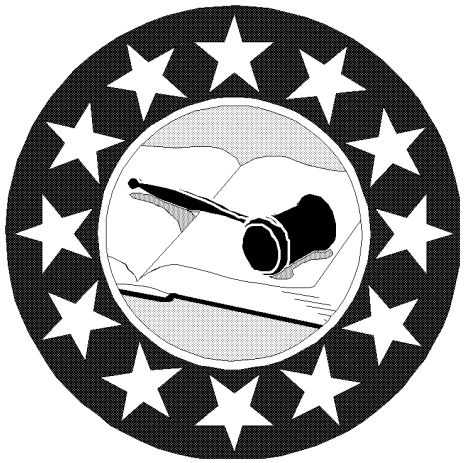

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Articles

The Law in the Service of Terror Victims: Can the Palestinian Authority Be Sued in Israeli Civilian Courts for Damages Caused by Its Involvement in Terror Acts During the Second Intifada?

Captain Gal Asael[*]

Reason can wrestle and overthrow terror.

–Euripides[1]

I. Introduction

A. The Importance of the Topic

On the morning of 28 September 2000, Ariel Sharon, then leader of the Israeli opposition in the Knesset (the Israeli parliament), visited the Temple Mount in Jerusalem.[2] "[T]he moment the plans for the visit had been made public . . . there was concern among Israeli security officials that the heavily media-covered visit might inflame some Palestinian nationalist sentiments . . . ."[3] Eventually, Sharon's visit was relatively quiet. "By the afternoon, despite sporadic flare-ups of further clashes between police and demonstrators, Israeli security officials concluded that the matter was behind them."[4] Unfortunately, that conclusion turned out to be totally wrong.[5]

"Within hours, the Voice of Palestine was broadcasting denunciations."[6] Sharon was blamed for degrading the Muslim holy places.[7] "Yasser Arafat, the Palestinian Authority chairman, called upon the entire Arab and Islamic world to 'move immediately to stop these aggressions and Israeli practices against holy Jerusalem.'"[8]

The following day brought great escalation.[9] "In the West Bank town of Qalqilya a Palestinian police officer participating in a joint security patrol with Israeli police opened fire and killed his Israeli counterpart."[10] In Jerusalem,

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[*] Israel Defense Forces. Written while assigned as a student in the 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, U. S. Army, Charlottesville, Va. 2008, LL.M., The Judge Advocate General's Legal Ctr. & Sch. (TJAGLCS); 2007, LL.M. (*Cum Laude*), Haifa University, Faculty of Law, Israel; 2001, LL.B., (*Cum Laude*), Haifa University, Faculty of Law, Israel. Previous assignments include Legal Adviser to the Deputy Military Advocate General, Military Advocate General's Corps, IDF 2005–2007; Security Branch Head, Infrastructure Branch Head, and Senior Legal Advisor, International Law Department, Military Advocate General's Corps, IDF 2001–2005. Member of the Israel Bar Association.

The Israeli-Palestinian conflict is well-known to the author. In his assignments, the author frequently engaged in legal aspects concerning Israel's relations with the Palestinians. The author would like to thank the Professors at TJAGLCS for their input on earlier drafts of this article and especially to Lieutenant Colonel Craig Burton.

The positions and opinions stated in this article are those of the author and do not represent the views of the State of Israel, Israel Defense Forces, and the Military Advocate General's Corps.

[1] RICHARD ALAN KRIEGER, CIVILIZATION'S QUOTATIONS: LIFE'S IDEAL 105 (2002) (quoting Euripides, 480–406 BC).

[2] *See, e.g.*, Mike Hanna & Assoc. Press., *Israeli Troops, Palestinians Clash after Sharon Visits Jerusalem Sacred Site*, CNN, Sept. 28, 2000, http://archives.cnn.com/2000/WORLD/meast/09/28/jerusalem.violence.02/.

[3] Ziv Hellman, *The Beginnings of the Second Intifada*, MY JEWISH LEARNING, http://www.myjewishlearning.com/index.html?VI=010604080630 (follow "History & Community" hyperlink; then follow " Contemporary Isreal" hyperlink; then follow "Israeli-Palestinian relations" hyperlink; then follow" Intifada 1" hyperlink; then follow "The second Intifada" hyperlink) (last visited June 30, 2008).

[4] *Id.*

[5] *See* Hanna, *supra* note 2; *see, e.g.*, Mark Tran, *Middle East Fighting Restarts*, GUARDIAN (London) Oct. 3, 2000, *available at* http://www.guardian.co.uk/world/2000/oct/03/israel8.

[6] Hellman, *supra* note 3.

[7] *Id.*

[8] *Id.*

[9] *Id.*; *see also* Jerrold Kessel et al., *Violence Escalates Between Palestinians, Israeli Troops*, CNN, Sept. 30, 2000, http://archives.cnn.com/2000/WORLD/meast/09/30/israel.violence.03/; Ross Dunn, *Israel-Palestinians Update*, GLOBAL SECURITY, Oct. 5, 2000, http://www.globalsecurity.org/military/library/news/2000/10/war-001005-meisr7.htm.

[10] Hellman, *supra* note 3.

hundreds of Palestinians threw heavy rocks onto the Wailing Wall while Jewish worshippers were praying.[11] The worshippers had been coerced to run away and the Israeli border guard responded by opening fire on the Palestinian rioters.[12]

The second Intifada broke out.

The appellation Intifada—meaning uprising in Arabic[13]—was given to the erupting violence as if it was a continuation of the first Palestinian Intifada against Israel.[14] "But the differences between the two rapidly became clear. Where the first Intifada was characterized most memorably by Palestinian youths throwing stones at Israeli soldiers, the second Intifada has been far bloodier, taking on the aspects of armed conflict, guerilla warfare, and terrorist attacks."[15]

During the second Intifada, wide-ranging terror attacks struck Israel.[16] "Most of the terrorist attacks were directed toward civilians. They struck at men and at women; at elderly and at children. Entire families lost their loved ones. . . . The terror attacks occurred everywhere, including public transportation, shopping centers and markets, coffee houses, and inside . . . houses and communities."[17] Great fear descended on the streets of Israeli towns.

As time passed, it became more and more clear that the Palestinian Authority was the life and soul of the renewed uprising.[18] Strong evidence showed that the Palestinian Authority engaged in planning and executing terror attacks.[19] It also encouraged them ideologically and authorized them financially.[20] To date, more than a thousand Israelis have been killed in the attacks,[21] and thousands of businesses were damaged.[22] Unfortunately, the terror attacks are still taking place.[23]

Is the law able to come to those victims' aid?

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[11] *Id.*

[12] *Id.*

[13] *See, e.g.*, Merriam-Webster Online Dictionary, *Definition of Intifada*, http://www.m-w.com/dictionary/Intifada (last visited Mar. 14, 2008). The second Intifada is also known as the al-Aqsa Intifada. ITAMAR RABINOVICH, WAGING PEACE: ISRAEL AND THE ARABS, 1948–2003, at 308 (2004). "Al-Aqsa" is the important mosque on the Temple Mount. *Id.* The second Intifada is also called the "Oslo War" by those who consider it a tragic result of the Oslo agreements signed by the government of Israel and the PLO. *Id.* The Israel Defense Forces (IDF) codenamed the Palestinian violence "Ebb and Tide Events." *Id.* However, the common name for the violent events that broke out in September 2000 is "the second Intifada." *Id.*

[14] The first Intifada broke out in 1987. It began in Jabalia refugee camp in the vicinity of Gaza, and spread to the Gaza Strip and the West Bank.

> Palestinian actions took a number of forms, including increased attacks against Israeli civilians, civil disobedience, general strikes, boycotts on Israeli products, graffiti, barricades, Molotov cocktails and grenades, but it was young people throwing stones at Israeli soldiers and vehicles that caught the media attention. Over the course of the first Intifada, an estimated 1,100 Palestinians and 160 Israelis were killed.

RABINOVICH, *supra* note 13, at 147. The Intifada officially ended in 1993 when Israel and the Palestine Liberation Organization signed the Oslo Accords. *Id. See generally* ZE'EV SCHIFF & EHUD YA'ARI, INTIFADA: THE PALESTINIAN UPRISING: ISRAEL'S THIRD FRONT (1989) (providing background and historical analysis with regard to the first Intifada).

[15] Hellman, *supra* note 3.

[16] *See* HCJ 7957/04 Mara'abe v. Prime Minister of Israel [2005] IsrSC 58(2) 393, 395 (discussing the factual background that led to the establishment of the security fence in the West Bank).

[17] *Id.*

[18] *See, e.g.*, ISRAELI MINISTRY OF FOREIGN AFFAIRS, THE INVOLVEMENT OF ARAFAT, PA SENIOR OFFICIALS AND APPARATUSES IN TERRORISM AGAINST ISRAEL (2002) [hereinafter TERRORISM AGAINST ISRAEL], *available at* http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2002/5/The%20Involvement%20of%20Arafat-%20PA%20Senior%20Officials%20and (concluding that the Palestinian Authority under Yasser Arafat supported, encouraged and executed terror attacks).

[19] *Id.*

[20] *Id.*

[21] *See, e.g.*, B'Tselem Human Rights Organization, *Fatalities Statistics*, http://www.btselem.org/English/Statistics/Casualties.asp (last visited July 1, 2008) [hereinafter *Fatalities Statistics*].

[22] *See, e.g.*, Nehemia Strasler, *The Price of the Intifada*, HA'ARETZ, May 24, 2001, *available at* http://old.kh-uia.org.il/Crisisnew/archiev/English/enma29.htm.

[23] *See, e.g.*, Efrat Weiss, *Israeli Killed in West Bank Terror Attack*, YNETNEWS, Nov. 20, 2007, http://www.ynetnews.com/articles/0,7340,L-3473402,00.html; *see also* Efrat Weiss, *Killers of Off-Duty Soldiers near Hebron Were PA Security Officers*, YNETNEWS (Isr.), Jan. 1, 2008, http://www.ynetnews.com/articles/0,7340,L-3489270,00.html.

The question placed in the heart of this article is whether the Palestinian Authority can be sued in Israeli civilian courts for damages caused by its involvement in terror acts during the second Intifada. Answering this question in the affirmative may create a significant and actual change. It may render hope, relief, and a sense of justice.

B. The Scope of the Research

This article will demonstrate that under international and domestic law, there is an adequate legal basis for the terror victims to sue the Palestinian Authority in Israeli courts for damages caused by its involvement in terrorism.

The Israelis have suffered from the Palestinian terrorism since Israel's establishment.[24] Terror was Israel's lot even—and sometimes especially—during the peace process with the Palestinians.[25] However, this article refers to a specific timeframe starting in September 2000 when the second Intifada broke out, with the significant role of the Palestinian Authority in planning and executing terror attacks.[26]

The first section of this article focuses on the Israeli-Palestine conflict and on the involvement of the Palestinian Authority in terror acts against Israel. The legal background will concentrate on the existing legal means the Israeli legal system offers the terror victims in order to sue the Palestinian Authority.

The article will then analyze the topic's key-question: can the Palestinian Authority be sued in Israeli civilian courts for damages caused by its involvement in terror acts? Addressing this key-question, five sub-questions require legal analysis in both domestic and international spheres:

1. Is the Palestinian Authority considered a legal personality; i.e., is the Palestinian Authority entitled to foreign sovereign immunity when it is sued before Israeli courts?

2. Are actions filed by terror victims against the Palestinian Authority justiciable in domestic courts?

3. What is the appropriate forum to deal with actions filed by terror victims against the Palestinian Authority?

4. Assuming the Israeli courts are entitled to treat those actions, which law should be applied in accordance with the rules of private international law?

5. Upon what sources of law can the terror victims base their actions?

This article argues that under international law and domestic law, there is a solid legal basis for the terror victims to sue the Palestinian Authority in Israeli courts.

Finally, this article provides a proposal for domestic legislation designed to regulate the matter of suing the Palestinian Authority in Israeli courts for damages caused by its involvement in terrorism.

II. Background

A. Factual Background

1. The Israeli-Palestinian Conflict

Before discussing the Palestinian terrorism and its consequences, it is crucial to be familiar with the general picture of the Israeli-Palestinian conflict. The latter "is an ongoing dispute between the State of Israel and Arab Palestinians. In

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[24] *See generally* AHRON BREGMAN, ISRAEL'S WARS: A HISTORY SINCE 1947 (2002) (discussing the Israeli-Palestinian ongoing conflict).

[25] *See generally* DENNIS ROSS, THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE (2005) (providing historical background with respect to Palestinian terror acts during the Israeli-Palestinian peace process).

[26] *See* TERRORISM AGAINST ISRAEL, *supra* note 18. This article will not address the much-debated political question whether the Palestinian terror is considered a justified war against Israel, as well as its legal aspects, to include the "acts of war" issue. The discussion on those issues significantly exceeds the article's scope.

general, the Israeli-Palestinian conflict is part of the wider Israeli-Arab continuing conflict."[27] Scholars tend to attribute the origins of the Israeli-Palestinian conflict to three different aspects.[28]

The first aspect is identity. Whereas the "Israeli national identity stems from historic longing and contemporary political realization, a sense of Palestinian peoplehood stems from indigenous settlement."[29] In the 1800's, "European Anti-Semitism and increased recognition of small nations' rights sparked the drive for a Jewish homeland."[30] At last, millions of Jews would endorse the call made by the founder of Zionism, Theodor Herzl, to "be a free people in our own land."[31] When the modern state of Israel was founded in 1948, hundreds of thousands Jews immigrated to Israel.[32] Many of the immigrants were survivors of the European Jewry Holocaust.[33] In spite of the fact that "Palestinian nationalism developed a generation after Zionism, Muslim and Christian Arabs who identify as Palestinian root their nationality in centuries of continued residence in the land they call Palestine, and Jews call Israel. Both Israelis and Palestinians, to varying degrees, have rejected the legitimacy of their neighbors' national identity."[34] Arab leaders used to claim that the problems of the Jews in the modern era were not their concern, and that Jews had no more right to settle in Palestine.[35] Conversely, many Israelis assert that there are actually no Palestinian people, and that Jordan is the proper national home for the Arabs of Palestine.[36]

The second aspect refers to land. After World War I, the

> European powers awarded Britain the right to determine Palestine's fate. The 1917 Balfour Declaration promised to work toward a Jewish "national home" in Palestine. But by 1937 the British were desperate to separate the feuding Jewish and Arab communities, and set up a Royal Commission on Palestine to determine a solution that would bring peace to the area. The commission deduced that the Arabs feared that the establishment of a Jewish national home would eliminate their national aspirations and political rights was at the root of Arab opposition to a Jewish presence in Palestine. The commission recommended partition of Palestine into two sovereign states, Arab and Jewish.[37]

Unlike the Jews, the Arab leaders rejected this proposal.[38] In 1947, when the second partition plan was suggested, the Palestinians and surrounding Arab nations responded by initiating a war against the futuristic state of Israel.[39] Eventually, the War of Independence ended in a great defeat for the Arabs.[40] An independent Palestinian state was never established. Thousands of Palestinians fled from their lands, and most of the area designated for the Palestinian state was conquered by Jordan and Egypt.[41] Palestinians believe that they are entitled to return to their lands, whereas Israel rejects the alleged right

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[27] BREGMAN, *supra* note 24, at 29. *See generally* SABINA CITRON, THE INDICTMENT: THE ARAB-ISRAELI CONFLICT IN HISTORICAL PERSPECTIVE (2006) (providing general history regarding the Israeli-Arab conflict).

[28] Hellman, *supra* note 3.

[29] Overview: Palestinian-Israeli Relations, http://www.myjewishlearning.com/history_community/Israel/PIConflict.htm (last visited Aug 4, 2008).

[30] *Id.*

[31] Israeli Ministry of Foreign Affairs, *A Free People in Our Land: Israel's Declaration of Independence*, Apr. 1, 2005, http://www.israel-mfa.gov.il/MFA/Government/Facts+about+Israel-+The+State/A+Free+People+in+Our+Land-+Declaration+of+Independence.htm.

[32] *See generally* HOWARD M. SACHAR, A HISTORY OF ISRAEL: FROM THE RISE OF ZIONISM TO OUR TIME (2007) (discussing the establishment of Israel).

[33] *Id.*

[34] Ziv Hellman, *Overview: Palestinian-Israeli Relations*, MY JEWISH LEARNING, http://www.myjewishlearning.com/index.html?VI=010604080630 (follow "History & Community" hyperlink; then follow " Contemporary Isreal" hyperlink; then follow "Israeli-Palestinian relations" hyperlink) (last visited June 30, 2008). *See generally* RASHID KHALIDI, PALESTINIAN IDENTITY (1998) (providing background regarding the Palestinians and their origins).

[35] Hellman, *supra* note 34.

[36] *See* AVI SHLAIM, THE IRON WALL: ISRAEL AND THE ARAB WORLD 311 (2001) (quoting Israeli Prime Minister, Golda Meir's saying that "there is no such thing as a Palestinian people").

[37] Hellman, *supra* note 34.

[38] *See* AHARON COHEN, ISRAEL AND THE ARAB WORLD 207 (1970); *see also* DORE GOLD, THE FIGHT FOR JERUSALEM: RADICAL ISLAM, THE WEST, AND THE FUTURE OF THE HOLY CITY 134 (2007). *See generally* TOM SEGEV, ONE PALESTINE COMPLETE: JEWS AND ARABS UNDER BRITISH MANDATE (1999) (describing the proposal to divide Palestine into two sovereign states, Arab and Jewish).

[39] Hellman, *supra* note 34.

[40] *Id.*

[41] *Id.*

of the attackers.[42] The next significant clash occurred in the 1967 Six-Day War, when "Israeli counterstrikes took over all of Jerusalem and captured Gaza and the western bank of the Jordan. Israel's ambivalence over control of the territory once set aside for a Palestinian state developed into a policy of building settlements in strategic and historic areas."[43]

In the first Palestinian Intifada that was initiated in 1987, the land issue played a significant role.[44] The Israeli use of force as well as the continuing control over the West Bank and the Gaza Strip resulted in a controversy within the Israeli society.[45] The pressure on the government to find a solution to the ongoing conflict eventually led to a new elected government and meaningful negotiations between the parties.[46] Similarly, "[i]n the context of the . . . (second) Intifada, the devastating effect of continued terrorist attacks within Israel . . . has . . . increased the pressure to find a solution to the . . . conflict . . . ."[47]

The third and final aspect regarding the origins of the Israeli-Palestinian conflict regards religion.[48] In addition to the known controversies between Islam and Judaism, religious militants in both parties reject the solution of shared sovereignty over disputed holy places, and especially with regard to the Temple Mount in Jerusalem.[49] "For Jews it is the site of the original, ancient Temple and thus a political symbol of their claim to the land. To Muslims, it is the site of two great mosques, the religious center for Palestinian Muslims, and a political symbol of *their* claim to the land."[50] As mentioned, it was a visit to the Temple Mount by then the opposition leader Ariel Sharon in September 2000 that was claimed to ignite the second Intifada.[51]

In light of these conflicts' origins, Arab governments had refused to recognize Israel for decades after its establishment. The Palestine Liberation Organization (PLO) was founded in 1964 with a declared aim to eliminate Israel.[52] The breakthrough of actual negotiations between Israel and the PLO occurred in 1993, when the parties reached the Oslo historical agreement.[53] During the Oslo process, the PLO, as the representative of the Palestinian people, was permitted to establish an autonomous authority in the West Bank and the Gaza Strip, with the understanding that it would recognize the existence of Israel.[54] According to the Palestinian narrative, the Oslo process

> gave the Palestinian people hope that they would shortly see Israeli settlements dismantled, their economic condition dramatically improved, and their flag raised in a sovereign State of Palestine in all of the Gaza Strip and West Bank.
>
> Seven years later, Israeli settlements had only expanded, the average Palestinian was mired deeper in poverty than before, and the Palestinian Authority—not state—controlled a disappointing less than half of the West Bank. When the Camp David summit meeting of Israeli Prime Minister Ehud Barak, U.S.

