

**HUMAN RIGHTS FIRST
WRITTEN TESTIMONY FOR
THE COMMISSION ON WARTIME CONTRACTING IN IRAQ AND
AFGHANISTAN**

**HEARING ON
“ARE PRIVATE SECURITY CONTRACTORS PERFORMING INHERENTLY
GOVERNMENTAL FUNCTIONS”**

JUNE 18, 2010

We are pleased to submit this testimony on behalf of Human Rights First. Human Rights First works in the United States and abroad to promote a secure and humane world by advancing justice, human dignity and respect for the rule of law. We have been a leader since 9/11 in advocating for national security policies that comport with the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and work to ensure that human rights law and principles are enforced in the United States and abroad. Human Rights First applauds the Commission for investigating the role that Private Security Contractors are playing in ongoing contingency operations and is grateful for the opportunity to submit this testimony.

The use of private contractors is a defining feature of the United States military and diplomatic presence in Iraq and Afghanistan. As this Commission well knows, private sector employees permeate virtually every component of the mission in those countries—from filing paperwork to using deadly force. As of May 2010, the Department of Defense estimates that it employs over 207,000 contractors in Iraq and Afghanistan alone, of which at least 28,000 are classified as “Private Security Contractors.”¹ This number will only grow in the coming months as the Afghan “surge” takes shape; indeed the Congressional Research Service estimates that another 20,000-50,000 will be required to support that strategy.² Similarly, the State Department and USAID report that they employ around 9,000 and 16,700 contractors respectively in the United States’ main combat zones (though they have no estimate on PSC’s specifically, and GAO suspects that each of those numbers severely under-represents the contractor force of each agency).³ Private security contractors provide protection to convoys of vital supplies to U.S. bases, conduct interrogations, guard the perimeter of the U.S. embassies and consulates, and act as the personal security detail for U.S. diplomats.

¹ DEPARTMENT OF DEFENSE, CONTRACTOR SUPPORT OF U.S. OPERATIONS IN THE USCENTCOM AREA OF RESPONSIBILITY, IRAQ, AND AFGHANISTAN 2 (2010), *available at* www.acq.osd.mil/log/PS/p_vault/5A_May2010.doc.

² MOSHE SCHWARTZ, DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS 13 (Congressional Research Service 2009).

³ GOVERNMENT ACCOUNTABILITY OFFICE, GAO-09-19, CONTINGENCY CONTRACTING DoD, STATE, AND USAID CONTRACTS AND CONTRACTOR PERSONNEL IN IRAQ AND AFGHANISTAN 6-7 (2008).

The U.S. government has relied more on contractors in Iraq and Afghanistan than at any other time. With this increased reliance on contractors have come increased incidents of serious criminal violations. Yet, only a handful of U.S. contractors have been prosecuted for criminal misconduct. The most notorious incident—the killing of 17 Iraqi civilians in Nisoor Square in 2008 by Blackwater employees—symbolizes the “culture of impunity” that Human Rights First reported on in 2008.

Contractors have been implicated in a range of abuses across theaters and in multiple capacities. They have been accused of participating in torture⁴ and of imposing wanton violence on local civilian populations.⁵ In an incident that eerily mirrors the Nisoor Square violence, Blackwater subcontractors are accused of the unprovoked murder of two Afghan men and injuring one other after firing at a nearby vehicle in a Kabul intersection.⁶

By failing to hold contractors accountable for acts of violence and abuse abroad, the United States has created a culture of impunity which has fostered great hostility among civilian populations towards the United States. This threatens the safety of U.S military personnel and contractors as well as undermines the U.S. mission.

These abuses, and the accompanying lack of accountability, are inextricably linked with the tasks that we ask private security contractors to perform. In this testimony we focus on each aspect of that link and offer potential solutions to ensure that the United States’ use of contractor personnel, who often contribute to mission success in important ways, conforms to U.S. values and policy interests. In short, minimizing the likelihood that security contractors will be drawn into hostilities, while ensuring appropriate accountability and oversight, can restore America’s position as a leader on human rights issues while strengthening our ability to accomplish important national security objectives.

Private Security Contractors Functions and Conduct

Restrictions on what functions private security contractors are asked to fulfill and on when they are permitted to use force are essential to maintaining the important distinction between combatants, who are legitimate military targets, and civilians who are not engaged in combat and so are not legitimate targets of war. Current U.S. policy on what functions and conduct private security contractors are allowed to engage in threatens to blur the essential international humanitarian law (IHL) distinctions between civilians and combatants, and jeopardize other civilians performing important roles in theater.

⁴ Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009).

