions," Cardozo Legal Studies Research Paper No. 104, March 1, 2005, at 28.
[154] See GAO, "Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers," July 28, 2005 (http://www.gao.gov/htext/d05737.html).
[155] Dickinson, Laura, "Accountability and the Uses of Contract," *IPOA Online*, April 10 2006.
[156] *Ibid*.
[157] *Ibid*.

launched in 2000 to provide personal security for foreign dignitaries, U.S. and foreign diplomats and embassies, among other entities, is currently shared between three private security providers: Blackwater USA, Dyncorp, and Triple Canopy, and a re-bid that will be announced in coming months will add a few others. The contract specifies with prolix precision the types of duties that contractors will take on—including the number of hours and types of training they will receive, the course offerings and physical requirements of the training centers they receive it from, the types of weapons contractors may use, their rules of engagement, and so on. According to one expert, it leaves absolutely no room for interpretation.[158] WPPS also creates an expedited bidding process—after selecting a handful of winners from an open bidding process each of these winners will be approved to bid on individual task orders that the State Department will distribute as needs arise. Because the WPPS-holders have already been approved as vendors, task orders may be bid on and filled in an expedited manner without compromising accountability or running up costs.[159]

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In order to implement any of these changes, however, the "hidden" costs of contracting must be more fully understood—the operational, financial and social consequences of the increased use of PMCs. Mapping and measuring the constraints that accompany PMCs to the battlefield is critical to the debate over military contracting, for while these constraints have begun to emerge only recently, they are growing in scope and in strength, even while reliance on contractors increases.

As American troops are drawn down from Iraq, contractors are likely to play an even larger role in Iraq's reconstruction. But the more that PMCs are embroiled in tort suits and contracts disputes, the more they are beset by costly externalities such as rising insurance rates and legal fees that are incorporated into cost-plus contracts, the more uneconomical and unwieldy they will become. And as the outsourcing trend continues, it will become increasingly difficult for governments to rollback outsourcing and metabolize the functions that are currently being performed by contractors. The efficiency rationale for using PMCs is that they provide surge capacity. However, when the surge turns out to be chronic and constant, this rationale should be re-examined.

The policy implications of the rise in the PMC industry extend far beyond the immediate situation in Iraq and Afghanistan. Assuming that PMCs are a durable feature of the international political landscape, the underlying issues raised by the debate over military contracting have long term significance for the future of private military service provider activities worldwide.

[158] Conversation with Fred Piry, former State Department official, June 12, 2006.
[159] For more on the WPPS, see: http://www.whitehouse.gov/omb/expectmore/detail.10001113.2005.html.