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[42] *See generally* BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM REVISITED (2004) (providing background information concerning the 1948 War of Independence).

[43] Hellman, *supra* note 34; *see also* GERSHOM GORENBERG, THE ACCIDENTAL EMPIRE: ISRAEL AND THE BIRTH OF THE SETTLEMENTS, 1967–1977, at 364 (2006); ALAN DERSHOWITZ, THE CASE FOR ISRAEL 91 (2004).

[44] *See supra* note 13 and accompanying text.

[45] Hellman, *supra* note 34.

[46] MICHAEL N. BARNETT, ISRAEL IN COMPARATIVE PERSPECTIVE: CHALLENGING THE CONVENTIONAL WISDOM 43 (2006).

[47] Hellman, *supra* note 34.

[48] *See, e.g.*, RELIGIOUS FUNDAMENTALISM AND POLITICAL EXTREMISM 84 (Leonard Weinberg & Ami Pedahzur eds., 2004).

[49] Hellman, *supra* note 34.

[50] *Id.*

[51] *See supra* Part I.A.

[52] BREGMAN, *supra* note 24, at 58. *See generally* MARK A. TESSLER, A HISTORY OF THE ISRAELI-PALESTINIAN CONFLICT (1994) (discussing the ongoing conflict between Israel and the Palestinians).

[53] ROSS, *supra* note 25, at 38.

[54] *Id. See generally* CHARLES ENDERLIN & SUSAN FAIRFIELD, SHATTERED DREAMS: THE FAILURE OF THE PEACE PROCESS IN THE MIDDLE EAST, 1995–2002 (2003) (providing historical background with respect to the Israeli-Palestinian peace process).

> President Bill Clinton, and Arafat in July 2000 failed to conclude an agreement leading to the creation of a Palestinian state, the Palestinian public mood dropped to new lows of despair and heights of anger. [55]

It was claimed that as a result of those emotions, the second Intifada broke out.[56]

As opposed to the Palestinians who blamed Israel for not taking a step towards compromise, Israel considered its offer to be extremely generous, i.e. creating a Palestinian state in 96% of the West Bank and Gaza Strip to include dismantling most of the settlements and dividing sovereignty in Jerusalem.[57] The fact that Palestinians rejected the offer without making any counter-offer and initiated an armed conflict response caused the Israeli public to become disillusioned with the peace process.[58]

After discussing the Israeli-Palestinian conflict, the next section introduces the entity of the Palestinian Authority.

2. The Palestinian Authority

The Palestinian Authority, or the National Palestinian Authority, is an interim administrative organization designed to govern parts of the West Bank and the Gaza Strip.[59] "It was established in 1994, pursuant to the Oslo Accords between the PLO and the government of Israel, as a 5-year transitional body during which final status negotiations between the two parties were to take place."[60]

According to the Oslo Accords, the Palestinian Authority was placed in charge of the civil administration mostly in the major cities of the West Bank and the Gaza Strip.[61] The Interim Agreement between the parties that was signed in 1995 gave the Palestinian Authority legislative, executive, and judicial powers, and paved the way for the first presidential and legislative elections in 1996.[62] The PLO's chairman, Yasser Arafat, was elected to the Presidency.[63] However, since the establishment of the Palestinian Authority and up until the death of Yasser Arafat in late 2004, only one election had taken place.[64] In January 2005, the new PLO chairman, Mahmoud Abbas, won the presidential elections.[65]

In light of the peace process' deadlock and the continuing second Intifada, in August 2005, Israel unilaterally withdrew its forces and settlers from the Gaza Strip, ceding full control of the area to the Palestinian Authority.[66] In January 2006, Hamas[67] won the Palestinian Legislative Council elections.[68] Following an escalation in intra-Palestinian violence, in June 2007 Hamas seized full control of the Gaza Strip.[69] As a result of Hamas' takeover, the Palestinian Authority governs de facto only areas of the West Bank.[70] Furthermore, a Palestinian state has not been declared or founded yet.[71]

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[55] Hellman, *supra* note 3.

[56] *See* THE ISRAELI-PALESTINIAN PEACE PROCESS: OSLO AND THE LESSONS OF FAILURE 38 (Robert L. Rothstein et al. eds., 2004).

[57] Hellman, *supra* note 3.

[58] *See* GRASPING THE NETTLE: ANALYZING CASES OF INTRACTABLE CONFLICT 363 (Chester A. Crocker et al., 2005).

[59] NIGEL C. PARSONS, THE POLITICS OF THE PALESTINIAN AUTHORITY: FROM OSLO TO AL-AQSA 23 (2005).

[60] David Brewer, *For Muslim, Palestinian and Arab Sources*, AMF INT'L, http://www.amfi.org/israelnewslinks.asp (last visited July 1, 2008) (citing Palestinian National Authority (PNA), http://www.pna.gov.ps).

[61] PARSONS, *supra* note 59, at 23.

[62] *Id.*

[63] BARRY M. RUBIN & JUDITH COLP RUBIN, YASIR ARAFAT: A POLITICAL BIOGRAPHY 161 (2003).

[64] PARSONS, *supra* note 59, at 41.

[65] *See, e.g.*, ANTHONY H. CORDESMAN WITH JENNIFER MORAVITZ, THE ISRAELI-PALESTINIAN WAR: ESCALATING TO NOWHERE 174 (2005).

[66] *Id.*

[67] *See, e.g.*, Kathryn Westcott, BBC NEWS, 19 Oct. 2000, http://news.bbc.co.uk/2/hi/middle_east/978626.stm (discussing the Hamas organization).

[68] *See* Assoc. Press, *Hamas Takes Control of Gaza Strip*, USATODAY, June 14, 2007, http://www.usatoday.com/news/world/2007-06-14-gaza_N.htm.

[69] *Id.*

[70] *Id.*

[71] *See, e.g.*, *As Expected, Palestinian State Not Declared*, GLOBES, May 5, 1999, http://www.globes.co.il/DocsEn/did=352757.htm.

3. Palestinian Terror and Its Victims

Since September 2000, when the second Intifada broke out, a huge wave of terrorism has flooded over Israel.[72] "Most of the terrorist attacks were directed toward civilians. Entire families lost their loved ones. The attacks were designed to take human life . . . to sow fear and panic . . . [and] to obstruct the daily life of the citizens of Israel."[73] Palestinian terrorism has turned into a strategic threat for Israel. "[Terror attacks] occurred everywhere, including public transportation, shopping centers and markets, coffee houses, and inside . . . houses and communities."[74]

The Palestinian terrorists have used a variety of means of warfare. "These include suicide attacks, car bombs, explosive charges, throwing of Molotov cocktails and hand grenades, shooting attacks, mortar fire, and rocket fire. A number of Palestinian attempts at attacking strategic targets have failed."[75] For example, in April 2002 the Palestinians failed to topple a skyscraper in Tel Aviv using a car bomb.[76] In May 2003 another Palestinian terror act failed when they attempted to detonate a truck in a large gas tank farm near Tel Aviv.[77]

To date, more than one thousand Israelis have lost their lives due to the Palestinian attacks[78] and many of those injured in the attacks are now severely handicapped.[79] Israeli commerce has also experienced much hardship.[80] As time passed, the role of the Palestinian Authority in executing the attacks became more and more clear.[81]

4. The Involvement of the Palestinian Authority in Terror

The Palestinians originally asserted that the second Intifada was spontaneous response to the visit of Ariel Sharon, then leader of the Israeli opposition in the Knesset, to the Temple Mount in Jerusalem.[82] Yet, "later statements by Palestinian leaders in the Arab-language media contradicted this assertion. Nor did the report issued by the Mitchell Committee, composed of American and European leaders, give support to the earlier Palestinian claim."[83]

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[72] The Israeli Supreme Court has described the Palestinian terror and its terrible consequences in a series of judgments: HCJ 2461/01 Kna'an v. Commander of IDF (unpublished) (upholding seizure of lands in the West Bank for military purposes); HCJ 9293/01 Barake v. Minister of Def. [2001] IsrSC 56(2) 509 (concluding that the prohibition on Israelis to enter the territories governed by the Palestinian Authority is lawful); HCJ 3114/02 Barake v. Minister of Def. [2002] IsrSC 56(3) 11 (approving a compromise regarding burial of terrorists who were killed by the IDF); HCJ 3451/02 Almandi v. Minister of Def. [2002] IsrSC 56(3) 30 (holding that the IDF attack against the terrorists who broke into the Church of the Nativity in Bethlehem was being carried out according to the rules of international law); HCJ 7015/02 Ajuri v. Military Commander [2002] IsrSC 56(6) 352 (deciding that the military commander was authorized to assign the residence of Palestinians who imposed a security threat); HCJ 8172/02 Ibrahim v. Commander of IDF (unpublished) (upholding seizure of lands in the West Bank for the establishment of the security fence); HCJ 7957/04 Mara'abe v. Prime Minister of Israel [2005] IsrSC 58(2) 393 (discussing the legality of a segment of the security fence in the West Bank that surrounds the Israeli town of Alfei Menashe and creates an enclave of Palestinian villages); HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel [2006] IsrSC 57(6) 285 (discussing the legality of the preventive strikes policy executed by the IDF in the West Bank and the Gaza Strip); *see also* ORNA BEN-NAFTALI & YUVAL SHANI, INTERNATIONAL LAW BETWEEN WAR AND PEACE 142 (2006); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 201 (2005).

[73] *Mara'abe*, IsrSC 58(2) at 396.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* The Palestinian terror attacks caused Israel to carry out military operations, such as operation "Defensive Shield" (March 2002) and operation "Determined Path" (June 2002). *Id.* The objective of these military actions was to defeat the Palestinian terrorist infrastructure and to prevent terror attacks. *Id.* These campaigns did not stop immediately the terror attacks. *Id.* Consequently, Israel decided to take additional steps to confront the terror attacks. *Id.* The main decision regarded the construction of the security fence. *Id.*

[78] *See Fatalities Statistics*, *supra* note 21. Since the second Intifada broke out, more than 4,000 Palestinians were killed, including terrorists. *Id.* However, the fatalities data derives from several sources which often conflict. *Id.*

[79] *Id.*

[80] *See, e.g.*, Martin Wolk, *Economic Impact of Terror May Be Lasting*, MSNBC, July 8, 2005, http://www.msnbc.msn.com/id/8514278/#storyContinued. However, since the end of 2003 however, Israel has experienced a strong economic recovery. *Id.*

[81] *See infra* Part II.A.4.

[82] Israeli Ministry of Foreign Affairs, *Israel, the Conflict and Peace*, Nov. 2007, http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Palestinian+terror+since+2000/Israel+the+Conflict+and+Peace+Answers+to+ Frequen.htm.

[83] *Id.* Imad Al-Falouji, then the Palestinian Minister of Communication, stated that the Palestinian violence had been planned in advance.

> Speaking at a symposium in Gaza . . . Al-Falouji confirmed that the Palestinian Authority had begun preparations for the outbreak of the [second] Intifada from the moment the Camp David talks concluded, this in accordance with instructions given by Chairman Arafat himself. Mr. Falouji went on to state that Arafat launched [the second] Intifada as a culminating stage to the immutable

On 13 September 2000, a few days before the second Intifada officially broke out, members of Palestinian leader Yasser Arafat's Fatah movement had executed several attacks on Israeli military and civilian targets.[84] In addition, during that time the Palestinian official television network inflamed the hatred towards Israel with militant broadcasts.[85] However, evidence of the heavy involvement of the Palestinian Authority in terror acts was obtained two years later.[86] During operation "Defensive Shield" which was carried out in the West Bank in April 2002, Israel Defense Forces (IDF) captured documents and obtained information from the questioning of captured terrorists.[87] "Both the documents and the information pointed at the direct and indirect involvement of Arafat, the Palestinian Authority (PA) and the Palestinian intelligence apparatuses . . . in the execution of terrorist attacks against Israel."[88]

A special report prepared by Israeli Minister of Parliamentary Affairs stated that Yasser Arafat and the Palestinian Authority were "involved in the planning and execution of terror attacks. [They] encouraged them ideologically [and] authorized them financially."[89] Arafat was also the head of the terror organization Al Aqsa Brigades that used women and even children to execute terrorist activity.[90] "The Palestinian Authority allocated vast sums of money from its budget to pay salaries to . . . terrorists . . . ."[91] To finance terrorist activity, the Palestinian Authority used funds donated by other countries, including the European Union.[92] Moreover, the Palestinian Authority established close links with Iran and Iraq (under the regime of Saddam Hussein) who supplied them with funds and munitions.[93]

The mask was lifted, and the findings were shocking.

Palestinian stance in the negotiations, and was not meant merely as a protest of Israeli opposition leader Ariel Sharon's visit to the Temple Mount.

Peace with Realism, *Sharon and the Intifada*, Apr. 2005, http://www.peacewithrealism.org/pdc/sharon.htm (quoting Al-Ayyam, Dec. 6, 2000).

At 'Ein Al-Hilweh Palestinian refugee camp in Lebanon, Al-Falouji restated that the violence had been planned in advance:

> Whoever thinks that the Intifada broke out because of the despised Sharon's visit to the Al-Aqsa Mosque, is wrong, even if this visit was the straw that broke the back of the Palestinian people. This Intifada was planned in advance, ever since President Arafat's return from the Camp David negotiations, where he turned the table upside down on President Clinton. Arafat remained steadfast and challenged Clinton. He rejected the American terms and he did it in the heart of the US. My visit here in South Lebanon is a clear message to the Zionist enemy. We say: Just as the national and Islamic Resistance in South Lebanon taught Israel a lesson and made it withdraw humiliated and battered, so shall Israel learn a lesson from the Palestinian Resistance in Palestine. The Palestinian Resistance will strike in Tel-Aviv, in Ashkelon, in Jerusalem, and in every inch of the land of natural Palestine. Israel will not have a single quiet night. There will be no security in the heart of Israel.

Special Dispatch No. 194, The Middle East Media Research Institute, PA Minister: The Intafad was Planned from the Day Arafat Returned from Camp David (Mar. 21, 2001), *available at* http://memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP19401 (quoting Al-Faluji, Speech at 'Ein Al-Hilweh Hilweh Palestinian refugee camp, Al-Safir, Lebanon (Mar. 3, 2001)).

Mamduh Nofal from the terror organization of the Democratic Front for the Liberation of Palestine, also stated that the second Intifada had been planned in advance. *See* David Samuels, *In a Ruined Country*, THE ATLANTIC.COM, Sept. 2005, http://www.theatlantic.com/ doc/200509/Samuels. Nofal recounts that Arafat told him and his colleagues that they must be ready for the approached fight against Israel. *Id.*

[84] *See, e.g.*, Assoc. Press, *Israeli Settler Convoy Bombed in Gaza, Three Injured*, CNN, Sept. 27, 2000, http://archives.cnn.com/2000/WORLD/meast/09/27 /israel.attack.ap/index.html.

[85] *See* TERRORISM AGAINST ISRAEL, *supra* note 18.

[86] *Id.*

[87] *Id.*

[88] *Id.* Executive Summary para. 1.

[89] *Id.* Introduction, main finding 1.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

B. Legal Background

1 A Brief on Israel's Law and Legal System

The Israeli legal system is unique. It is characterized as a mixed system that does not belong to either the Common Law or Civil Law family of legal systems. The origins of the combined nature of the system are rooted in the history of Israel.[94]

> For approximately four centuries, until the end of the first World War, the area, now constituting Israel was part of the Ottoman Empire ruled by Turkey. During this period the law of the land was a mixture of traditional Islamic law and modern European laws . . . . Following the defeat of Turkey, a British Mandate was established [by the] League of Nations. The Mandatory government gradually replaced the pre-existing law with legislation supplemented by English principles of common law and equity. While most areas of law have been Anglicized, the British kept intact the Ottoman system of family law, which authorized religious courts of the different religious communities to administer their specific laws on members of these communities.[95]

Israel was founded in 1948 as a democratic state.[96] The legislation enacted by the Knesset has changed the pre-existing non-Israeli law and has created a modern legal system.[97]

Israel has no written constitution. However, in 1950, the Knesset agreed to enact "basic laws" that would gather to a constitution.[98] To date, eleven basic laws have been enacted with regard to Human Dignity and Freedom, and Freedom of Occupation. [99] The Supreme Court has determined that even before the completion of a constitution, the basic laws are of a higher normative status and provide the fundamental principles and rights that in other Western democracies are protected by constitutions.[100]

Many areas of Israeli law are codified. Legislation is the basis of the system and is considered the system's primary legal source.[101] "The Israeli judiciary enjoys wide judicial discretion and judicial power to create case law. According to the principle of stare decisis as practiced in Israel, a rule laid down by a court will guide any lower court, and the Supreme Court is not bound by its own decisions."[102] In addition, the jury system does not exist in Israel. Thus, determinations of facts and law are made by a judge only.[103]

As it will be presented throughout this article, the described characters of the system play a very important role when dealing with the question of whether terror victims can sue the Palestinian Authority in Israeli courts for its involvement in terror acts.

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[94] *See* Ruth Levush, *Features—A Guide to the Israeli Legal System*, LLRX, Jan. 15, 2001, http://www.llrx.com/features/israel.htm# Supremacy.

[95] *Id.*

[96] *Id.*

[97] Aharon Barak, *Some Reflections on the Israeli Legal System and Its Judiciary*, 6.1 ELEC. J. COMP. L. (2002), http://www.ejcl.org/61/art61-1.html.

[98] Levush, *supra* note 94.

[99] *Id.*

[100] *See* Daphne Barak-Erez, *The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue*, 2 INT'L J. CONST. L. 611 (2004).

[101] *See generally* ARIEL BIN-NUN, THE LAW OF THE STATE OF ISRAEL: AN INTRODUCTION (1990) (providing a brief on the law of Israel).

[102] Levush, *supra* note 94.

[103] *Id.*

2. Analyzing the Problem: Current Legal Means of Terror Victims to Sue Terrorists in Israeli Courts

a. The Criminal Aspect

According to the Israeli law, committing a terror act is considered an offense.[104] A terrorist who commits a terror act in Israel or against Israelis and Israeli interests outside of Israel can be brought before a civilian court in Israel.[105] In most cases, if the terror act is committed in the West Bank, the terrorist will be brought before an independent military court that was established under the Fourth Geneva Convention.[106]

The Israeli law enforcement authorities commit to try the terrorists, their collaborators, and their supporters.[107] The courts can order compensation to terror victims,[108] but the domestic criminal procedures are not designed to compensate them.[109] The criminal procedures place the accused against the whole public rather than against the victim solely.[110] Additionally, the courts tend to not "mix" the criminal process with a "civil" matter like compensation.[111] As a result, the compensation is limited and is not intended to cover all of the victim's damages.[112] Finally, according to the current legal regime, it is unclear whether the Palestinian Authority—as an entity[113]—can be subjected to criminal prosecution for its involvement in terror acts.

b. The Civil Aspect (Torts)

As in many of the legal systems all over the world, a claim for compensation—not on the grounds of a contract—is governed by the law of torts.[114] The main source of Israel's law of torts is the Civil Wrongs Ordinance.[115] The statute regulates the basic elements of torts law, and sets the torts of negligence and breach of statutory obligation as general torts.[116] By virtue of the statute, one can initiate an action if negligence or a breach of statutory obligation has been performed.[117]

Theoretically—and discussed in detail later in this article[118]—the Civil Wrongs Ordinance may provide terror victims a cause of action if negligence or a breach of statutory obligation has been performed and has caused damages.[119] Thus, the Civil Wrongs Ordinance may be considered an adequate legal source on which the terror victims are able to rest their actions for compensation.

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[104] 1948 Prevention of Terror Act and 1945 Defense (Emergency) Regulations. The regulations were enacted by the British authorities during the British Mandate over Palestine. In light of the complicated security situation of Israel, all initiatives to abolish the regulations were rejected. *See* Brigadier General (BG) (Retired) Dov Shefi, Lecture at West Point Military Academy: Counter Terrorism in Democracies: The Legal Experience of Israel (Dec. 8, 1999) [hereinafter BG Shefi Lecture] (transcript available at The Investigative Project on Terrorism, http:// www.investigativeproject.org/article/563).