⁵ See Indictment, U.S. v. Cannon, No. 2:10cr 1, 2010 WL 28529 (E.D.Va. Jan 6, 2010), accusing two former PSC’s of murder and attempted murder in an incident where they fired, unprovoked, on an Afghan vehicle in Kabul; HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS AT WAR 27 inset (2008) describing the murder of a bodyguard to an Iraqi Vice President by an American PSC.

⁶ Indictment, U.S. v. Cannon, No. 2:10cr 1, 2010 WL 28529 (E.D.Va. Jan 6, 2010).

Contractor Functions

While U.S. government policy bars security contractors from engaging in combat or in offensive military operations, it permits contractors to use deadly force to protect lawful military targets, including military facilities, property and personnel, from even non-imminent threats. By tasking contractors to protect military targets in environments such as Iraq and Afghanistan, the U.S. government renders them targetable under the laws of war, makes security contractor operations more likely to result in innocent civilian casualties, and virtually ensures that they will engage in combat – without the protections under the law of war to which uniformed military personnel are entitled as combatants. Because contractors are civilians and (unlike combatants) do not have a legal privilege to participate in hostilities in armed conflict, critical distinctions between civilians and combatants under the law of war are eroded, thus jeopardizing other civilians performing important roles in theater.

Department of Defense Instruction No. 3020.41 prescribes policies and procedures concerning Defense Department contractors authorized to accompany the U.S. military.⁷ The instruction prohibits security contractors from performing “inherently governmental military functions,” but Defense Department guidance defines this term far too narrowly, limiting the restriction to “offensive tactics”⁸ such as conducting assault or preemptive attacks.⁹ A security contractor, however, can participate in hostilities in many types of defensive activities. For instance, if security contractors are protecting a legitimate military objective, such as military hardware, they may be acting in a defensive capacity but they are engaging in a combat function, i.e. they are directly participating in hostilities and are therefore rendered a legitimate target. A 2008 Senate Armed Services Committee¹⁰ proposal to address these inadequacies in the military’s definition of “inherently governmental military functions” focused on whether the contractor would be most likely to shoot first. However, under IHL who shoots first is irrelevant to whether a contractor is directly participating in hostilities.

To preserve the distinction between combatants and civilians in a theater of combat and to best protect all civilians in such areas, the definition of inherently governmental functions should be reworked. The new definition should minimize the likelihood that contractors will be drawn into participating directly in hostilities regardless of whether they would be acting in an offensive or defensive capacity. Such a definition should require consideration of the nature of the object, property, or persons that contractors are hired to protect and other circumstances that are likely to put civilians at high risk of being pulled into combat.

⁷ Department of Defense Instruction 3020.41 (Oct. 3, 2005).

⁸ Department of Defense Instruction 1100.22 subpara 2.d.(6)(a) of Enclosure 5 (April 12, 2010).

⁹ Department of Defense Instruction 1100.22 para. 1.d. of Enclosure 4 (April 12, 2010).

¹⁰ National Defense Authorization Act for Fiscal Year 2009, S. 3001, 110th Cong. §841 (2008).

Rules for the Use of Force

Similarly, rules governing private security contractors' conduct should be specifically crafted to minimize the risk that private security contractors will be drawn into combat. Unlike the military, contractors do not have a legal privilege to engage in hostilities and are not subject to the military chain of command. Under international humanitarian law, it is paramount that rules governing combatant and civilian conduct remain distinct and separate in order to protect civilians from harm as well as domestic prosecution.

Private security contractors, as civilians, follow the Rules for the Use of Force (RUF), not the military's Rules of Engagement (ROE). According to this Commission's Interim Report, the significant differences between the RUF from ROE detrimentally impacted security.¹¹ For example, military operating under ROE are more willing to quickly and decisively engage a threat, and unlike private security contractors, are authorized to hold individuals that pose a potential threat.¹² As a result, according to the report, RUF for private security contractors guarding forward operating bases may not adequately protect military personnel.¹³

However, the solution should not be that the rules for the use of force by security contractors should more closely track the military's rules of engagement. Instead, a closer analysis should be conducted of whether this function is appropriate for private security contractors to perform, rather than the military. To do otherwise would dangerously blur the principle of distinction, putting all civilians at risk.

Binding rules for the use of force should be modeled on appropriate civilian principles of self-defense and defense of others. Current regulations, while barring security contractors from engaging in "combat" or in "offensive" military operations, do not go far enough. Under the current rules, contractors are authorized to use deadly force under a "hostile act/hostile threat" framework that sets an unacceptably low threshold for civilian (even security contractors) use of deadly force.

For example, the Memorandum of Agreement (MoA) between the Defense and State Departments regarding private security contractors in Iraq¹⁴ and Department of Defense Instruction No. 3020.41 (including corresponding DFARS¹⁵ and FAR¹⁶ provisions) authorize private security contractors to use deadly force beyond self-defense when necessary to execute their contract security missions to protect assets and/or persons. By

¹¹ COMMISSION ON WARTIME CONTRACTING, AT WHAT COST? CONTINGENCY CONTRACTING IN IRAQ AND AFGHANISTAN 72 (2009).