[105] *See* BG Shefi Lecture, *supra* note 104.

[106] *Id.*

[107] *Id.*

[108] A victim compensation program does not exist in Israel. However, under the domestic law courts can order the accused to pay the victim NIS 84,400 for each offense the accused was convicted of. *See* Uri Yanay, *Police Assisting Crime Victims: Issues of Victim Compensation*, 6 POLICE & SOC'Y 73–98 (2002).

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] Levush, *supra* note 94.

[115] Civil Wrongs Ordinance, 1968, S.H. 101.

[116] *Id.* The Civil Wrongs Ordinance also deals with particular torts such as unjustified detention or nuisance, but none of them is relevant to the discussed topic. *Id.*

[117] *Id.*

[118] *See infra* Part II.F.2.

[119] Civil Wrongs Ordinance, 1968, S.H. 101.

Yet, the Civil Wrongs Ordinance was allegedly not designed to govern damages derived from warlike acts, but rather to adjudicate tortious conduct.[120] Moreover, in the existing Israeli legislation there is no other statute that regulates the question of whether the terror victims can sue the Palestinian Authority for its involvement in terror acts.

c. The Courts' Rulings

The Israeli jurisprudential law with respect to the question of whether the Palestinian Authority can be sued in Israeli courts for its involvement in terror acts is slight. Thus, in several cases that were brought in together in the District Court in Jerusalem, the court ruled that neither the Palestinian Authority nor the PLO met the essential elements of a state and therefore were not entitled to foreign sovereign immunity.[121] The court could have made a step towards acknowledging the terror victims legal capability to sue the Palestinian Authority by its ruling. Yet, in the end the court held that the final determination of whether or not the Palestinian Authority is entitled to sovereign immunity and can be sued for its involvement in terror acts was not to be made by the court but rather by the government (via submitting to the court a certificate signed by the Minister of Foreign Affairs).[122]

Approving the district court's opinion at the appeal level, the Israeli Supreme Court emphasized that the question of whether the Palestinian Authority is a state that is entitled to sovereign immunity is a factual question that must be answered by the government.[123] Such a determination should be made on a case by case basis with respect to each action at the relevant time.[124] Applying this policy, the judgment does not clarify the complex questions presented.

In another case that was discussed prior to the Supreme Court decision, the District Court in Jerusalem declined an action against the Palestinian Authority for not enforcing Israeli civil judgments in its territories.[125] The court ruled that the Palestinian Authority meets, in one way or another, the provisions of an independent entity.[126] However, the court neither addressed the matter of sovereign immunity, nor the capability of suing the Palestinian Authority for its involvement in terror acts.

To date most of the actions against the Palestinian Authority which were filed due to its involvement in terror acts are still pending.

3. Conclusion: The Question of Whether the Victims Are Able to Sue the Palestinian Authority Is Unclear

Domestic criminal procedures against terrorists were not designed to compensate terror victims. From the civil aspect, the Civil Wrongs Ordinance is an appropriate legal source for terror victims to rest their actions. However, the Civil Wrongs Ordinance allegedly did not contemplate terror acts scenarios. There is no other Israeli statute regulating the issue of suing the Palestinian Authority for its involvement in terror acts. Additionally, there is a scarcity of Israeli jurisprudential law on the matter.

To conclude, since the current legislation and courts' rulings do not provide an unambiguous response, the question of whether the victims are able to sue the Palestinian Authority for their damages is unclear. Indeed, this is the legal ground for this research.

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[120] *See, e.g.*, HCJ 8276/05 Adalah v. Minister of Def. [2006] (unpublished) (stating that the classic law of torts is not designed to govern damages derived from warlike acts); *see also* CA 5946/92 Bani Uda v. State of Israel [2002] IsrSC 56(4) 1 (holding that injuries originated from combat acts should not be regulated by the ordinary law of torts).

[121] CC (Jer) 2538/00 Noritz v. Palestinian Auth. [2003] (unpublished).

[122] *Id.*; *see* discussion *infra* Part III.B.2.d.

[123] CA 4060/03 Dayan v. Palestinian Auth. [2007] (unpublished).

[124] *Id. See* discussion *infra* Part III.B.2.d.

[125] CC (Jer) 4049/02 Midreshet Eilon More v. State of Israel [2006] (unpublished).

[126] *Id.*

III. The Key-Question: Can the Palestinian Authority Be Sued in Israeli Civilian Courts for Damages Caused by Its Involvement in Terror Acts?

A. Introduction: The Method of Analysis

Analysis of the key-question whether the Palestinian authority can be sued in Israeli civilian courts for damages caused by its involvement in terror acts requires dividing it into five sub-questions as mentioned above.[127] Each question raises issues in fields of both international and domestic law. When applicable, this article will integrate comparative research with respect to the U.S. law.

B. Is the Palestinian Authority Considered a Legal Personality; i.e., Is the Palestinian Authority Entitled to Foreign Sovereign Immunity When It Is Sued in Israeli Courts?

1. The Palestinian Authority as a Legal Personality

a. Is the Palestinian Authority a Legal Personality Under Domestic Law?

Before analyzing whether the Palestinian Authority is entitled to foreign sovereign immunity, the preliminary question is whether the Palestinian Authority is considered a legal personality that generally can sue as a plaintiff and be sued as a defendant before Israeli courts.

Under the Israeli law, a legal personality is an entity that was recognized by law as having rights and obligations.[128] The domestic law contains no explanation of whether the Palestinian Authority is a legal personality. Though, based on the legislation that implemented the international agreements between Israel and the Palestinians,[129] the court held that the Palestinian Authority is considered a legal personality.[130]

b. Is the Palestinian Authority a Legal Personality in Light of the International Agreements Between Israel and the Palestinians?

According to the provisions of the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, the Palestinian Authority is an interim administrative organization designed to govern parts of these areas.[131] Additionally, the Palestinian Authority was given legislative, executive and judicial powers.[132] The executive power includes, among other

[127] *See supra* Part I.B.

[128] *See, e.g.*, CA 2735/99 Amutat Beit Hakneset Le'sfaradim v. Orenstein [1999] IsrSC 55(3) 433, 440 (discussing the definition of a legal personality).

[129] *See, e.g.*, The Implementation of the Agreement on the Gaza Strip and the Jericho Area Act, 1994, S.H. 85.

[130] CC (Jer) 2538/00 Noritz v. Palestinian Auth. [2003] (unpublished).

[131] The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-PLO, art. III, Sept. 28, 1995, KA 1071, 1 [hereinafter Interim Agreement]; *see also* PARSONS, *supra* note 57, at 83.

[132] Interim Agreement, *supra* note 131, art. III.

things, the power to sue and be sued.[133] In light of these provisions, the Palestinian Authority is considered a legal personality.[134]

To conclude, the international agreements between Israel and the Palestinians, as well as the implemented legislation of the agreements, show that the Palestinian Authority is recognized as a legal personality that can be sued in Israeli courts. This conclusion is supported by the opinion of the District Court in Jerusalem.[135]

2. The Palestinian Authority and Foreign Sovereign Immunity

a. Introduction

Finding that the Palestinian Authority is recognized as a suable legal entity, the next question to be answered is whether the Palestinian Authority is entitled to foreign sovereign immunity from the jurisdiction of the Israeli courts.

In accordance with the doctrine of foreign sovereign immunity, a state is immune from exercise of judicial jurisdiction by another state.[136] "Originally, the prevailing theory in the international law was that of absolute immunity, according to which actions against foreign states were in general inadmissible without their consent."[137] Since then, restrictive immunity has gained sway, and today it is the predominant theory.[138] Under the latter theory, immunity is relative and is to be granted only in the case of governmental activities. Thus, a state is not immune from the exercise of judicial jurisdiction over activities of a kind carried out by private persons.[139]

The problem arisen on the matter is "drawing a precise demarcation line between immune and non-immune state activity."[140] In view of the uncertainty as to the immunity's application, in 1977 the United Nations (U.N.) General Assembly decided to forward the issue to the U.N. International Law Commission (ILC) for a recommendation.[141] On 2 December 2004, after more than a quarter of a century of intense international negotiations, the U.N. General Assembly adopted the U.N. Convention on Jurisdictional Immunities of States and Their Property.[142] Articulating a comprehensive approach to the issue of foreign sovereign immunity, the convention embraces notably the restrictive immunity theory.[143]

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[133] *Id.* art. IX. Article IX states:

> The executive power of the Palestinian Council shall extend to all matters within its jurisdiction under this Agreement or any future agreement that may be reached between the two Parties during the interim period. It shall include the power to formulate and conduct Palestinian policies and to supervise their implementation, to issue any rule or regulation under powers given in approved legislation and administrative decisions necessary for the realization of Palestinian self-government, the power to employ staff, *sue and be sued* and conclude contracts, and the power to keep and administer registers and records of the population, and issue certificates, licenses and documents.

Id. art. IX, para. 2 (emphasis added); *see also id.* art. XX (recognizing the legal personality of the Palestinian Authority as well). Article XX states: "The transfer of powers and responsibilities from the Israeli military government and its civil administration to the Council, as detailed in Annex III, includes all related rights, liabilities and obligations arising with regard to acts or omissions which occurred prior to such transfer." *Id.* art. XX, para 1a. The article also acknowledges that the Palestinian Authority can generally be sued. *Id.*

[134] *See, e.g.*, Celia W. Fassberg, *Israel and the Palestinian Authority: Jurisdiction and Legal Assistance* 28 ISR. L. REV. 318, 321 (1994) ("[I]n view of the power to sue and to be sued granted by the agreement, Israel presumably also has jurisdiction over actions against the Palestinian Authority itself whenever a sufficient link is established under the normal rules of jurisdiction.").

[135] CC (Jer) 2538/00 Noritz v. Palestinian Auth. [2003] (unpublished).

[136] *See* Georges R. Delaume, *Economic Development and Sovereign Immunity*, 79 AM. J. INT'L L. 319 (1985); Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 5 N.Y. INT'L L. REV. 51 (1992). *See generally* GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (1992) (providing a brief regarding the foreign sovereign immunity).

[137] Burkhard Heβ, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property*, 4 EUR. J. INT'L L. 269 (1993).

[138] *Id.* The absolute theory is applied only in China and a few third world countries. *See* Jin Jingshen, *Immunities of States and Their Property: The Practice of the People's Republic of China*, 1 HAGUE Y.B. INT'L L. 163 (1988).

[139] BORN & WESTIN, *supra* note 136, at 77.

[140] Heβ, *supra* note 137, at 269.

[141] G.A. Res. 32/151, U.N. Doc. A/RES/32/151 (Dec. 19, 1977).

[142] G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) [hereinafter G.A. Res. 59/38].

[143] *Id.*; *see also* David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194 (2005).

b. The Term "State" in International Law

Basically and historically, foreign sovereign immunity is designed for states only.[144] The immunity is procedural and applies when an entity is acknowledged as a state.[145] Its extent is not predetermined.[146] "[T]he independence and equality of states made it philosophically as well as practically difficult to permit municipal courts of one country to manifest their power over foreign sovereign states, without their consent."[147]

Customary international law requires an entity to possess the following qualifications in order to be considered a state:[148]

1. Permanent population. This element refers to a group of people that live permanently within a territory as one social unit although religious, linguistic and ethnical differences may exist.[149] These are the people of the nation.[150]
2. Defined territory. The state has to consist of a certain coherent territory effectively governed and populated.[151]
3. Government. Every sovereign state must have a government, regardless of the regime's form.[152] The government has to impose its authority over its territory.[153] Additionally, the government must speak for the state as a whole. Thus, the mere presence of independent factions within a territory, lacking common institutions, cannot constitute a government in control.[154]

4. Capacity to enter into relations with other states. Scholars claim that this element is the most important qualification of a state because it equals the fundamental requirement of independence or sovereignty.[155]

It has also been said, that "[t]he first, second, and fourth elements are dependent on (or, sometimes, subsumed by) the third."[156] According to this approach, the question is whether the entity claiming to be a state has a "defined territory under its control [and] a permanent population under its control."[157] Political recognition, meaning a formal acknowledgment by a nation that another entity possesses the qualifications of a state, is not a prerequisite to a finding of statehood.[158]

Foreign sovereign immunity can be granted to an entity that does not meet the four discussed qualifications, but is soon to become an independent state.[159] This approach was taken by the ILC who originated the draft of the UN Convention on Jurisdictional Immunities of States and Their Property: "The expression 'state' includes fully sovereign and independent

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[144] BORN & WESTIN, *supra* note 136, at 77.

[145] CA 7092/94 Her Majesty the Queen in Right of Canada v. Edelson [1997] IsrSC 51(1) 625, 644 (concluding that the immunity applies when an entity is acknowledged as a state).

[146] *Id.*

[147] MALCOLM N. SHAW, INTERNATIONAL LAW 492 (1997).

[148] *See* Montevideo Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, T.S. 881; *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 70 (1998).

[149] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 40 (1979).

[150] *Id.*

[151] *Id.*

[152] *Id.* at 42.

[153] NII LANTE WALLACE-BRUCE, CLAIMS TO STATEHOOD IN INTERNATIONAL LAW 54 (1994).

[154] Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 63 (Oct. 16).

[155] YORAM DINSTEIN, THE INTERNATIONAL LAW AND THE STATE 97 (1971); *see also* Joel Singer, *Aspects of Foreign Relations Under Israeli-Palestinian Agreements on Interim Self-Government Arrangements for the West Bank and Gaza*, 28 ISR. L. REV. 268, 269 (1994) (discussing the fourth element of capacity to enter into relations with other states).

[156] Ungar v. PLO, 402 F.3d 274, 289 (1st Cir. 2005) (discussing the four elements for an entity to be considered a state).

[157] Knox v. PLO, 306 F. Supp. 2d 424, 434 (S.D.N.Y. 2004).

[158] *See, e.g.*, DINSTEIN, *supra* note 155, at 97; *see also* N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc., 954 F.2d 847, 853 (2d Cir. 1992).

[159] *See* Stewart, *supra* note 143, at 194.

foreign states, and also, by extension, entities that are sometimes not really foreign and at other times not fully independent or only partially sovereign."[160]

The practice of some states supports the view that semi-sovereign states and even colonial dependencies are able to be treated as foreign sovereign states.[161] United States courts, for instance, consistently declined jurisdiction in actions against semi-sovereign states dependent on the United States.[162] On the other hand, the High Court of New Zealand held that United Nations trust territories, such as the Marshall Islands, have not yet achieved the status of a sovereign state and, therefore, are not entitled to sovereign immunity.[163]

In the case of *Morgan Guaranty Trust Co. Of New York v. Republic of Palau*,[164] the U.S. Court of Appeals for the Second Circuit had to determine whether the Republic of Palau is a foreign state within the definition of the Foreign Sovereign Immunities Act (FSIA).[165] Analyzing the required characteristics for an entity to be considered a state, the court delineated the four qualifications listed in the Montevideo Convention on Rights and Duties of States.[166] In addition, the court listed the following attributes of sovereign statehood: the power to declare and wage war; to conclude peace; to maintain diplomatic ties with other sovereigns; to acquire territory by discovery and occupation; and to make international agreements and treaties.[167] Applying the mentioned attributes to the Republic of Palau, the court found the latter was a trust territory of the United States under a trusteeship agreement and lacked sovereignty because the trusteeship agreement conferred upon the United States full power of administration, legislation and jurisdiction over the territory.[168] As a result, the court concluded that the Republic of Palau is not a foreign sovereign within the meaning of the FSIA, and, therefore, is not entitled to foreign sovereign immunity.[169]

To conclude, foreign sovereign immunity is designed for states. However, foreign sovereign immunity was also granted to semi-sovereign states and dependencies, notably when actions against them are brought to the courts of the "paternalist state" as opposed to any other state. The matter whether an entity—even on the verge of full independence—meets the required qualifications to become a state is governed by the pertinent facts.

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[160] U.N. INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, at 21, U.N. Doc A/46/10, U.N. Sales No. E.93.V.9 (Part 2) (1991) [hereinafter JURISDICTIONAL IMMUNITIES DRAFT]. This approach is reflected in the convention's broad definition of 'state' that includes

> constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity; [and] agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State.

G.A. Res. 59/38, *supra* note 142.

[161] *See* U.N. INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, *supra* note 160 (providing a brief regarding the practice of United Kingdom and France on the matter).

[162] *See, e.g.*, Kawananakoa v. Polybank 205 U.S. 349 (1907) (holding that the territory of Hawaii is granted sovereign immunity, before it was admitted to the Union on August 21, 1959).

[163] Marine Steel Ltd. v. Gov't of Marshall Islands, [1981] 2 N.Z.L.R. 158 (H.C.).

[164] 924 F.2d 1237 (2d Cir, 1991).

[165] Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330–1332, 1391, 1441, 1602–1611 (2000).

[166] Under the Montevideo Convention on Rights and Duties of States, a state is said to be an entity possessed of a defined territory and a permanent population, controlled by its own government, and engaged in or capable of engaging in relations with other such entities. *See* Montevideo Convention on Rights and Duties of States, *supra* note 148, art. 1; *see also* BROWNLIE, *supra* note 148, at 70.

[167] *Morgan Guar. Trust Co. of N.Y.*, 924 F.2d at 1243 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318–19 (1936)). The court also noted:

> According to international law, a sovereign state has certain well accepted capacities, rights and duties:
>
> (a) sovereignty over its territory and general authority over its nationals;
>
> (b) status as a legal person, with capacity to own, acquire, and transfer property, to make contracts and enter into international agreements, to become a member of international organizations, and to pursue, and be subject to, legal remedies;
>
> (c) capacity to join with other states to make international law, as customary law or by international agreement.

Id. at 1243–44 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 206 (1987)).

[168] *Id.* at 1246.

[169] *Id.* at 1247.

c. Is the Palestinian Authority a State in Light of International Law?

With this background in mind, it is time to move from the general to the specific. Is the Palestinian Authority considered a state that is granted foreign sovereign immunity in accordance with the international law standard?

As mentioned,[170] in 1993, Israel and the PLO signed the Declaration of Principles on Interim Self-Government Arrangements.[171] Israel accepted the PLO as the representative of the Palestinian people and the PLO acknowledged Israel's statehood.[172] The Declaration's stated purposes included the establishment of a Palestinian interim self-governing authority as a precursor to a permanent arrangement.[173] It also set forth a framework for negotiating the structure of the Palestinian Authority,[174] and specified that Israel would remain responsible for external security, including the overall safety of Israelis, in the affected territory.[175]

On 28 September 1995, Israel and the PLO signed the Interim Agreement aspiring to reach a permanent agreement within five years.[176] The Interim Agreement enumerated those powers and responsibilities to be transferred to the Palestinian Authority.[177] Yet, the Palestinian Authority was denied authority over foreign relations, including the establishment of embassies, the hiring of diplomatic staff, and the exercise of diplomatic functions.[178] Moreover, the Interim Agreement stated that Israel would continue to exercise powers and responsibilities that have not been transferred.[179] The Interim Agreement subdivided the West Bank and the Gaza Strip into three main zones (A, B, and C) each under a different level of control of the Palestinian Authority.[180] The overall framework required the Palestinian Authority to police the Palestinian population but Israel continued to be responsible over external threats and border defense.[181] Additionally, the legislative powers of the Palestinian Authority were restricted. The Interim Agreement specified that any law that is inconsistent with the agreement has no effect.[182]

By the year 2000, the two sides failed in an effort to reach a final agreement, and the second Intifada broke out.[183] In 2003, the Quartet—a group comprised of representatives of the United States, the European Union, the Russian Federation, and the United Nations—presented a "road map" setting forth a series of steps designed to break the impasse and move toward a permanent two-state solution in the region.[184] Recently, Israel and the Palestinian Authority restarted the peace negotiations that have been non-existent since 2000, but the violence still continues.[185]

In view of the foregoing, it is unmistakable that the Palestinian Authority is in many ways sui generis. As mentioned,[186] the customary international law requires an entity to possess four qualifications in order to be considered a state.[187] The

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[170] *See* discussion *supra* Part II.A.1.

[171] Declaration of Principles on Interim Self-Government Arrangements, Isr.-PLO, Sept. 13, 1993 [hereinafter Declaration of Principles], *available at* http://www.knesset.gov.il/process/docs/oslo_eng.htm.

[172] *See* UNITED NATIONS DEP'T OF PUB. INFO., THE QUESTION OF PALESTINE & THE UNITED NATIONS, at 3, U.N. Doc. DPI/2276, U.N. Sales No. 04.I.15 (2003) [hereinafter UN QUESTION OF PALESTINE].

[173] Declaration of Principles, *supra* note 171, art. I.

[174] *Id.* art. VII.

[175] *Id.* art. VIII.

[176] Interim Agreement, *supra* note 131.

[177] *Id.* art. IX.

[178] *Id.* According to the agreement, the PLO was permitted to conduct limited foreign affairs activities on behalf of the Palestinian Authority. Those activities pertained only to economic, cultural, scientific, and educational matters. *Id.*

[179] *Id.* art. I.

[180] *Id.* art. XI.

[181] *Id.* art. XII.

[182] *Id.* art. XVIII.

[183] *See* UN QUESTION OF PALESTINE, *supra* note 172, at 55.

[184] Letter from the Secretary-General Addressed to the President of the Security Council (May 7, 2003), U.N. Doc. S/2003/529 (2003).

[185] *See* Kevin Flower et al., *Mideast Peace Push Hits Turbulence*, CNN, Jan. 16, 2008, http://www.cnn.com/2008/WORLD/meast/01/16/israel.coalition/index.html?iref=newssearch.

[186] *See* discussion *supra* Part III.B.2.b.

Palestinians as the people of the Palestinian Authority who live permanently within a territory meet the first element of permanent population. In accordance with the agreements signed between the parties, Israel ceded to the control of the Palestinian Authority areas in the West Bank and the Gaza Strip.[188] These areas were subdivided into three main zones according to the level of control of the Palestinian Authority.[189] Arguably, the Palestinian Authority also meets the element of defined territory.

The question of whether the Palestinian Authority meets the element of government is critical. It is not surprising that this element governs the first, second, and fourth elements of a state.[190] Indeed, the agreements between Israel and the Palestinians have granted some autonomy to the Palestinian Authority. Respectively, the Palestinian Authority has its own government. On the other hand, the responsibilities and powers transferred to the Palestinian Authority were limited and Israel explicitly reserved control over all matters not transferred.[191] Several of these reserved powers are incompatible with the notion that the Palestinian Authority had independent governmental control over the defined territory. Thus, the Interim Agreement expressly left Israel with an undiminished ability to defend and control the territorial borders.[192] The Interim Agreement also denied the Palestinian Authority the right to create or maintain either an army or a navy,[193] retained Israeli control over the territorial airspace,[194] and placed severe restrictions on the Palestinian Authority's lawmaking ability.[195] Hence, it seems that the Palestinian Authority does not meet the element of government since it has no "defined territory . . . [and] a permanent population under its control."[196]

Accordingly, the Palestinian Authority cannot meet the fourth element of capacity to enter into relations with other states. Moreover, the Interim Agreement expressly denied the Palestinian Authority the right to conduct foreign relations.[197]

As stated previously,[198] foreign sovereign immunity can be granted to an entity that does not meet the four discussed qualifications, but is soon to become an independent state. However, in practice, foreign sovereign immunity was granted to those entities when suits against them were brought to the courts of the "paternalist state."[199] This is clearly not the case when engaging in actions against the Palestinian Authority because of its involvement in terror that are brought in the Israeli civil courts.

It should be emphasized that the Palestinian Authority has never declared itself as a state or an independent entity. Such a declaration is expected to emanate from the finalization of the negotiations with Israel.[200] This fact has a significant importance. "While the traditional definition [of state] does not formally require it, an entity is not a state if it does not claim to be a state."[201] Indeed, many countries throughout the world recognized the right of the Palestinian people to establish a state,[202] but refrained from recognizing the Palestinian Authority as a state.[203]

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[187] *See* BROWNLIE, *supra* note 148, at 70; *see also* discussion *infra* p. 40 with regard to granting a foreign sovereign immunity to an entity that does not meet the four discussed qualifications, but is soon to become an independent state.

[188] Interim Agreement, *supra* note 131, art. XI.

[189] *Id.*

[190] Ungar v. PLO, 402 F.3d 274, 289 (1st Cir. 2005).

[191] Interim Agreement, *supra* note 131, art. I.

[192] *Id.* art. XII.

[193] *Id.* art. XIV. The Palestinian Authority was permitted to organize a police force, but this force had no jurisdiction over Israeli citizens within the territory. *Id.* art. XI.

[194] *Id.* art. XIII.

[195] *Id.* art. XVIII.

[196] Ungar v. PLO, 402 F.3d 274, 289 (1st Cir. 2005) (quoting Knox v. PLO, 306 F. Supp. 2d 424, 434 (S.D.N.Y. 2004)); *see* discussion *infra* Part III.B.2.e.

[197] Interim Agreement, *supra* note 131, art. IX.

[198] *See* discussion *supra* Part III.B.2.b.

[199] *See, e.g.*, Kawananakoa v. Polybank 205 U.S. 349 (1907).

[200] The Interim Agreement explicitly states that the status of the occupied Palestinian territories will be preserved during the interim period. *See* Interim Agreement, *supra* note 131, art. XXI.

[201] RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 cmt. f (1987).

[202] However, political recognition is not a prerequisite to a finding of statehood. *See, e.g.*, DINSTEIN, *supra* note 1557, at 97.

[203] *See* TAL BECKER, INTERNATIONAL RECOGNITION OF A UNILATERALLY DECLARED PALESTINIAN STATE: LEGAL AND POLICY DILEMMAS (2000).

In sum, the Palestinian Authority does not satisfy the requirements for statehood under the principles of international law. This is the prevailing position among scholars as well.[204]

In light of the peace process' deadlock and the continuing violence, in August 2005 Israel unilaterally withdrew from the Gaza Strip, ceding full control of the area to the Palestinian Authority.[205] Following an escalation in intra-Palestinian violence, in June 2007 Hamas seized full control of the Gaza Strip.[206] As a result, the Palestinian Authority governs only areas of the West Bank.[207] Do these recent events change the conclusion that the Palestinian Authority does not satisfy the requirements for statehood?

It seems that the answer is no. The fact that Israel withdrew from the Gaza Strip has not allowed the Palestinian Authority to exercise effective authority in the West Bank.[208] Since the withdrawal was unilateral, it had no effect on the agreements between the parties.[209] Today, the Palestinian Authority has no governmental control at all over any territory or population in the Gaza Strip.[210] As a matter of fact, it has suffered only a continuing deterioration of its control from the date the disengagement plan was implemented to the takeover by Hamas.[211] Therefore, the recent political events certainly exacerbated the ongoing conflict between the parties, but did not render a change in the status of the Palestinian Authority as a non-state entity. The Palestinian Authority still does not meet the requirements for statehood under the principles of international law.

d. The Status of the Palestinian Authority Under Israeli Law

The Israeli law does not provide an answer to the critical question of whether the Palestinian Authority is considered a state that is entitled to foreign sovereign immunity. As a matter of fact, as opposed to several countries around the globe,[212] Israel has no legislation that governs the issues of foreign sovereign immunity and the definition of "state."

Yet, under the Israeli law, the principles regarding the foreign sovereign immunity and the term of "state" are considered customary international law.[213] The latter is incorporated into the domestic Israeli law as long as it does not explicitly contradict the domestic law.[214] "According to the consistent case law of this court, customary international law is a part of the law of the country, subject to Israeli statute determining a contrary provision."[215] As a result, the laws with respect to

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[204] *See, e.g.*, GEOFFREY R. WATSON, THE OSLO ACCORDS 68 (2000) (concluding that "there was no Palestinian state at the time of the signing of the Interim Agreement"); Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT'L L. & POL'Y 27, 86 (1997) (stating that the Palestinian Authority does not satisfy the four criteria for statehood and is not a state under international legal standards); D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 226 (1998) (concluding that the Interim Agreement "falls short of [achieving] statehood for the Palestinian people"); *see also* discussion *infra* Part III.B.2.e regarding the status of the Palestinian Authority in U.S. legislation and jurisprudential law. *But cf.* Eyal Benvenisti, *The Status of the Palestinian Authority*, *in* THE ARAB-ISRAELI ACCORDS: LEGAL PERSPECTIVES 47 (Eugene Cotran & Chibli Mallat eds., 1996) (stating that one can argue that the Palestinian Authority meets the international qualifications for statehood).

[205] CORDESMAN WITH MORAVITZ, *supra* note 65, at 174.

[206] *See* Assoc. Press, *Hamas Takes Control of Gaza Strip*, USATODAY, June 14, 2007, http://www.usatoday.com/news/world/2007-06-14-gaza_N.htm.

[207] *Id.*

[208] Israeli Ministry of Foreign Affairs, *Israel's Disengagement Plan: Selected Documents*, http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israeli+Disengagement+Plan+20-Jan-2005.htm (last visited July 10, 2008).

[209] *Id.*

[210] *See* Assoc. Press, *Bush Calls for 'Painfu'l Mideast Concessions*, CNN, Jan. 10, 2008, http://www.cnn.com/2008/POLITICS/01/10/bush.mideast/.

[211] *See, e.g.*, *Profile: Gaza Strip*, BBC NEWS, Jan. 21, 2008, http://news.bbc.co.uk/2/hi/middle_east/5122404.stm.

[212] *See, e.g.*, Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330–1332, 1391, 1441, 1602–1611 (2000); State Immunity Act, 1978, c. 33 (Eng.); State Immunity Act, R.S.C., ch. S 18 (1985) (Can.); Foreign States Immunities Act, 1986, c. 3 (Austl.).

[213] CA 7092/94 Her Majesty the Queen in Right of Canada v. Edelson [1997] IsrSC 51(1) 625, 639 and the caselaw referred to within (concluding that the principles concerning foreign sovereign immunity are considered customary international law).

[214] *Id.*

[215] HCJ 785/87 Afu v. Commander of IDF Forces in the West Bank [1987] IsrSC 42(2) 4, 35; *see also* Yaffa Zilbershatz, *Integration of International Law into Israeli Law—The Current Law is the Desirable Law*, 24 MISHPATIM 317 (1994) (discussing the applicability of customary international law in the Israeli law).

foreign sovereign immunity are a part of the Israeli system.[216] This customary law is part of Israeli law, "by force of the State of Israel's existence as a sovereign and independent state."[217]

The Israeli courts had only a few opportunities to engage in the question of whether the Palestinian Authority is a state. In several cases that were brought together before the District Court in Jerusalem, the court ruled—after applying the principles crystallized in the international law—that apparently the Palestinian Authority does not meet the essential elements of a state and therefore is not entitled to foreign sovereign immunity.[218] However, the court held that the final determination of whether the Palestinian Authority is a state is not to be made by the court but rather by the government through a certificate signed by the Minister of Foreign Affairs.[219]

It should be mentioned that the plaintiffs requested the court to implement the U.S. legislation that permits American citizens to sue for injuries or death caused by international terrorism.[220] The plaintiffs also referred the court to the case of *Ungar v. Palestinian Authority*, in which the federal court in Rhode Island granted a suit between terror victims and the Palestinian Authority after rejecting the defense of foreign sovereign immunity.[221] The Israeli court denied the requests stating that foreign legislation cannot be implemented in the domestic law unless it is adopted in domestic legislation.[222] The court added that a foreign case law cannot lead to the determination whether the Palestinian Authority is a state.[223]

Approving the district court decision at the appeal level, the Supreme Court emphasized that the question of whether the Palestinian Authority is a state is a factual question that shall be answered merely by the executive branch.[224] Such a determination should be made case by case, with respect to each action at the relevant time.[225]

In another case that was discussed prior to the Supreme Court decision, the District Court in Jerusalem declined an action against the Palestinian Authority for not enforcing Israeli civil judgments in its territories.[226] The court ruled that the Palestinian Authority meets, in one way or another, the provisions of an independent entity.[227] However, the court neither addressed the matter of sovereign immunity nor the capability of suing the Palestinian Authority.

In light of the foregoing, according to the current Israeli ruling, the final determination of whether the Palestinian Authority is a state has to be made by the government on a case by case basis.

e. A Comparative View: The Status of the Palestinian Authority in U.S. Legislation and Jurisprudential Law

The Foreign Sovereign Immunities Act of l976 [FSIA] "provides a comprehensive scheme for civil litigation—including civil actions involving terrorism—when the defendant is a foreign state."[228] Enacting FSIA, Congress embraced the restrictive theory of sovereign immunity.[229] The FSIA provides the only basis for executing jurisdiction over a foreign state

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[216] *Edelson*, IsrSC 51(1) at 639.

[217] CrimA 174/54 Shtempfeffer v. Att'y Gen. [1954] IsrSC 10 5, 15.

[218] CC (Jer) 2538/00 Noritz v. Palestinian Auth. [2003] (unpublished).

[219] *Id.*

[220] *See* Anti-Terrorism Act of 1991 (ATA), 18 U.S.C. § 2333 (2000).

[221] 153 F. Supp. 2d 76 (D.R.I. 2001); *see* discussion *infra* Part III.B.2.e.

[222] CC (Jer) 2538/00 Noritz v. Palestinian Auth. [2003] (unpublished).

[223] *Id.*

[224] CA 4060/03 Dayan v. Palestinian Auth. [2007] (unpublished).

[225] *Id.*

[226] CC (Jer) 4049/02 Midreshet Eilon More v. State of Israel [2006] (unpublished).

[227] *Id.*

[228] Jack L. Goldsmith & Ryan Goodman, *U.S. Civil Litigation and International Terrorism*, *in* CIVIL LITIGATION AGAINST TERRORISM 15 (John Norton Moore ed., 2004).

[229] 28 U.S.C. § 1605(a)(2) (2000).

in U.S. courts.[230] One of the FSIA's listed exceptions to immunity must be satisfied to establish subject matter jurisdiction in a suit against a foreign state.[231] Two of the enumerated exceptions are pertinent for terror-related suits:

1. The state-sponsored terrorism exception.[232] Plaintiffs can bring a claim for injuries resulting from terror acts against a foreign state officially designated by the State Department as a sponsor of terrorism.

> This exception requires four primary conditions to be satisfied: 1. The state is officially designated by the State Department as a state sponsor of terrorism at the time of the incident or as a result of the incident; 2. "[A]n official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency" commits the act or provides material support to an individual or entity which commits the act; 3. [T]he act involves torture, extrajudicial killing, aircraft sabotage, or hostage taking; and 4. [T]he act results in the death or personal injury of a United States citizen.[233]

A number of suits have succeeded under this exception.[234]

2. The noncommercial tort exception.[235] According to this exception, foreign states are denied immunity from suits for "personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment."[236] Therefore, "a foreign state would lack immunity for such a tort committed in the course of terrorist activity, even if the state is not an officially designated state sponsor of terrorism."[237]

Does an action against the Palestinian Authority brought in U.S. courts for its involvement in terror acts occurring in Israel fall within one of the discussed FSIA's exceptions? The U.S. courts answered this question in the negative.

The state-sponsored terrorism exception[238] does not apply in these circumstances simply because according to the current judgments the Palestinian Authority is not considered a state.[239] Thus, the Palestinian Authority is not one of the states that are officially designated as sponsors of terrorism.[240] Also, the noncommercial tort exception[241] does not apply to the Palestinian Authority because it is not considered a state. In addition, the scope of the exception has been interpreted narrowly in the sense that both the tortious act and the injury are required to occur in the United States.[242] Since the discussed terror acts occurred in Israel, the requirement cannot be satisfied.

However, a number of suits filed by terror victims against the Palestinian Authority in U.S. courts were successful due to the fact that the courts held that the Palestinian Authority is not a state, and therefore it is not entitled to foreign sovereign immunity.[243] Because the FSIA does not apply in the case of the Palestinian Authority, the suits were based upon the Anti-

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[230] Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 11 (D.D.C. 1998); *see also* SHAW, *supra* note 147, at 480.

[231] The list of exceptions to the jurisdictional immunity of a foreign state is noted in 28 U.S.C. § 1605(a)(2) (1988).

[232] *Id.* § 1605(a)(7).

[233] Goldsmith & Goodman, *supra* note 228, at 29 (quoting the elements of the state-sponsored terrorism exception under FSIA).

[234] However, most of the suits involved default judgments. *See, e.g.*, Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62 (D.D.C. 1998); *Flatow*, 999 F. Supp. 1; Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107 (D.D.C. 2000). Currently seven states are officially designated sponsors of terrorism: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. *See* 31 C.F.R. § 596.201 (2008); *see also* Walter W. Heiser, *Civil Litigation as a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT'L L. J. 1, 15 (2002).

[235] 28 U.S.C. § 1605(a)(5) (2000).

[236] *Id.*

[237] Goldsmith & Goodman, *supra* note 228, at 29.

[238] 28 U.S.C. § 1605(a)(7).

[239] *See* Ungar v. PLO, 402 F.3d 274 (1st Cir. 2005); Knox v. PLO, 306 F. Supp. 2d 424 (S.D.N.Y. 2004); Biton v. Palestinian Interim Self-Gov't Auth., 510 F. Supp. 2d 144, 147 (D.D.C. 2007); *see also* discussion *infra* pp. 20–22.

[240] *See supra* note 234.

[241] 28 U.S.C. § 1605(a)(5).

[242] Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980).

[243] *See* discussion *infra* pp. 20–21.

Terrorism Act of 1991 (ATA), which permits American citizens to sue for injuries or death caused by international terrorism.[244]

The main case against the Palestinian Authority that was litigated in U.S. courts, and the first to be decided at the appeals court level, is the case of *Ungar v. Palestinian Authority*.[245] The case arose in the aftermath of the death of Yaron Ungar (an American citizen) and his wife Efrat on 9 June 1996.[246] They were killed after gunmen affiliated with Hamas opened fire on their car near the town of Beit Shemesh in Israel.[247] In March 2000, the Ungars' estates and their two children filed suit in federal court in Rhode Island.[248] Included among the defendants was the Palestinian Authority, since the plaintiffs claimed that it had aided and abetted the murders.[249] The court denied the motion submitted by the Palestinian Authority to dismiss on the basis of sovereign immunity, and finally entered a $116 million default judgment.[250] The Palestinian Authority appealed the judgment to the First Circuit, who affirmed.[251]

The defendants argued that the Palestinian Authority was immune from suit under both the FSIA and the ATA because it constituted core elements of a state.[252] The court stated that in determining whether to grant immunity in individual cases, it has to rely on the international law standard as opposed to the actions of the State Department.[253] Analyzing the matter,[254] the court rejected the argument and decided that the Palestinian Authority fails to qualify as a state and thus is not entitled to sovereign immunity from tort suits.[255] The court concluded:

> [T]he defendants have not carried their burden of showing that Palestine satisfied the requirements for statehood under the applicable principles of international law at any point in time. In view of the unmistakable legislative command that sovereign immunity shall only be accorded to states—a command reflected in both the FSIA and the ATA—the defendants' sovereign immunity defense must fail.[256]

An appeal filed by the Palestinian Authority to the Supreme Court was denied.[257]

The second case concerned with an action against the Palestinian Authority due to its involvement in terror is *Knox v. PLO*.[258] On the night of 17 January 2002, Ellis, an American citizen then thirty-one years old, was performing as a singer before 180 guests celebrating the Bat Mitzvah of twelve-year-old Nina in Hadera, Israel.[259] At approximately 10:45 p.m.,

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[244] 18 U.S.C. § 2333(a) (2000).

> Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefore in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

Id.; *see also* Keith Sealing, *Cuba Is No Longer a "State Sponsor of Terrorism": Why the Foreign Sovereign Immunities Act Sanction Failed*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 143, 151 (2004). Like FSIA, the ATA provides that no civil action shall be maintained against a foreign state, but it contains no specific definition of the term "foreign state." *Id.* Consequently, in *Ungar*, , the court held that an assertion of sovereign immunity under the ATA should be regarded as being functionally equivalent to an assertion of sovereign immunity under the FSIA. 402 F.3d at 282.

[245] 402 F.3d 274.

[246] *Id.* at 276.

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] Ungar v. Palestinian Auth., 315 F. Supp. 2d 164 (D.R.I. 2004).

[251] *Ungar*, 402 F.3d at 294.

[252] *Id.* at 289.

[253] "[C]ourts should look to international law to determine statehood for purposes of the FSIA." *Id.* at 284.

[254] The analysis of the court referred to three time periods: the period from the beginning of the mandate through the 1967 war; the period from the end of that war until the establishment of the Palestinian Authority in 1994; and the period from 1994 forward. *Id.* at 290.

[255] *Id.* at 292.

[256] *Id.*

[257] PLO v. Ungar, 546 U.S. 1034 (2005).

[258] 306 F. Supp. 2d 424 (S.D.N.Y. 2004).

[259] *Id.* at 426.

while the guests were dancing, a terrorist arrived at the banquet hall, burst through the door and, using a machine gun, opened fire into the crowd.[260] Six people were killed in the attack, including Ellis, and over thirty were wounded.[261] "[W]hat began as an initiation ended in fatality."[262] Plaintiffs sought damages from defendants, claiming, among other things, that the attack was executed under instructions provided by the Palestinian Authority.[263] Defendants moved to dismiss the action for lack of subject matter jurisdiction.[264]

The court denied the motion and held that defendants were not entitled to immunity under the ATA and the FSIA, because they failed to establish that the Palestinian Authority was a state.[265] The court explained that the Palestinian Authority did not sufficiently control a territory, given that its authority was subordinate to Israel's sovereign control under the Oslo Accords, and it was expressly prohibited from conducting foreign relations under the Interim Agreement.[266] Consequently, the court directed entry of final judgment against the PLO and the Palestinian Authority in the total amount of $192 million.[267]

The third, and most recent suit, filed by terror victims against the Palestinian Authority is *Biton v. Palestinian Interim Self-Government Authority*.[268] "[O]n November 20, 2000, a roadside device exploded near a bus that was transporting elementary school children and their teachers from Kfar Darom . . . towards Gush Katif."[269] Gabriel Biton, one of the plaintiff's husband, was killed.[270] Mrs. Biton asserted that the Palestinian Authority was responsible for his death.[271] The Palestinian Authority again raised the assertion of foreign sovereign immunity.[272] The court rejected the assertion, stating: "Defendants remain collaterally estopped from asserting a defense of sovereign immunity by the prior decisions in *Ungar v. PLO* . . . and *Knox v. PLO* . . . ."[273]

In light of the preceding discussion, the U.S. courts granted a number of suits filed by terror victims against the Palestinian Authority. By applying the international law standards, the U.S. courts—and not the executive branch—decided that the Palestinian Authority was not considered a state, and therefore it was not entitled to foreign sovereign immunity.

3. Conclusion: The Palestinian Authority Is a Legal Personality, but Not a State and Therefore Is Not Immune from Civil Actions

The Palestinian Authority is recognized as a suable legal personality. Furthermore, since the foreign sovereign immunity is designed for states, it had to be determined if the Palestinian Authority is a state. In accordance with the customary international law standards, an entity is required to posses the following qualifications in order to be considered a state:[274] permanent population, defined territory, government, and capacity to enter into relations with other states. It has been shown that the Palestinian Authority is in many ways sui generis. Arguably, it meets the first two elements of a state. However, it cannot satisfy the latter two elements. The responsibilities and powers transferred to the Palestinian Authority were limited

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[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *Id.* at 438.

[265] *Id.*

[266] *Id.*

[267] Knox v. PLO, 2006 U.S. Dist. LEXIS 52320, at *4 (S.D.N.Y. July 11, 2006)

[268] 510 F. Supp. 2d 144 (D.D.C. 2007).

[269] Biton v. Palestine Interim Self-Gov't Auth., 412 F Supp. 2d. 1, 2 (D.D.C. 2005).

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Biton*, 510 F. Supp. 2d at 147. The court added that defendants remained collaterally estopped from asserting a defense of sovereign immunity in spite of subsequent events to the filing of the complaint in the Gaza Strip, i.e. the withdraw of Israel and the coup by Hamas. *Id.* These events do not change the defendants' status. *Id.* at 147.

[274] *See* Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097; *see also* BROWNLIE, *supra* note 148, at 70.

and Israel explicitly reserved control over all matters not transferred.[275] The Palestinian Authority may be close to becoming an independent state, but it has never reached this status.[276] Moreover, the Palestinian Authority has intentionally never declared itself a state.[277]

Engaging in the matter, the Israeli courts have not determined the exact political status of the Palestinian Authority. The determination has been left to be made by the government. However, a different approach can certainly be taken. The U.S. courts have decided that the Palestinian Authority is not considered a state, and is therefore not entitled to foreign sovereign immunity. Clearly, the approach taken by the U.S. courts can ease the way of the terror victims towards compensation and there is no reason to refrain from applying it in Israel as well.

C. Are Actions Filed by Terror Victims Against the Palestinian Authority Justiciable in Domestic Courts?

1. The Doctrine of Non-Justiciability Under Domestic Law

The doctrine of sovereign immunity is closely related to the doctrine of non-justiciability. The concept of the latter doctrine posits an area of international activity of states that is simply beyond the competence of the domestic tribunal in its assertion of jurisdiction.[278]

According to the Israeli courts' point of view, there is a distinction between an argument of normative non-justiciability and an argument of institutional non-justiciability.[279] "An argument of normative non-justiciability claims that legal standards for deciding the dispute put before the court do not exist."[280] However, under the courts' rulings, the argument of non-justiciability has no legal base, "since there is always a legal norm according to which the dispute can be solved."[281] An argument of institutional non-justiciability "deals with the question whether the law and the court are the appropriate framework for deciding . . . the dispute."[282] Thus, a court must refrain from entering a matter that relates to "questions of policy within the jurisdiction of other branches of a democratic government."[283] The question that must be asked is what the predominant nature of the dispute is; i.e., whether the nature is predominantly political or predominantly legal.[284] Since the borderline between political issue and legal issue might be blurred, the doctrine of non-justiciability should be rarely exercised.[285] Moreover, "there is no application of the doctrine where recognition of it might prevent the examination of impingement upon human rights."[286]

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[275] Interim Agreement, *supra* note 131.

[276] *See supra* note 204 and accompanying text.

[277] *See, e.g.*, Deborah Sontag, *Assembly in Gaza Defers Declaring Palestinian State*, N.Y. TIMES, Sept. 11, 2000, http://query.nytimes.com/gst/fullpage.html?res=9E02E7DB1F39F932A2575AC0A9669C8B63.

[278] SHAW, *supra* note 147, at 492.

[279] HCJ 910/86 Resler v. Minister of Def. [1988] IsrSC 42(2) 441, 488 (concluding that enlistment of Yeshiva students to military service is a justiciable issue).

[280] HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel [2006] IsrSC 57(6) 285, 343 (stating that the doctrine of non-justiciability does not apply when examining the legality of the preventive strikes policy executed by the IDF in the West Bank and the Gaza Strip).

[281] *Id.*

[282] *Resler*, IsrSC 42(2) at 488.

[283] HCJ 4481/91 Bargil v. Gov't of Israel [1993] IsrSC 47(4) 210, 218 (concluding that Israel's policy regarding the settlements in the West Bank is not justiciable); *see also* HCJ 9070/00 Livnat v. Rubinstein [2001] IsrSC 55(4) 800, 812 (determining that questions of day to day affairs of the Knesset are not institutionally justiciable).

[284] HCJ 852/86 Aloni v. Minister of Justice [1987] IsrSC 41(2) 1, 29 (deciding that the nature of extradition issue is predominantly legal and therefore justiciable); *see also Resler*, IsrSC 42(2) at 521.

[285] *Resler*, IsrSC 42(2) at 488.

[286] *Pub. Comm. Against Torture in Israel*, IsrSC 57(6) at 343; *see also* HCJ 606/78 Oyeb v. Minister of Def. [1978] IsrSC 33(2) 113, 124.

> [I]t is clear that issues of foreign policy . . . are decided by the political branches, and not by the judicial branch. However, assuming . . . that a person's property is harmed or expropriated illegally, it is difficult to believe that the Court will whisk its hand away from him, merely since his right might be disputed in political negotiations.

Id.

Against the background of this discussion, one must ask whether the doctrine of non-justiciability is a hurdle for terror victims in their path towards compensation.

When dealing with suits filed by terror victims against the Palestinian Authority, the District Court in Jerusalem restated that it should not engage in a dispute if its nature is predominantly political, and noted that the suits may raise political questions.[287] Affirming the ruling of the district court, the Supreme Court did not address the issue.[288]

Although the Israeli courts have not determined whether the doctrine of non-justiciability applies to terror victims' actions, the doctrine should not hamper these actions for two reasons. First, the doctrine of non-justiciability is not applicable when impingement of human rights is involved.[289] Since terror acts harm the most basic right of a human being—the right to life—they are justiciable. Second, as stated, "[w]hen the character of the disputed question is political . . . it is appropriate to prevent adjudication. However, when that character is legal, the doctrine of institutional nonjusticiability does not apply."[290] Indeed, suits filed by terror victims against the Palestinian Authority can influence the relations between Israel and the Palestinian Authority. The suits may raise political aspects, especially when dealing with the validity of the agreements between the parties. Yet, the dominant nature of the suits is not political. The question is whether terror victims can sue the Palestinian Authority for damages caused by its involvement in terror acts. It involves primarily tragic events that violated the victims' rights. The question has a legal dominant character both from a domestic law and international law point of view. It may have political implications, but the dominant nature of the question is legal.

2. A Comparative View: The Doctrine of Non-Justiciability and the U.S. Courts

In actions against the Palestinian Authority that are brought in the U.S. courts, the Palestinian Authority kept asserting that the actions should have been dismissed because the actions presented a non-justiciable political question. The court found the assertion unconvincing.

In *Baker v. Carr*[291] the Supreme Court explained that "it is the relationship between the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the 'political question.'"[292] Yet, not "every case or controversy which touches foreign relations lies beyond judicial cognizance."[293] The Supreme Court set forth six tests designed to determine whether it deals with a political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[294]

In the case of *Ungar v. Palestine Liberation Organization* the court held that the actions against the Palestinian Authority easily clear the six hurdles.[295] Hence, the actions do not present a non-justiciable political question. To begin, the decision of the court "neither signaled an official position on behalf of the United States with respect to the political recognition of Palestine nor amounted to the usurpation of a power committed to some other branch of government."[296] The purpose of the

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[287] *Id.*

[288] CA 4060/03 Dayan v. Palestinian Authority [2007] (unpublished).

[289] *Pub. Comm. Against Torture in Israel*, IsrSC 57(6).

[290] *Id.* at 343.

[291] 369 U.S. 186 (1962).

[292] *Id.* at 210.

[293] *Id.* at 211.

[294] Ungar v. PLO, 402 F.3d 274, 280 (1st Cir. 2005) (quoting *Baker*, 369 U.S. at 217).

[295] *Id.*

[296] *Id.*

FSIA and the ATA is "to allow the courts to determine questions of sovereign immunity under a legal, as opposed to a political, regime."[297] The second and third hurdles present no insuperable obstacles. The courts are able to solve the issue before them by accessing judicially manageable standards, and these standards do not require the court to make nonjudicial policy determinations. The determination of whether the Palestinian Authority has adduced sufficient evidence to satisfy the definition of a "state" is appropriate for a judicial body.[298] The final three hurdles are "relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests."[299] This is not the case here. "[T]he political branches have enacted a law that leaves undiminished their ability either to recognize or withhold recognition from foreign states, while leaving to the courts the responsibility of determining the existence vel non of statehood for jurisdictional purposes."[300] Moreover, the determination that the Palestinian Authority is not entitled to foreign sovereign immunity "is not incompatible with any formal position thus far taken by the political branches."[301]

The court also noted that "in these tempestuous times, any decision of a United States court on matters relating to the Israeli-Palestinian conflict will engender strong feelings."[302] On the other hand, "the capacity to stir emotions is not enough to render an issue nonjusticiable. For jurisdictional purposes, courts must be careful to distinguish between political questions and cases having political overtones."[303]

Fourteen years before, in 1991, the Second Circuit reached the same conclusion in *Klinghoffer v. S.N.C. Achille Lauro* when the PLO sought to dismiss the case on the grounds of non-justiciability.[304] "On October 7, 1985, four persons seized the Italian cruise liner Achille Lauro in the Eastern Mediterranean Sea. During the course of the incident, the hijackers murdered an elderly Jewish-American passenger, Leon Klinghoffer, by throwing him and the wheelchair in which he was confined overboard."[305] The victim's estate brought in the court a tort action against various defendants, who impleaded the PLO.[306] The PLO argued that the case raised non-justiciable political questions.[307] The court denied the argument for two reasons. First, the court states that "[t]he fact that the issues before us arise in a politically charged context does not convert what is essentially an ordinary tort suit into a non-justiciable political question."[308] Second, the court concluded that all the six discussed tests put forth in *Baker v. Carr*, weighed against applying the political question doctrine.[309] The court also noted that common law tort claims are constitutionally committed to the judicial branch and pointed out that Congress had expressly endorsed these types of lawsuits under the ATA.[310]

In sum, the U.S. courts decided that the political question doctrine does not preclude judicial resolution of the actions filed by the terror victims.

3. Conclusion: Actions Filed by Terror Victims Against the Palestinian Authority Are Justiciable in Domestic Courts

The doctrine of non-justiciability should not void the terror victims' actions. The doctrine of non-justiciability is not applicable when impingement of human rights is involved. Furthermore, the suits against the Palestinian Authority may raise

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[297] *Id.*

[298] *Id.* at 281.

[299] *Id.* (quoting Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995)).

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] *Id.*

[304] 937 F.2d 44 (2d Cir. 1991).

[305] *Id.* at 47.

[306] *Id.*

[307] *Id.* at 49.

[308] *Id.*

[309] *Id.* (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

[310] *Id.*; *see also* Knox v. PLO, 306 F. Supp. 2d 424, 449 (S.D.N.Y. 2004).

political aspects, but the dominant nature of the suits is not political. The approach articulated by the U.S. courts supports this conclusion. In view of the foregoing, suits against the Palestinian Authority should be justiciable in the Israeli courts.

D. What Is the Appropriate Forum to Deal with Actions Filed by Terror Victims Against the Palestinian Authority?

1. The Doctrine of Forum Non Conveniens

The doctrine of forum non conveniens permits a court to dismiss a case where an alternative forum that is fair to the parties and substantially more convenient for them is available in another country.[311] Generally, there is a strong presumption in favor of the plaintiff's choice of forum, especially if the plaintiff is a resident of the forum.[312] The defendant must first demonstrate "that an adequate alternative forum exists, and then that considerations of convenience and judicial efficiency strongly favor litigating the claim in the alternative forum."[313] The possibility of an unfavorable change in the substantive or procedural law is ordinarily not a relevant consideration, unless the remedy provided by the alternative forum is "so clearly inadequate or unsatisfactory that it is no remedy at all."[314]

2. The Doctrine of Forum Non Conveniens and the Actions Against the Palestinian Authority Under Israeli Law

The doctrine of forum non conveniens is also applicable under Israeli law.[315] A domestic court is able to deny an action if a forum in another country is equitable and more convenient for the parties.[316] The convenient forum is the forum to which the alleged tort has the most links.[317] This approach, sometimes called the "majority of links" or "center of gravity" approach, offers an efficient rule of preference, able to assist in solving most cases of forums competition.[318] It was emphasized that it should be an actual possibility to litigate the action in the alternative forum.[319] Yet, there is a strong presumption in favor of the domestic forum. Accordingly, only in rare occasions do courts dismiss cases merely on the grounds of forum non conveniens doctrine.[320]

Is the doctrine of forum non conveniens an obstacle for the terror victims in their actions against the Palestinian Authority? The Interim Agreement between Israel and the Palestinians permits an Israeli to file a suit in a Palestinian court.[321] However, the agreement does not treat—for obvious reasons—a scenario of filing a suit against the Palestinian

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[311] *See* Heiser, *supra* note 234, at 27; *see also* Nowak v. Tak How Inv. Ltd., 94 F.3d 708, 719 (1st Cir. 1996).

[312] *See* Islamic Republic of Iran v. Pahlavi, 467 N.E. 2d 245, 249 (N.Y. 1984).

[313] *See* Heiser, *supra* note 234, at 28 (citations omitted). The author also states that "[t]he threshold requirement is usually satisfied if the defendant shows that an alternative forum provides some redress for the type of claims alleged in the plaintiff's complaint and that the defendant is amenable to suit in the alternative forum." *Id.* (citation omitted). *See generally* Iragorri v. Int'l Elevator, Inc., 203 F.3d 8 (1st Cir. 2000) (providing guidelines regarding the issue of forum non conveniens).

[314] *See* Heiser, *supra* note 234, at 28 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)).

[315] *See, e.g.*, CA 1432/03 Yinon Food Prod. Mfg. & Mktg. Ltd. v. Kara'an [2004] IsrSC 59(1) 345 (stating that the doctrine of forum non conveniens is applicable in the Israeli law and that there is a strong presumption in favor of the domestic forum).

[316] *Id.*

[317] *Id.*

[318] *Id.*; *see* CA 4716/93 Arab Ins. Co. v. Zariqat [1993] IsrSC 48(3) 265, 269; CA 851/99 Van Doosselaere v. Depypere [1999] IsrSC 57(1) 800, 813. However, this approach has been criticized. It has been claimed that such an approach is liable to impinge upon legal certainty, and even be used as a manipulative mechanism in the hands of the court. *See* MICHAEL KARAYANNI, THE INFLUENCE OF THE CHOICE OF LAW PROCESS ON INTERNATIONAL JURISDICTION 53 (2002).

[319] HCJ 8754/00 Ron v. Beit Hadin Harabani [2001] IsrSC 56(2) 625, 655 (indicating that there should be an actual possibility to litigate the action in the alternative forum).

[320] *See, e.g.*, CA 9141/00 Lang v. Markas [2001] IsrSC 56(1) 118, 123 (concluding that there is a strong presumption in favor of the domestic forum).

[321] Interim Agreement, *supra* note 131, Annex IV Protocol Concerning Legal Affairs, art. III. Article III(2) states that in cases where an Israeli is a party, the Palestinian courts have jurisdiction over civil actions in the following cases:

> a. the subject matter of the action is an ongoing Israeli business situated in the Territory (the registration of an Israeli company as a foreign company in the Territory being evidence of the fact that it has an ongoing business situated in the Territory);
>
> b. the subject matter of the action is real property located in the Territory;
>
> c. the Israeli party is a defendant in an action and has consented to such jurisdiction by notice in writing to the Palestinian court or judicial authority;

Authority due to its involvement in terror acts.[322] It is therefore, the courts' role to provide an answer to this question. In several suits brought in the District Court in Jerusalem by terror victims, the Palestinian Authority raised the doctrine of forum non conveniens as a ground for dismissing the cases.[323] The Palestinian Authority claimed that the appropriate forum for the actions should be the Palestinian court.[324] The court restated the basic principles concerning the doctrine of forum non conveniens but refrained from deciding whether the doctrine is applicable with respect to the suits against the Palestinian Authority.[325] The court added that the applicability of the doctrine of forum non conveniens has to be examined case by case through implementing the "majority of links" approach.[326] Affirming the ruling of the court, the Supreme Court did not address the issue.[327]

However, based on the doctrine's principles one can certainly argue that the doctrine of forum non conveniens should not apply with respect to suits against the Palestinian Authority for several reasons. First, courts should generally not grant a forum non conveniens dismissal where the plaintiff is a resident of Israel since there is a strong presumption in favor of the domestic forum.[328] Second, the Israeli courts have more links to the alleged tort than the Palestinian courts: the victims are Israelis, the terror acts were executed in Israel, and the evidence and witnesses are likely to be located in Israel. In this sense, the Israeli court is the convenient forum.[329] Third, under the Israeli Supreme Court's precedents, only in rare occasions do courts dismiss cases merely on the grounds of the doctrine.[330] Suits filed by Israeli terror victims against the Palestinian Authority do not involve considerations of convenience and judicial efficiency that fall into these rare occasions. Furthermore, there is no unique advantage in litigating these suits in Palestinian courts. In view of the foregoing, the doctrine of forum non conveniens should not impede terror victims in their actions against the Palestinian Authority.