¹² *Id.* at 73.

¹³ *Id.* at 3.

¹⁴ Memorandum of Agreement between the Department of Defense and the Department of State on USG Private Security Contractors (December 5, 2007) www.defenselink.mil/pubs/pdfs/Signed%20MOA%20Dec%2005%2007.pdf.

¹⁵ Defense Federal Acquisition Regulation Supplement, Subpart 252.225-7040 (2009).

¹⁶ Federal Acquisition Regulation, Subpart 52.225-19 (2008).

doing so, the rules increase the likelihood that security contractors will be drawn into combat.

Both the functions performed by security contractors and the rules governing their conduct should minimize the likelihood that they will be drawn into hostilities. Not doing so dangerously blurs the principle of distinction designed to protect civilians in conflict from harm and leaves contractors susceptible to domestic prosecution.

Criminal Accountability

Ensuring that sufficient laws, mechanisms and resources are in place to hold wartime contractors criminally responsible for serious abuses is essential to protecting the reputation of the United States as a nation committed to upholding the rule of law and to ensuring fulfillment of U.S. military missions abroad. When government contractors commit offenses that amount to serious violations of the law of armed conflict or human rights law, the government likewise is responsible to ensure the availability of effective mechanisms for investigating and prosecuting offenders. Meaningful accountability for U.S. contractors operating abroad will require clarification and expansion of U.S. criminal jurisdiction, an increase in investigatory and prosecutorial resources, and increased oversight and control over private security contractors in the field.

Clarification and Expansion of Criminal Jurisdiction

While there is legislation in place that allows federal courts to exercise jurisdiction over security contractors who commit crimes, the resources and political will to prosecute such crimes has been lacking; this must change. The Military Extraterritorial Jurisdiction Act (MEJA)¹⁷ is the primary tool by which federal courts exercise jurisdiction over crimes committed by contractors in combat zones. It allows the prosecution for several enumerated serious crimes of anyone employed as a contractor by the Department of Defense or other federal agency, “to the extent such employment relates to supporting the mission of the Department of Defense overseas.”¹⁸ Although this legislation has been used in a range of contractor prosecutions,¹⁹ some government officials have asserted that MEJA would not cover non-DoD contractors.²⁰ Though imperfect, this grant of jurisdiction does extend to virtually all security contractors deployed in current contingency operations and has been used successfully against non-DoD contractors.²¹ MEJA should not be used to mask the dearth of political will that has been the main impediment to criminal prosecutions.

¹⁷ 18 U.S.C. §3261 et seq.

¹⁸ 18 U.S.C. §3267(1)(A)(ii)(II).

¹⁹ See, e.g., U.S. v. Slough, 677 F.Supp.2d 112 (D.D.C. 2009) (where MEJA was used to prosecute Blackwater employees for voluntary manslaughter); U.S. v. Gleason, 2009 WL 799645 (D.Or. 2009) (MEJA used in a child pornography prosecution); U.S. v. Maldonado, 215 Fed. Appx. 938 (11th Cir. 2007) (MEJA used in an Abusive Sexual Contact prosecution).

²⁰ See, e.g., Statement of Secretary of State Condoleezza Rice, House Committee on Oversight and Government Reform, *The State Department and the Iraq War*, 110th Cong., 1st sess., Oct. 25, 2007, pp. 93-105 (declaring that “there is a hole” in U.S. law that has prevented prosecution of contractors).

²¹ U.S. v. Gleason, 2009 WL 799645 (D.Or. Mar. 24, 2009).

Moreover, Senator Patrick Leahy²² and Representative David Price²³ have introduced legislation in each house of Congress which would clarify and expand the jurisdiction of U.S. courts over serious crimes committed by private contractors deployed abroad by the United States to include anyone “employed by or accompanying any department or agency of the United States.” This clearly and unambiguously holds civilian contractors for agencies such as the Department of State and the Department of the Interior accountable in federal courts for acts committed overseas. Known as CEJA, the Civilian Extraterritorial Jurisdiction Act is a meaningful step towards closing the accountability gap and preventing future abuses of contractors deployed by the United States abroad.

Perhaps even more important than addressing the jurisdiction gap are the resources and guidance that CEJA provides for the establishment of “Investigative Units for Contractor and Employee Oversight.”²⁴ The provision unequivocally makes the investigation and prosecution of contractor crime a priority. These units would give the Justice Department and other federal agencies the manpower necessary to properly re-evaluate referrals made since 9/11 (an unaccountably large proportion of which have been dropped)²⁵ and to investigate new allegations as they arise. Invigorating this investigative process is key to ending the “culture of impunity” in the contractor community and ensuring proper oversight going forward.

Increasing the Effectiveness of Control and Oversight of Private Security Contractors in the Field

In recent years, Congress has taken important steps in mandating regulations governing selection, training, equipping and conduct of personnel performing private security functions in areas of combat operations.²⁶ However, oversight and accountability gaps persist when it comes to ensuring implementation of these regulations in the field.

In an attempt to fill some of these gaps, last month the Senate Armed Services Committee included additional provisions of oversight and accountability in the National Defense Authorization Act of Fiscal Year 2011.²⁷ The provision would require that an appropriate number of personnel are assigned to the oversight of contractors performing private security functions. Moreover, it would provide new measures to hold contractors accountable for any failure by their employees or subcontractors to comply with the requirements of law or regulation, or with directives from combatant commanders.

This push for greater accountability and U.S. government oversight is a positive development and it is complemented by international efforts to raise the standards for

²² Civilian Extraterritorial Jurisdiction Act (CEJA) of 2010, S. 2979, 111th Cong. (2010).

²³ Civilian Extraterritorial Jurisdiction Act (CEJA) of 2010, H.R. 4567, 111th Cong. (2010).

²⁴ S.2979 §3.

²⁵ The 17 MEJA prosecutions contrast unfavorably with the hundreds of suspicious incidents identified in *Private Security Contractors at War*. HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS AT WAR (2008), available at <http://www.humanrightsfirst.info/pdf/08115-usls-psc-final.pdf>.

²⁶ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 862 (2008).

²⁷ National Defense Authorization Act for Fiscal Year 2011, S. 3454, 111th Cong. § 842 (2010).

private security contractors globally. In 2008, the United States, joined by 16 other states, agreed to the “Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict,” which laid out state obligations via such companies under existing international law.²⁸ Following the completion of the Montreux Document, a number of key stakeholders came together, led by the Swiss Department of Foreign Affairs, to work to establish a Global Code of Conduct that would apply directly to the industry as opposed to states. This initiative has involved various key governments, companies, and civil society representatives who are working to establish a set of standards and mechanisms for standard implementation and accountability.

While the Code of Conduct for private security companies is still in its initial stages, the experience of existing multi-stakeholder initiatives suggests that a Code of Conduct accompanied by a robust enforcement mechanism has the potential to effectively assist companies in significantly mitigating their negative human rights impacts on the communities in which they operate. Existing multi-stakeholder frameworks such as the Fair Labor Association, in the textiles and footwear industry, and the Kimberly Process, in the diamond industry, incorporate due diligence requirements designed to preserve the legitimacy of the initiative in a manner that will help protect companies against the risk of legal non-compliance and the cost of community resistance, in addition to reducing adverse human rights impacts.

Existing industry initiatives have, however, demonstrated that for a code of standards to be meaningful, companies must also commit to take specific steps to fulfill their due diligence responsibility to respect human rights. In order for it to be effective, any Code implementation mechanism for the private security sector must take into account the need for a governance structure that is credible, includes all relevant stakeholders and enjoys the authority needed to be effective. Additionally, it should reflect the need for effective, credible implementation that includes independent assessment, public reporting, and transparency among stakeholders.

Moreover, HRF’s experience in working with existing multi-stakeholder initiatives demonstrates that companies can adopt a code and provide training and monitoring of company activities but still face serious compliance gaps. To fill those gaps an implementation must take a holistic approach that goes beyond binary, yes/no auditing to look closely at how companies fulfill a particular code requirement or meet a specific benchmark in the field. This information is then used to identify systematic or entrenched problems and to formulate a capacity building plan that addresses the issues identified. Human Rights First has urged the participants in the initiative to establish a Code of Conduct for private security companies to learn from the lessons of governance and implementation experiences of existing initiatives, and at the earliest stages of the initiative’s development, to work to agree to the essential elements of a governance structure and implementation plan.

²⁸ International Committee of the Red Cross, *Montreux Document on the Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*, Sept. 17, 2008.

Conclusion

Private security contractors are being asked to function in active combat zones in ways that dangerously blur the line between civilians and the military. Consequently, contractors have continued to engage in hostile activity with minimal command, contractual, or judicial oversight. This has put other civilians, and America's security interests, at risk and contributed to a lack of political will to hold contractors accountable when they engage in criminal activity. To correct this, the definition of "inherently governmental" should reflect a strong preference that contractors not engage in hostile activity. Contractors must also be held responsible by a robust and adequately-resourced judicial system when they commit crimes, and additional, credible, oversight must be exercised in the field. Human Rights First applauds this Commission's efforts and urges that continued emphasis be put on ensuring that private security contractors are employed in a manner consistent with American values and interests.