3. A Comparative View: The Doctrine of Forum Non Conveniens and the U.S. Law's Approach Towards Actions Against the Palestinian Authority

As a defendant in several actions submitted in the United States, the Palestinian Authority filed a motion to dismiss the actions on the grounds of forum non conveniens. Generally, the court has the discretion to grant or deny a motion to dismiss based on the doctrine of forum non conveniens after consideration of the relevant factors.[331] Nonetheless, suits against the

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> d. the Israeli party is a defendant in an action, the subject matter of the action is a written agreement, and the Israeli party has consented to such jurisdiction by a specific provision in that agreement;
>
> e. the Israeli party is a plaintiff who has filed an action in a Palestinian court. If the defendant in the action is an Israeli, his consent to such jurisdiction in accordance with subparagraphs c. or d. above shall be required; or
>
> f. actions concerning other matters as agreed between the sides.

Id. The Knesset embraced this article to the domestic law by enacting implementing legislation of the agreement. *See* The Extension of Emergency Regulations Act (Judea and Samaria—Judging Offences and Legal Assistance), 1967, S.H. 20, art. 2(b).

[322] The agreements between the parties were designed to bring peace and hope; they were not meant to treat terror acts initiated by one party against the other. *See* Interim Agreement, *supra* note 131, pmbl.

> Reaffirming their determination to put an end to decades of confrontation and to live in peaceful coexistence, mutual dignity and security, while recognizing their mutual legitimate and political rights;
>
> Reaffirming their desire to achieve a just, lasting and comprehensive peace settlement and historic reconciliation through the agreed political process;
>
> . . . .
>
> Hereby agree as follows . . . .

Id.

[323] CC (Jer) 2538/00 Noritz v. Palestinian Auth. [2003] (unpublished).

[324] *Id.*

[325] *Id.*

[326] *Id.*

[327] CA 4060/03 Dayan v. Palestinian Auth. [2007] (unpublished).

[328] *See, e.g.*, CA 9141/00 Lang v. Markas [2001] IsrSC 56(1) 118, 123 (concluding that there is a strong presumption in favor of the domestic forum).

[329] *See, e.g.*, CA 1432/03 Yinon Food Prod. Mfg. & Mktg. Ltd. v. Kara'an [2004] IsrSC 59(1) 345.

[330] *Lang*, IsrSC 56(1) at 123.

[331] Ungar v. Palestinian Auth., 153 F. Supp. 2d 76, 100 (D.R.I. 2001). Discussing the relevant considerations, the court stated:

Palestinian Authority are filed under the ATA[332] that limits the circumstances under which a court can entertain a motion to dismiss on the grounds of the inconvenience of the forum. Specifically, § 2334(d) provides that a district court shall not dismiss any action brought under the ATA on the grounds of the inconvenience of the forum, unless:

> (1) the action may be maintained in a foreign court that has jurisdiction over the subject matter and over all the defendants; (2) that foreign court is significantly more convenient and appropriate; and (3) that foreign court offers a remedy which is substantially the same as the one available in the courts of the United States.[333]

Consequently, the inclusion of a claim under the ATA would reduce the prospects of a forum non conveniens dismissal as to render the motion almost meaningless.[334]

For instance, in the case of *Estates of Ungar v. Palestinian Authority*, brought in the federal court in Rhode Island under the ATA, the court denied the motion to dismiss under the doctrine of forum non conveniens.[335] The court explained that the Palestinian Authority did not name any specific adequate alternative forum and stated that "without some degree of proof as to whether the alternative forum has jurisdiction over the subject matter and all defendants, and offers a remedy which is substantially the same as the one available in this Court,"[336] the motion filed by the Palestinian Authority has no base.

As opposed to the Israeli legislation, the ATA provides guidelines with respect to the applicability of the doctrine of forum non conveniens to suits filed by terror victims. Not only does the ATA regulate the matter, it limits significantly the likelihood of granting a motion to dismiss on the grounds of the inconvenience of the forum.

4. Conclusion: The Israeli Court Is the Convenient Forum for Litigating Actions Against the Palestinian Authority

As explained, the Israeli court is the most convenient and appropriate forum to litigate actions filed by terror victims against the Palestinian Authority. The actions do not involve considerations of judicial efficiency that justify litigating the suits in any other forum. The U.S. view, as articulated in legislation and judgments, supports this conclusion. Respectively, the doctrine of forum non conveniens should not be applied to those actions.

E. Which Law Should the Courts Apply When Treating Actions of Terror Victims Against the Palestinian Authority?

1. The "Choice of Law" Determination Under Israeli Law

Concluding that the actions filed by terror victims against the Palestinian Authority should be litigated in the Israeli courts, it has to be determined which law applies to these actions. The situation in which a choice of the applying legal system must be made between different legal systems that would apply themselves upon the same case by force of a number of links is called "choice of law" or "conflict of laws."[337] The legal realm of conflict of laws is usually categorized as part of

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> An illustrative list of considerations relevant to the private interest includes: "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 508. Factors of public interest include administrative difficulties for courts with overloaded dockets, the imposition of jury duty on a community with no connection to the underlying dispute, the "local interest in having localized controversies decided at home," and the court's familiarity with the law to be applied in the case. *Id.* at 508–509.

Id. (quoting *Gulf Oil Corp*., 330 U.S. 501 (1947)).

[332] The Anti-Terrorism Act of 1991 (ATA), 18 U.S.C. § 2333 (2000).

[333] *Id.* § 2334(d).

[334] *See* Heiser, *supra* note 234, at 27; *see also* Goldsmith & Goodman, *supra* note 228, at 45 (reaching the same conclusion with respect to suits filed under the FSIA).

[335] *Ungar*, 153 F. Supp. 2d at 100.

[336] *Id.*

[337] *See* A. LEVONTINE, CONFLICT OF LAW—A BILL 12 (1987) (discussing the "choice of law" theories).

private international law.[338] The choice of law should be made in light of the rules set out in the law of the forum hearing the case.[339] Each legal field has its own unique rule of choice of law.[340] Thus, the Israeli law provides that the law applying to a tort which has links to more than one legal system will usually be the law in the place the tortious conduct was committed (*lex locus delicti*).[341]

Which law should the Israeli courts apply when engaging in actions filed by terror victims against the Palestinian Authority? The answer to this question cannot be found in the agreements between Israel and the Palestinians. The agreements do not treat a scenario of filing a suit against the Palestinian Authority due to its involvement in terror acts.[342] The domestic legislation does not address the matter either. On the other hand, the Israeli courts have provided an answer to the question.[343]

In the cases brought in the District Court in Jerusalem, the Palestinian Authority contended that the law governing the issue is the Palestinian law since several elements of the alleged tortious conduct occurred in territories controlled by the Palestinian Authority.[344] The court was not convinced by this contention. Stating that the tortious conduct as well as the damage occurred in Israel, the court concluded that the sole foreign element involved in the suits is the defendant, i.e. the Palestinian Authority.[345] In these circumstances, and notably since the tortious conduct occurred within the forum's territory, it was determined that the Israeli law should be applied.[346] The Supreme Court affirmed this opinion.[347]

2. A Comparative View: The U.S. Courts' Approach

Actions against the Palestinian Authority filed by terror victims that are brought in the U.S. courts may also involve choice of law issue.[348] The case of *Estates of Ungar v. Palestinian Authority*[349] illustrates how the matter may arise. The Ungars' estate filed the action in the federal court in Rhode Island under state tort law and the ATA.[350] As a starting point, the court "correctly recognized that it must determine whether the substantive law of Rhode Island or of Israel governed the state law tort claims."[351] The court then applied Rhode Island's "choice of law" doctrine,[352] and determined that the Israeli law governed the action.[353]

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[338] CA 1432/03 Yinon Food Prod. Mfg. & Mktg. Ltd. v. Kara'an [2004] IsrSC 59(1) 345, 348 (concluding that the law applying to a tort which has links to more than one legal system should be the law in the place the tortious conduct was committed).

[339] *Id.* at 359.

[340] *Id.*

[341] *Id.*

[342] *See supra* note 322 and accompanying text.

[343] CC (Jer) 2538/00 Noritz v. Palestinian Auth. [2003] (unpublished).

[344] *Id.*

[345] *Id.*

[346] *Id.*

[347] CA 4060/03 Dayan v. Palestinian Auth. [2007] (unpublished).

[348] Heiser, *supra* note 234, at 30.

[349] 153 F. Supp. 2d 76 (D.R.I. 2001).

[350] *Id.* at 77.

[351] Heiser, *supra* note 234, at 30.

[352] *Ungar*, 153 F. Supp. 2d at 98.

> This Court applies Rhode Island law to issues of state law that arise in federal court because the *Erie* doctrine extends to actions in which federal jurisdiction is premised on supplemental jurisdiction over state law claims. *Doty v. Sewall*, 908 F.2d 1053, 1063 (1st Cir. 1990) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 722 (1966)). This includes the application of Rhode Island's conflict-of-laws provisions.

Id.

[353] *Id*. at 99 ("[I]t is the determination of this Court that Rhode Island law requires the application of Israeli law to the state law claims contained in plaintiffs' complaint"). In absence of specific Israeli legislation, the claims were rested upon the general torts of the Israeli Civil Wrongs Ordinance, i.e. negligence and breach of statutory obligation. *See* discussion *infra* Part III.F.2.

The issue of "choice of law" did not arise with respect to other actions filed in the United States by terror victims against the Palestinian Authority. However, "choice of law" determinations may still be necessary though the result can vary under different state doctrines and factual circumstances.[354]

3. Conclusion: The Israeli Law Should Be Applied

According to the Israeli rules of private international law, the law applying to a tort that has links to more than one legal system will usually be the law in the place the tortious conduct occurred.[355] Based on this rule and since the tortious conducts, i.e. the terror acts, were committed in Israel, the Israeli court concluded that the Israeli law is the law to be applied when treating the actions against the Palestinian Authority.[356] A different conclusion would have created unjustified difficulties for the terror victims.

Determining that the Israeli law is the law to be applied, it is time to examine upon what sources of law the terror victims can rest their claims.

F. Upon What Sources of Law Can the Terror Victims Base Their Actions?

1. The International Agreements Between the Parties

Under the Israeli law, there is a significant distinction "between the rules of customary international law, including the general legal principles embodied in international law, and the rules of conventional international law."[357] Customary international law is an integral part of the Israeli law, "but where obvious conflict arises between those rules and Israeli enacted law, the enacted law prevails."[358] That is not the case regarding conventional law:

> Like the English practice . . . and differing from the American practice under its Constitution, the rules of conventional international law are not adopted automatically and do not become part of the law as applicable in Israel, so long as they have not been adopted or incorporated by way of statutory enactment . . . .[359]

The agreements between Israel and the Palestinians are international agreements. Regardless of the force and validity of the agreements in the international law sphere, it is not a law that the domestic courts will recognize. Indeed, the agreements grant rights and impose obligations, but these are the rights and obligations of the entities that signed the agreements.[360] Such agreements do not fall at all under the jurisdiction of the Israeli courts "except in so far as they, or the rights and duties deriving from them, have become integrated into state legislation and received the status of binding law."[361]

The agreements between the parties were designed to bring peace and hope; they were not meant to treat terror acts initiated by one party against the other.[362] Moreover, the Interim Agreement is premised upon a mutual fight against terror and calls upon "[b]oth sides [to] take all measures necessary in order to prevent acts of terrorism."[363] The agreement did not

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[354] *See* Heiser, *supra* note 234, at 30 (discussing "choice of law" determinations under the FSIA with regard to actions against sovereign entities).

[355] CA 1432/03 Yinon Food Prod. Mfg. & Mktg. Ltd. v. Kara'an [2004] IsrSC 59(1) 345.

[356] CC (Jer) 2538/00 Noritz v. Palestinian Auth. [2003] (unpublished).

[357] HCJ 69/81 Abu A'ita v. Commander of the Judea and Samaria Area [1983] IsrSC 37(2) 197, 234 (discussing the applicability of customary international law in the Israeli law).

[358] *Id.*

[359] *Id.*; *see also* HCJ 785/87 Afu v. Commander of IDF Forces in the West Bank [1987] IsrSC 42(2) 4, 35 (stating that rules of conventional international law are not a part of the Israeli law as long as they have not been adopted or incorporated by domestic legislation); Zilbershatz, *supra* note 215, at 317 (discussing the applicability of international law in the Israeli law).

[360] CA 25/55 Custodian of Absentee Prop. v. Samara [1956] IsrSC 10 1824, 1829 (concluding that rights in international agreements that were not adopted through domestic legislation do not provide a cause of action in domestic courts).

[361] *Id.*; *see also* Ruth Lapidot, *International Law within the Israel Legal System*, 24 ISR. L. REV. 451, 458 (1990) (discussing the applicability of international law in the Israeli law).

[362] Interim Agreement, *supra* note 131, pmbl.

[363] *Id.* art. XV para. 1.

predict a scenario of filing a suit against the Palestinian Authority due to its involvement in terror acts. Hence, the agreements do not grant the terror victims an explicit right to sue the Palestinian Authority. But even if the agreements would have stipulated that certain rights are to be vested in terror victims, this obligation is in the nature of an international obligation only.[364] That is to say, the terror victims would not have acquired any substantial rights on the basis of the agreements and could not have effectuated their rights in court as beneficiaries of the agreements.[365] Terror victims may, however, rest their actions upon domestic law.

2. A Cause of Action Under Domestic Law

As demonstrated,[366] it was proven that the Palestinian Authority was "involved in the planning and execution of terror attacks. . [It] encouraged them ideologically [and] authorized them financially.[367] "The Palestinian Authority allocated vast sums of money from its budget to pay salaries to . . . terrorists . . . ."[368] To finance terrorist activity, the Palestinian Authority used funds donated by other countries, including the European Union.[369] Moreover, the Palestinian Authority established close links with Iran and Iraq (under the regime of Saddam Hussein) that supplied funds and munitions.[370] In light of the foregoing, it seems that terror victims have a general factual basis to file suits against the Palestinian Authority.

In absence of specific legislation that governs the matter of suing the Palestinian Authority for its involvement in terror acts, the victims may base their actions upon the Israeli Civil Wrongs Ordinance.[371] The statute regulates the basic principles of torts law, and sets the torts of negligence and breach of statutory obligation as general torts.[372] The Civil Wrongs Ordinance provides a cause of action if negligence or a breach of statutory obligation has been performed and has caused damages.[373]

Under the negligence tort, terror victims may allege that a reasonable entity acting in the same circumstances would have foreseen that the victims would likely be injured by the acts and omissions of the Palestinian Authority. According to this argument, the Palestinian Authority failed to use the skill and degree of caution that any reasonable entity or organization would have used under similar circumstances. As a result, the terror victims suffered severe physical, emotional, and financial damages.

The breach of statutory obligation tort provides a cause of action for the failure to comply with an obligation imposed by any Israeli statute or regulation. Examples of statutory obligations breached by the Palestinian Authority in these circumstances are murder and assault offenses under the Israeli Penal Code of 1977,[374] and the prohibition to execute and support terror acts under the 1948 Prevention of Terror Act.[375] Consequently, the victims suffered severe physical, emotional, and financial damages.

As described previously, one suit brought under the Israeli Civil Wrongs Ordinance by terror victims in U.S. courts was successful.[376] This was the case of *Estates of Ungar v. Palestinian Authority* in which the federal court in Rhode Island

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[364] *See Custodian of Absentee Prop.*, IsrSC 10 at 1829.

[365] *Id.*

[366] *See* discussion *supra* Part II.A.4.

[367] TERRORISM AGAINST ISRAEL, *supra* note 18, Introduction, main finding 2.

[368] *Id.* Introduction, main finding 5.

[369] *Id.*

[370] *Id.*

[371] Civil Wrongs Ordinance, 1968, S.H. 101.

[372] *Id.* The Civil Wrongs Ordinance also deals with particular torts such as unjustified detention or nuisance, but none of them is relevant to the discussed topic. *Id.*

[373] *Id.*

[374] Penal Code, 1977, S.H. 226.

[375] Prevention of Terror Act, 1948, S.H. 73.

[376] The vast majority of the suits filed by terror victims against the Palestinian Authority are based upon the Anti-Terrorism Act of 1991 (ATA), which permits American citizens to sue for injuries or death caused by international terrorism. *See supra* note 234 and accompanying text.

concluded that the Israeli law governed the suit.[377] The suit was rested upon the general torts of the Civil Wrongs Ordinance, i.e. negligence and breach of statutory obligation. Granting the suit, the court ultimately entered a default judgment against the Palestinian Authority.[378]

Indeed, the Civil Wrongs Ordinance provides a cause of action if negligence or a breach of statutory obligation has been performed and has caused damages. This legislation is an appropriate legal source on which the terror victims are able to rest their actions for compensation. Yet, the Civil Wrongs Ordinance allegedly did not contemplate to govern damages derived from warlike acts,[379] or to engage in terror acts scenarios. Moreover, no other Israeli statute directly regulates the discussed issue.

3. Conclusion: Domestic Law Provides an Adequate Cause of Action

The agreements between Israel and the Palestinians do not provide the terror victims an explicit right to sue the Palestinian Authority for its involvement in terror acts. Therefore, the terror victims must rest their actions upon the domestic law. If an individual commits a breach of statutory obligation causing damages, the Civil Wrongs Ordinance provides a cause of action.[380] This legislation should be considered a satisfactory legal source to sue the Palestinian Authority, but as discussed, the Civil Wrongs Ordinance may not be the ideal vehicle to engage in the matter.

Hence, it seems that enacting new legislation may be a good solution in light of the current legal situation. Such legislation will regulate the question of whether terror victims can sue the Palestinian Authority for its involvement in terror acts. In this sense, the U.S. legislation, notably the ATA,[381] can serve as a role model.

IV. Summary

The Israelis have suffered from the Palestinian terrorism since Israel's establishment.[382] However, the second Intifada has set a record in the brutality of the terror. More than a thousand Israelis were killed in the attacks which were directed mostly and intentionally upon civilians anywhere, anytime.[383] Clear evidence has shown that the Palestinian Authority was involved in the planning and execution those attacks.[384]

Some will raise an eyebrow, some will call it an absurdity, but the facts speak for themselves: the question whether the terror victims are able to sue the Palestinian Authority for damages caused by its involvement in terror acts is unclear under the Israeli law.[385] On one hand, the domestic criminal procedures against terrorists are not primarily designed to compensate the victims. On the other hand, the terror acts executed by the Palestinian Authority allegedly do not fall within scenarios that the Civil Wrongs Ordinance contemplates. No other statute regulates the issue of suing the Palestinian Authority for its involvement in terror acts. In addition, the Israeli jurisprudential law on the matter is sparse. In those circumstances, no wonder the victims feel that they lose twice: first they were damaged, and then they cannot be compensated.[386]

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[377] 153 F. Supp. 2d 76, 99 (D.R.I. 2001) ("[I]t is the determination of this Court that Rhode Island law requires the application of Israeli law to the state law claims contained in plaintiffs' complaint").

[378] Ungar v. Palestinian Auth., 315 F. Supp. 2d 164 (D.R.I. 2004).

[379] *See, e.g.*, HCJ 8276/05 Adalah v. Minister of Def. [2006] (unpublished) (stating that the classic law of torts is not designed to govern damages derived from warlike acts); *see also* CA 5946/92 Bani Uda v. State of Israel [2002] IsrSC 56(4) 1 (holding that injuries originated from combat acts should not be regulated by the ordinary law of torts).

[380] Civil Wrongs Ordinance, 1968, S.H. 101.

[381] Anti-Terrorism Act of 1991 (ATA), 18 U.S.C. § 2333 (1992).

[382] *See supra* Part II.A.

[383] *See supra* Part II.A.3.

[384] *See supra* Part II.A.4.

[385] *See supra* Part II.B.3.

[386] *See* discussion *supra* Part II.B.2.

This article seeks to attain a change and suggests a clear solution. It presents a thesis that under international and domestic law, there is a legal basis for the terror victims to sue the Palestinian Authority in Israeli courts. To reach this conclusion, the following five sub-questions had to be addressed in both domestic and international law spheres:

1. Is the Palestinian Authority considered a legal personality; i.e., is the Palestinian Authority entitled to foreign sovereign immunity when it is sued before Israeli courts?[387]

The international agreements between Israel and the Palestinians, as well as the implemented legislation of the agreements, demonstrate that the Palestinian Authority is recognized as a suable legal personality. Following this finding, it had to be determined if the Palestinian Authority is a state that is entitled to foreign sovereign immunity from the jurisdiction of the Israeli courts. As explained, the Palestinian Authority is in many ways sui generis. Arguably, it meets the first two elements of a state: permanent population and defined territory. Yet, it does not satisfy the latter two elements: government and capacity to enter into relations with other states. The Palestinian Authority may be close to becoming an independent state, but it has never reached this status.

The Israeli courts have ruled that the determination of the exact political status of the Palestinian Authority has to be made by the government. The U.S. courts, however, addressed the issue differently. Several suits filed by terror victims against the Palestinian Authority were granted under the determination that the Palestinian Authority is not considered a state, and therefore it is not entitled to foreign sovereign immunity. It is suggested that the Israeli courts may apply the approach taken by the U.S. courts.

2. Are actions filed by terror victims against the Palestinian Authority justiciable in domestic courts?[388]

It has been demonstrated that the doctrine of non-justiciability should not impede the actions against the Palestinian Authority. First, the doctrine of non-justiciability is not applicable when impingement on human rights is involved. Second, since the dominant nature of the suits against the Palestinian Authority is not political but rather legal, the suits are likely to be justiciable. The approach articulated by the U.S. courts supports this conclusion.

3. What is the appropriate forum to deal with actions filed by terror victims against the Palestinian Authority?[389]

The Israeli court is the most appropriate forum to litigate actions filed by terror victims against the Palestinian Authority for three reasons. First, the plaintiffs are residents of Israel and there is a strong presumption in favor of the domestic forum. Second, the Israeli courts have more links to the alleged tort than the Palestinian courts. Third, suits filed by Israeli terror victims against the Palestinian Authority do not involve considerations of convenience and judicial efficiency that justify litigating the suits in Palestinian courts. The U.S. view as expressed in legislation and judgments supports this position.

4. Assuming the Israeli courts are entitled to treat those actions, which law should be applied?[390]

Under the Israeli rules of private international law, the law applying to a tort that has links to more than one legal system will usually be the law in the place the tortious conduct occurred. Because the terror acts were committed in Israel, the Israeli court concluded that the Israeli law is the law that should be applied when treating the actions against the Palestinian Authority.

5. Upon what sources of law can the terror victims base their actions?[391]

Since the agreements between Israel and the Palestinians do not grant the terror victims an explicit right to sue the Palestinian Authority, the victims must rest their actions upon domestic law. The latter through the Civil Wrongs Ordinance provides a cause of action if negligence or a breach of statutory obligation has occurred and has caused damages. This legislation should be considered a satisfactory legal source to sue the Palestinian Authority.

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[387] *See* discussion *supra* Part III.B.

[388] *See* discussion *supra* Part III.C.

[389] *See* discussion *supra* Part III.D.

[390] *See* discussion *supra* Part III.E.

[391] *See* discussion *supra* Part III.F.

Indeed, after concluding that the Palestinian Authority is a legal personality, but not a state and therefore is not immune from civil actions; actions filed by terror victims against the Palestinian Authority are justiciable in domestic courts; the Israeli court is the appropriate forum for litigating this kind of actions; the Israeli law should be applied when treating the actions; and terror victims may rest their actions upon the domestic Civil Wrongs Ordinance when suing the Palestinian Authority for compensation; it is now clear that there is a solid legal basis for the terror victims to sue the Palestinian Authority in Israeli courts for damages caused by its involvement in terror acts during the second Intifada. Their path towards compensation is paved.

However, there is no absolute certainty that the described path would be acceptable for the current legal situation in Israel Consequently, this article also provides a proposal for domestic legislation designed to regulate the matter of suing the Palestinian Authority in Israeli courts for damages caused by its involvement in terrorism.[392]

The question placed in the heart of this article is whether the Palestinian Authority can be sued in Israeli civilian courts for damages caused by its involvement in terror acts during the second Intifada. This article has answered this question in the affirmative. The affirmative answer may create a significant and actual change. It may render hope, relief and a sense of justice. It may prove that the law is able to come to the victims' aid.

[392] *See infra* App.

Appendix

A Proposal for Designated Legislation

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The following legislation proposal is designed to regulate and clarify the current legal framework with respect to both substantial and procedural aspects of the capability to sue the Palestinian Authority in Israeli courts for damages caused by its involvement in terrorism. The proposal reflects the conclusions and lessons described in the article and is based *inter alia* on the pertinent provisions of the ATA[393] and the existing domestic legislation.

* * *

Actions Against the Palestinian Authority for its Involvement in Terrorism Act of 2008 (AAPAITA)

§ 1. Definitions

As used in this act—

(1) The term "terrorism" means activities that—

(A) Involve violent acts or acts dangerous to human life that are a violation of the laws of Israel to include customary international law, or that would be a violation if committed within the jurisdiction of Israel; and

(B) Appear to be intended—

(i) To intimidate or coerce a civilian population; or

(ii) To influence the policy of the government by intimidation or coercion; or

(iii) To affect the conduct of the government by mass destruction, assassination, or kidnapping.

(2) The term "Palestinian Authority" means the interim administrative organization which was established pursuant to the Oslo Accords between the PLO and the government of Israel, to include its officials and its collaborators.

(3) The term "individual" means any person or entity capable of holding a legal or beneficial interest in property.

§ 2. Jurisdiction and General Provisions

(a) General Principle.— The Palestinian Authority is a suable legal personality.

(b) Action.— Any individual injured in his or her person, property, or business by reason of an act of terrorism executed by the Palestinian Authority, or his or her estate, survivors, or heirs, may sue the Palestinian Authority in any appropriate Israeli court and shall recover the damages he or she sustains and the cost of the action, including attorney's fees.

(c) Foreign Sovereign Immunity.— The court shall not dismiss any action brought under this act on the grounds of foreign sovereign immunity, unless the court is convinced that the Palestinian Authority is considered a state which possesses foreign sovereign immunity.

(d) Non-justiciability.— The court shall not dismiss any action brought under this act on the grounds of non-justiciability, unless the court is convinced that the dominant nature of the action is political.

(e) Choice of Law.— The law applying to an action brought under this act is the Israeli law, unless the court is convinced that other law has more links to the action than the Israeli law has.

(f) Convenience of the Forum.— The court shall not dismiss any action brought under this act on the grounds of the inconvenience or inappropriateness of the forum chosen, unless—

(1) The action may be maintained in a foreign court that has direct jurisdiction over the subject matter and over all the defendants;

(2) That foreign court is significantly more convenient and appropriate; and

(3) That foreign court offers a remedy which is substantially the same as the one available in the Israeli courts.

[393] The Anti-Terrorism Act of 1991 (ATA), 18 U.S.C. § 2333 (1992).

The Iraqi High Tribunal and the Regime Crimes Liaison's Office

Major John C. Johnson, USAF[1]

Introduction

On 5 November 2006, Saddam Hussein Al-Majid Al-Tikriti and six co-defendants were convicted of crimes against humanity by Iraqi judges sitting as the Iraqi High Tribunal in Baghdad.[2] The former President of Iraq had ruled the country for nearly twenty-four years and untold thousands had died by his order. Five years before, such a trial would have been difficult for many Iraqis to imagine, including the judges and attorneys in the courtroom. Moreover, the court that tried him—the Iraqi High Tribunal—was an innovation: an Iraqi court created to apply international criminal law.[3] That such a trial was possible was due to the work of a multi-agency group of American civilian attorneys, Judge Advocates, paralegals, investigators, marshals, and other specialists in the Regime Crimes Liaison's Office—the RCLO.

This article describes the function of the RCLO and some of the challenges it has faced. In some respects, these experiences are unique to its work with the Iraqi High Tribunal; but in many ways they reflect common difficulties that Judge Advocates and others have experienced in reconstruction efforts overseas. However, in order to understand the RCLO, one must understand the genesis and structure of the Iraqi High Tribunal itself.

Background: The Ba'ath Regime in Iraq

The Arab Socialist Ba'ath Party came to power in Iraq in a July 1968 coup.[4] In 1979, Saddam Hussein Al-Majid Al-Tikriti displaced Al-Bakr as head of the Iraqi Ba'ath Party and President of Iraq.[5] Saddam Hussein purged the Ba'ath leadership and consolidated his hold on power.[6] Under the Ba'ath regime, the party, police, and military security apparatus underwent enormous growth, stabilizing the regime's control over a country with considerable ethnic, religious, and social divisions.[7]

In 1980, Saddam Hussein led Iraq into a lengthy and costly war with Iran.[8] The Iran-Iraq War merged with a long-running conflict between the Arab-dominated government in Baghdad and Kurdish guerillas in northern Iraq.[9] In the course of the war, Iraqi forces notoriously used chemical weapons against Iranians and Kurds, and attacked Kurdish civilians and villages with conventional military forces.[10] Attacks against the Kurds continued for some time after the August 1988 cease-fire with Iran.[11]

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[1] Written while assigned as an attorney-advisor with the Regime Crimes Liaison's Office at the U.S. Embassy, Baghdad, Iraq. Currently assigned as Chief, Operations and International Law Division, The Judge Advocate General's School, Maxwell Air Force Base, Ala.

[2] Kirk Semple, *Saddam Hussein Is Sentenced to Death*, N.Y. TIMES, Nov. 5, 2006, http://www.nytimes.com/2006/11/05/world/middleeast/05cnd-saddam.html?_r=1&ref=world&oref=slogin.

[3] *See Law of the Supreme Iraqi Criminal Tribunal*, AL-WAQA'I AL-IRAQIYA, Oct. 18, 2005 [hereinafter IHT Statute], *available at* http://www.iraqihigh tribunal.org/ doc/legal_doc_uk-3.pdf (Int'l Ctr. for Transitional Justice trans.).

[4] KANAN MAKIYA, REPUBLIC OF FEAR: THE POLITICS OF MODERN IRAQ 30 (1998). The Ba'ath had briefly seized power in Iraq as part of a violent coup in February 1963, but were forced out of government later that year. *Id*. at 29–30. Makiya's book, though somewhat dated, is strongly recommended for anyone with an interest in the history, philosophy, and structure of the Ba'ath regime in Iraq.

[5] *Id*. at 70.

[6] *Id*. at 70–72.

[7] *See id*. at 5–45. The majority of Iraqis are Arabs, but approximately one-quarter are Kurds, and smaller ethnic minorities including Turkmen and Assyrians comprise approximately 5% of the population. *See Iraq*, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/eb/article-22936 (last visited July 11, 2008) [hereinafter *Iraq* BRITANNICA]. *Id.* The population is overwhelmingly Muslim (with small numbers of Christians and other minorities), but split between Shia (approximately 60% of Muslims) and Sunni (approximately 40% of Muslims). *See id.*

[8] MAKIYA, *supra* note 4, at 258.

[9] *See id*. at 22–24; HUMAN RIGHTS WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS (1993), *available at* http://hrw.org/reports/1993/iraqanfal/.

[10] *See id*.

[11] *See id*.

The war resulted in hundreds of thousands of Iraqi casualties, extensive economic damage, and no significant territorial gains; yet the Iraqi Army emerged in 1988 larger and better-equipped than before.[12] On 2 August 1990, Iraq invaded Kuwait.[13] The United Nations responded with Security Council Resolutions 660[14] and 661,[15] condemning the invasion and imposing economic sanctions on Iraq.[16] Following United Nations Security Council Resolution 678, a multinational coalition led by the United States defeated Iraq and expelled its forces from Kuwait in February 1991.[17] In the wake of this defeat, popular uprisings in the Shia-dominated provinces of southern Iraq and the Kurdish-populated areas of northern Iraq threatened the Ba'ath regime.[18] Despite its losses and disorganization in the war, the regime was able to methodically crush this resistance and regain control of the provinces.[19] Moreover, it carried out a brutal "cleansing" campaign in those areas.[20] Thousands were executed outright; many thousands more were arrested and disappeared, detained and tortured, or forced to flee their homes.[21]

Though hampered by continuing sanctions, a deteriorating economy, and "no-fly" zones in the north and south, the Ba'ath regime remained in power for another twelve years.[22] During this time it continued its heavy-handed repression of any perceived or imagined threats.[23] The regime finally fell in April 2003 following the United States-led invasion.[24] As a result, Saddam Hussein and numerous other regime leaders ended up in the custody of the United States military.[25]

A Question of Justice

The question arose: What should be done with the leaders of the former regime? Although the Ba'ath regime had enjoyed the support of some Iraqi citizens, the majority of Iraqis—in particular, the Shia and Kurdish populations—had suffered greatly.[26] The regime's atrocities were well-known inside Iraq; indeed, they contributed to the pervasive climate of fear that sustained the regime.[27] Justice and popular sentiment called for an accounting of these crimes, at least with regard to the senior leaders most responsible.

However, the administration of such justice raised a number of questions. Who should conduct such proceedings? Several possibilities involved competing advantages and disadvantages—delay, feasibility, expense, international and domestic legitimacy. The coalition or the United States might have tried some of the regime leaders for war crimes and other offenses.[28] Alternatively, an international tribunal might have been created on the Yugoslavian or Rwandan model.[29]

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[12] *See Iraq* BRITANNICA, *supra* note 7.

[13] *See Iran-Iraq War*, ENCYCLOPEDIA BRITANNICA ONLINE, 2008, http://www.britannica.com/EBchecked/topic/293527/Iran-Iraq-War# (last visited Aug. 5, 2008).

[14] S.C. Res. 660, U.N. Doc. S/RES/0678 (Aug. 2, 1990), *available at* http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/575/10/IMG/NR057510.pdf?OpenElement.

[15] S.C. Res. 661, U.N. Doc. S/RES/0678 (Aug. 6, 1990), *available at* http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/575/11/IMG/ NR057511.pdf?OpenElement.

[16] *See Iraq* BRITANNICA, *supra* note 7.

[17] *See* S.C. Res. 678, U.N. Doc. S/RES/0678 (Nov. 29, 1990), *available at* http://daccessdds.un.org/doc/RESOLUTION/GEN/NRO/575/28/IMG/NRO5728.pdf?OpenElement; *Iraq* BRITANNICA, *supra* note 7.

[18] *See Iraq* BRITANNICA, *supra* note 7.

[19] *See* HUMAN RIGHTS WATCH, ENDLESS TORMENT: THE 1991 UPRISING IN IRAQ AND ITS AFTERMATH (1992) [hereinafter ENDLESS TORMENT], *available at* http://hrw.org/reports/1992/ Iraq926.htm.

[20] *See id.*

[21] *See Iraq* BRITANNICA, *supra* note 7.

[22] *See id.*

[23] *See id.*

[24] *See Iraq War*, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/870845/Iraq-War# (last visited Aug. 5, 2008).

[25] *See Iraq* BRITANNICA, *supra* note 7.

[26] M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT'L L.J. 327, 330 (2005) (citing U.S. Dep't of State, Fact Sheet: Past Repression and Atrocities by Saddam Hussein's Regime (Apr. 4, 2003)).

[27] *See* MAKIYA, *supra* note 4, *passim*.

[28] Certain actions by Saddam Hussein and other regime figures during the Iran-Iraq War, the invasion of Kuwait, the Gulf War, the 2003 invasion of Iraq, and perhaps other events may constitute "grave breaches" of international humanitarian law. *See generally* KARIM KHAN & RODNEY DIXON, ARCHBOLD

Perhaps some hybrid combination of an international and Iraqi tribunal could have been explored.[30] However, the Iraqi people themselves had suffered enormously and had the most immediate interest in the fate of their former rulers; allowing an Iraqi court to try the regime leaders could help satisfy a long-denied desire for justice. Depending on the nature of the proceedings, it could also carry greater legitimacy inside and, ideally, outside Iraq.[31]

However, relying on Iraqi courts could create certain legal problems. Iraq had existing codes of criminal law and procedure that had been in place for over three decades.[32] But under existing Iraqi criminal law, obedience to orders is a defense to criminal liability.[33] Indeed, it was more than just a legal principle; obedience to orders was a value strongly ingrained in Iraqi society under Saddam Hussein's rule. Since everyone knew Saddam Hussein had been the supreme leader of Iraq, in many cases regime officials could credibly argue they were simply following orders when they participated in various atrocities. It might be possible to change the law, but giving such a change retroactive effect would obviously be problematic.[34]

In the end, the authorities created a new court: an Iraqi court administering *international* criminal law—the Iraqi High Tribunal.

The Iraqi High Tribunal

In December 2003 the Iraqi Governing Council created the Iraqi High Tribunal (IHT)—originally known as the Supreme Iraqi Criminal Tribunal (SICT), then the Iraqi Special Tribunal (IST)—through a delegation of authority by the Coalition Provisional Authority (CPA).[35] The Iraqi Interim Government and the Iraqi National Assembly later amended and affirmed the statute creating the IHT.[36] According to this statute, the IHT exercises jurisdiction over Iraqi citizens or residents who committed genocide, crimes against humanity, war crimes, or certain violations of Iraqi law between 17 July 1968 and 1 May

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INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE & EVIDENCE 530–70 (2d ed. 2005) (listing and discussing the elements of war crimes in various international criminal courts).

[29] *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, Feb. 2006, [hereinafter ICTY Statute], *available at* http://www.un.org/icty/legaldoc-e/index-t.htm (then follow "Statute of the Tribunal" hyperlink); Statute: International Criminal Tribunal for Rwanda (ICTR), 2007, [hereinafter ICTR Statute], *available at* http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf.

[30] *See How the Mighty are Falling*, ECONOMIST, July 5, 2007, *available at* http://www.economist.com/world/international/displaystory.cfm?story_id =9441341 (listing many of the various international tribunals created around the world under the auspices of the United Nations, regional international organizations, national authorities, and combinations thereof).

[31] *See* KHAN & DIXON, *supra* note 28, at vii ("The primary responsibility for punishing crimes of international concern such as genocide, crimes against humanity and war crimes belongs to national criminal jurisdictions"); Michael A. Newton, *Symposium: Milosevic & Hussein on Trial: Panel 3: The Trial Process: Prosecution, Defense and Investigation: The Iraqi Special Tribunal: A Human Rights Perspective*, 38 CORNELL INT'L L.J. 863, 895 (Fall 2005) ("The Iraqi people almost universally support the concept of prosecuting Saddam and other Baathist officials inside Iraq rather than simply allowing and external tribunal to exercise punitive power" (citation omitted)).

[32] IRAQI PENAL CODE WITH AMENDMENTS (3d ed. 1969), [hereinafter 1969 IRAQI PENAL CODE], *available at* http://www.iraqihightribunal.org/ doc/legal_doc_uk-6.pdf (last visited Jan. 19, 2008); LAW ON CRIMINAL PROCEEDINGS WITH AMENDMENTS NO. 23 of 1971 [hereinafter 1971 IRAQI CRIMINAL PROCEDURE CODE], *available at* http://www.iraqihightribunal.org/doc/legal_doc_uk-5.pdf.

[33] 1969 IRAQI PENAL CODE, *supra* note 32, ¶ 40. Paragraph 40 provides:

> There is no crime if the act is committed by a public official or agent in the following circumstances:
>
> (1) If he commits the act in good faith in the performance of his legal duty or if he considers that carrying it out is within his jurisdiction.
>
> (2) If he commits the act in performance of an order from a superior which he is obliged to obey or which he feels he is obliged to obey. It must be established in these circumstances that the belief of the offender in the legitimacy of the act is reasonable and that he committed the act only after taking suitable precautions. Moreover, there is no penalty in the second instance if the Code does not afford the official an opportunity to question the order issued to him.

Id.

[34] *See* International Covenant on Civil and Political Rights 1966, Dec. 16, 1966, art. 15, [hereinafter ICCPR], *available at* http://www2.ohchr.org/english/law/ccpr.htm ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."). Iraq ratified the ICCPR on 25 January 1971, and has remained a party since the treaty came into effect on 23 March 1976. Office of the United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights New York, 16 December 1966*, *available at* http://www2.ohchr.org/english/bodies/ratification/4.htm (last visited July 11, 2008).

[35] *See* LAUREL MILLER, UNITED STATES INSTITUTE OF PEACE SPECIAL REPORT: BUILDING THE IRAQI SPECIAL TRIBUNAL: LESSONS FROM EXPERIENCES IN INTERNATIONAL CRIMINAL JUSTICE 2 (June 2004), *available at* http://www.usip.org/pubs/ specialreports/sr122.html.

[36] *See* IHT Statute, *supra* note 3.

2003—the period of Ba'ath rule in Iraq.[37] The IHT statute defines genocide, crimes against humanity, and war crimes in a manner generally consistent with customary international law.[38]

Thus the IHT is an Iraqi court that applies international criminal law. Precedent for such a body exists in the criminal tribunals that followed the Second World War, as well as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), International Criminal Court, and similar bodies.[39] One obvious difference between the IHT and the ICTY and ICTR is that the IHT is a national court rather than an international tribunal.[40] National courts may, of course, enforce international law, including international criminal law.[41] Customary international law has recognized the crimes of genocide, crimes against humanity, and war at least since the 1940s.[42] Trying members of the former regime for these international crimes avoids both the obedience to orders issue and the ex post facto problem under Iraqi law.[43] However, the IHT has faced and continues to face a number of other significant challenges.

Though separate from the regular Iraqi court system, the structure of the IHT reflects Iraq's civil law orientation. The Tribunals are composed of an Investigative Chamber, Trial Chambers, an Appeals Chamber, a Prosecution Department, and an Administration Department.[44] The Investigative Chamber consists of investigative judges and their staff who investigate cases that come under the IHT's jurisdiction.[45] The investigative judge is responsible for organizing the evidence in a referral file and drafting an indictment for the Trial Chamber.[46] The Trial Chambers are composed of a panel of judges who hear and decide cases referred to trial.[47] The Appeals Chamber is composed of nine judges who rule on the parties' appeals of decisions at the investigative and trial levels.[48] The President of the IHT, who possesses considerable authority for the operation of the Tribunal, is elected by the appellate judges from among their number.[49] The Prosecution Department represents the interests of the government and people of Iraq, though in practice they wield far less power than prosecutors in the United States and other common law countries.[50] The Administrative Department is responsible for the administration of the IHT, including safeguarding evidence and transporting and protecting victims and witnesses.[51] A Defense Office under the Administration Department supplies appointed counsel for defendants, who may also have privately-retained counsel.[52]

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[37] *See id.* art. 1.

[38] *See id.* arts. 11–13. Moreover, IHT judges may refer to the decisions of international criminal courts to interpret Articles 11, 12, and 13, dealing with genocide, crimes against humanity, and war crimes. *Id.* art. 17(2).

[39] *See* ICTY Statute, *supra* note 29; ICTR Statute, *supra* note 29; KHAN & DIXON, *supra* note 28, at 22–42.

[40] *See* IHT Statute, *supra* note 3.

[41] Indeed, where feasible, national courts are the preferred venue for international crimes prosecutions. *See* KHAN & Dixon, *supra* note 28, at vii ("The primary responsibility for punishing crimes of international concern such as genocide, crimes against humanity and war crimes belongs to national criminal jurisdictions."); Newton, *supra* note 31, at 863–97.

[42] *See* KHAN & DIXON, *supra* note 28, at 13.

[43] *See* ICCPR, *supra* note 34, art. 15; 1969 IRAQI PENAL CODE, *supra* note 32, ¶ 40.

[44] IHT Statute, *supra* note 3, art. 3.

[45] *See id.* arts. 8, 18.

[46] *Id.*

[47] *See id.* arts. 3, 20–24. Each Trial Chamber elects one of their number President (also known as the Chief Trial Judge), who presides at trial and supervises the Chamber's work. *Id.* art. 3.

[48] *See id.* arts. 3, 25.

[49] *See id.* art. 3. The appellate judge elected IHT President is also President of the Appellate Chamber. *Id.*

[50] *See id.* arts. 9, 20–26. For example, the investigative judge rather than the prosecutor is primarily responsible for investigating the case, preparing the evidence, and drafting the indictment. *See id.* art. 18. The prosecution role at trial is also more limited. For example, in the case currently in trial, the Chief Trial Judge has conducted the direct examination of the witnesses and asked the vast majority of the questions. *But see* Rules of Procedure and Gathering of Evidence with Regard to the Supreme Iraqi Special Tribunal R. 57 (18 Oct. 2005) [hereinafter IHT Rules of Procedure], *available at* http://www.iraqihightribunal.org/doc/legal_doc_uk-4.pdf (indicating that the party calling the witness would conduct the direct examination).

[51] *See* IHT Statute, *supra* note 3, art. 10; IHT Rules of Procedure, *supra* note 50, Rules 13–15.

[52] IHT Rules of Procedure, *supra* note 50, R. 30.

The Regime Crimes Liaison's Office

The IHT is an Iraqi court, staffed by and under the authority of the Government of Iraq (GOI).[53] However, the need for substantial United States assistance was clear from the outset. From its beginning the IHT faced major challenges that the United States was uniquely positioned to help it address. Among other requirements, the IHT needed to obtain offices, a courthouse, and equipment adequate for its size and purpose. It needed access to the detainees and evidence that were largely in the custody of the United States military. In addition, although the judges and attorneys assigned to the IHT were trained in Iraqi law, until 2003 they had little experience with or exposure to the substantive international law principles they were now called upon to apply. Therefore, the IHT needed significant training and advice regarding international law, as well as assistance in other specialized areas such as, among other things, forensics, investigating mass graves, and courthouse security. Finally, because the IHT, like other agencies of the GOI, operates in an environment that continues to have a heavy United States military presence, it needed a reliable point of contact with the U.S. Government.

Thus on 13 May 2004, National Security Presidential Directive 37 (NSPD 37) created the Regime Crimes Liaison's Office (RCLO), headed by the Regime Crimes Liaison (RCL), to support the IHT.[54] Specifically, the RCLO's purpose is to:

a. Help establish a fully functioning, independent IHT to investigate and prosecute former Iraqi regime and ASBP members for crimes within IHT jurisdiction, including genocide, crimes against humanity, and war crimes;
b. Assist IHT investigators, prosecutors, and investigative judges by providing training, investigative, and technical support necessary to ensure fair and impartial IHT proceedings; and
c. Serve as the United States Government's liaison to the GOI regarding IHT investigations and prosecutions.[55]

Originally part of the CPA, following the June 2004 transfer of sovereignty to the GOI, the RCLO's functions moved to the Department of State, acting through the Chief of Mission at the embassy in Baghdad.[56]

The RCLO is a multi-agency organization. Although it falls under the Department of State, NSPD 37 directs the Attorney General to appoint a RCL and the Department of Justice (DOJ) to provide "a team of advisors" and "administrative support" personnel to deploy to Iraq.[57] The NSPD 37 calls on the Secretary of Defense to "provide legal support, as appropriate," and the Department of Defense (DOD) to provide the RCLO with access to and transport of Iraqi detainees under its control, as well as "departmental expertise in military history, law of war, and international law issues, as appropriate."[58] In practice, each military service (Army, Navy, Air Force, Marine Corps) has supplied a Judge Advocate to serve alongside DOJ lawyers as attorney-advisors to the IHT, and the DOD has filled certain other RCLO positions as well. At its height, the RCLO included dozens of personnel, including attorneys, investigators, paralegals, support personnel, mass graves teams, U.S. Marshals, and translators. In addition, the RCLO paid for a number of contractors to provide video recording and broadcasting, construction, housing, security, and other services. Over time, the RCLO staff and budget has been reduced and responsibilities increasingly transferred to the IHT and GOI.

RCLO Attorney-Advisors

The RCLO is not merely comprised of attorneys; numerous individuals from multiple agencies have contributed to the RCLO's mission in a variety of ways. One of the most important forms of support to the IHT, and the role of Judge

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[53] *See* IHT Statute, *supra* note 3. Judges and prosecutors are nominated to the IHT by the Supreme Judicial Council of Iraq and appointed by the Presidency Council. *Id.* art. 4. The Statute provides for the possibility of non-Iraqi judges on the Tribunal, but to date all IHT judges and prosecutors have been Iraqis, and there seems to have been little interest in appointing foreigners. *See id.* art. 3. The IHT Statute also allows for non-Iraqi "persons of high moral character, honesty and integrity" to serve as experts to assist the Prosecution, Investigation, Trial, and Appellate Chambers. *Id.* arts. 7–9; *see* IHT Rules of Procedure, *supra* note 50, R. 21.

[54] THE WHITE HOUSE, NATIONAL SECURITY PRESIDENTIAL DIR./NSPD-37 (May 13, 2004) [hereinafter NSPD 37].

[55] *Id.*

[56] *See id.*; Press Release, Rebecca Ford Mitchell, Embassy of the United States, Baghdad, Iraq, Early Transfer of Iraqi Sovereignty Driven by Readiness, Security (June 28, 2004), *available at* http://iraq.usembassy.gov/iraq/transfer_of_iraq0628.html.

[57] NSPD 37, *supra* note 54.

[58] *Id.*

Advocates assigned to the RCLO, has been the work of the attorney-advisors. Attorney-advisors have fulfilled three major functions with respect to the IHT: advice, training, and logistic support.

Attorney-advisors have observed the operations of the IHT, consulted with IHT judges and attorneys, and provided detailed advice in every phase of a case. The IHT statute specifically permits the involvement of such non-Iraqi advisors and experts.[59] Consistent with the IHT rules of procedure, attorney-advisors are limited to advising one chamber of the IHT—investigative, trial, appellate, or prosecution—at least with respect to a particular case.[60] Attorney-advisors are, as the title implies, advisors; the Iraqi judges and attorneys decide how they will proceed in each situation.[61] Not infrequently, IHT judges have either not sought or declined to follow the advice of the RCLO, as is their prerogative.

Attorney-advisors have also provided training to IHT judges and attorneys. Much of this training is of the "on-the-job" variety, discussing points of law and procedure in the context of specific cases. However, attorney-advisors have also arranged formal training on international law and other subjects, either by the RCLO itself, or by bringing outside experts to Baghdad, or by facilitating trips by IHT members to meet experts in other countries. As the RCLO draws down in size, training may be its most important legacy with the IHT.

Attorney-advisors also provide important logistic assistance to the IHT. Examples include arranging investigative interviews of detainees, coordinating between the IHT and defense counsel, and managing an enormous amount of evidence, including a huge number of documents and recordings obtained from the former regime. Although this logistic role may not require as much legal expertise as advising or training the IHT judges and attorneys, for cultural and professional reasons it is helpful for attorneys to be involved in these matters.[62] For example, attorney-advisors may be best positioned to appreciate the importance of ensuring defense counsel receive opportunities to meet with their clients. Moreover, as a practical matter, controlling movement of and access to evidence and detainees gives the attorney-advisors more leverage with the IHT, and therefore a better opportunity to be heard.

Challenges

This brings us to some of the challenges the RCLO has faced. The security environment has imposed significant constraints. Fortunately, levels of violence in Iraq have generally declined recently, and the RCLO and the IHT courthouse are located in a relatively secure area.[63] However, Iraq remains a dangerous place to live and work. This reality impacts the IHT and RCLO in a variety of ways. Those Iraqis who choose to be a part of the IHT unfortunately do so at some personal risk. Security concerns can affect the willingness of witnesses to cooperate with investigators, or to travel to the IHT courthouse to testify, or to publicly reveal their identities. Security concerns complicate travel within Iraq, including the transportation and housing of witnesses and defense counsel and the movement of detainees and defendants.[64] Security concerns can interfere with the normal work schedules of IHT judges and attorneys. They can limit the degree to which counsel are permitted to communicate with their clients.[65] In short, security is a paramount concern, and security requirements can cause significant disruptions and delays in the judicial process.

Differences in the basic structure of the American and Iraqi legal systems also present some difficulties. The Iraqi legal system is based on the civil law or inquisitorial model, as opposed to the common law or adversarial system that is familiar to the American bar and public.[66] Major differences of the Iraqi system compared to the American system include, for example,

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[59] IHT Statute, *supra* note 3, arts. 7–9; IHT Rules of Procedure, *supra* note 50, R. 21.

[60] IHT Rules of Procedure, *supra* note 50, R. 21 ("Anyone who is assigned as a Non-Iraqi Advisor/Expert to one functional area of the Special Tribunal may not concurrently act as an advisor to another functional area of the Special Tribunal.").

[61] *See id.* (stating that non-Iraqi experts and advisors provide "confidential, non-binding expert advice and recommendations").

[62] From a cultural standpoint, Iraqi judges and attorneys may find dealing with fellow attorneys more palatable than consulting with laypersons. From a professional standpoint, attorneys may best be able to appreciate the significance of certain "logistical" matters.

[63] *See*, *e.g.*, Assoc. Press & Kim Gamel, *US Death Toll in Iraq at Lowest Point*, TIME, Aug. 1, 2008, http://www.time.com/time/world/article/0,8599,1828680,00.html?xid=feed-cnn-topics (describing a "drastic decline in violence" in Iraq over the preceding year).

[64] Three defense counsel were assassinated during the first trial at the IHT. *See Timeline: Saddam Hussein Dujail Trial*, BBC NEWS, Dec. 4, 2006 [hereinafter *Timeline*], http://news.bbc.co.uk/2/hi/middle_east/4507568.stm.

[65] Security concerns related to attorney-client meetings, and in particular the passing of notes and other information between detainees and the outside world, have been a long-standing issue at the IHT.

[66] *See* Common law, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/eb/article-9108636/common-law (last visited July 11, 2008); Civil law, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/eb/article-9108635/civil-law (last visited July 11, 2008).

the figure of the investigating judge, the absence of case law as legal precedent, the more active role of the trial judge, and more passive role of the prosecutor and defense counsel.[67] The IHT statute brings this structure to the Tribunal, and the Iraqi judges bring this mindset with them as well.[68] This reality can have significant consequences. Attorney-advisors need to beware attempting to artificially impose all the trappings of American-style common law proceedings onto an Iraqi civil law system.[69] Iraqi judges and attorneys are aware of the differences, and sometimes suspect the RCLO lawyers of mixing American apples with Iraqi oranges in their legal advice. That being said, in some respects customary Iraqi legal practice may not meet standards of due process set by international convention or the Tribunal's own governing sources of law.[70] The RCLO has pressed the IHT to reform its practice in such areas.

The Iraqis' inexperience with the details of international criminal law, or even the broad concepts of international law itself, is a significant obstacle. Granted, this difficulty is one of the primary justifications for the RCLO.[71] Yet it is difficult to exaggerate the scope of the challenge. This inexperience is not surprising. Under the former regime, international law was about the last source of guidance to which an Iraqi judge could be expected to refer.[72] Understandably, the IHT judges are sometimes prone to lapse into their familiar modes of operation, even when the new IHT statute,[73] IHT rules of procedure and evidence,[74] and Iraqi Constitution[75] might dictate otherwise. International criminal law in particular is a specialized and evolving body of law, and one in which attorney-advisors themselves have not always been well-versed prior to their arrival at the RCLO.

Relatedly, language is a difficult and persistent obstacle. The RCLO has always included a number of skillful translators, individuals who have exposed themselves to personal risk by working closely with the Americans. Nevertheless, the need for oral and written translation between Arabic and English[76] significantly slows the RCLO's work and can lead to misunderstandings. Because the IHT and RCLO deal with some relatively fine points of law, the difficulty is amplified. Communicating accurately and effectively under these circumstances requires careful attention by the translators and attorneys alike.

Legal technicalities aside, significant cultural differences impact the RCLO. Attorney-advisors must adjust to a difference pace of doing business. Directness or conciseness may be perceived as rudeness and thus counterproductive. Many hours may be spent in meetings with apparently very little being resolved. Relatedly, and unfortunately, during decades of Ba'ath rule, independence and initiative were often not rewarded, to put it mildly.[77] In addition, Iraqis may be sensitive to status in ways that are not immediately evident to Americans. For example, going to see someone in their office may imply the visitor has an inferior status. Therefore, judges or prosecutors may be reluctant to seek information from personnel perceived to be lower in the hierarchy, even if they require information or material from them. Similarly, IHT

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[67] *See* IHT Statute, *supra* note 3; IHT Rules of Procedure, *supra* note 50; 1971 IRAQI CRIMINAL PROCEDURE CODE, *supra* note 32.

[68] *See* IHT Statute, *supra* note 3; IHT Rules of Procedure, *supra* note 50.

[69] For example, in the IHT courtroom the accused does not sit with his defense counsel. This may strike some Americans as odd, or even troubling, but is quite normal for Iraqis and is not necessarily inconsistent with a fair trial.

[70] *See* ICCPR, *supra* note 34; IHT Statute, *supra* note 3; IHT Rules of Procedure, *supra* note 50. Examples of potentially problematic IHT practices include inadequate attention to detainee challenges to pretrial confinement; insufficiently specific indictments; representation of multiple defendants by the same counsel; temporary replacement of Trial Chamber judges during trial; removal of defendants and defense counsel from courtroom; and double jeopardy. *See* ICCPR, *supra* note 34, arts. 9, 14, 15.

[71] *See* NSPD 37, *supra* note 54.

[72] The Arab Socialist Ba'ath Party was created as a secular, Arab nationalist party, and the Ba'ath have long viewed "imperialism" and the perceived international order as forces to be struggled against. *See* MAKIYA, *supra* note 4, at 249–50 (discussing the Ba'ath view of twentieth-century imperialism). The innate Ba'ath hostility toward international authorities intensified in the repressive wartime, sanctions-laden atmosphere of Saddam Hussein's regime. *Id.*

[73] IHT Statute, *supra* note 3.

[74] IHT Rules of Procedure, *supra* note 50.

[75] IRAQI CONSTITUTION 2005 [hereinafter IRAQI CONST.], *available at* http://www.iraqihightribunal.org/doc/legal_doc_uk-8.pdf.

[76] And Kurdish, in some circumstances.

[77] *See* MAKIYA, *supra* note 4, at 99. Makiya writes:

> A society like Iraq has choked off all the avenues by which anything other than mediocrity can flourish. Its share of good and caring minds belong now to a different world. Those who did not sell out are either dead, or locked into the Sisyphus-like labours of exile politics.

Id. Makiya wrote in the past from the perspective of an exile looking from the outside at the opaque surface of Saddam Hussein's Iraq; but his description captures the nature of a lingering problem. *Id.*

judges may resent being summoned to a location for a meeting or for training. These are but a couple of examples; religion, ethnicity, tribe, social status, gender, and other factors are all constantly at work on or below the surface of human interactions.

Finally, institutional pressures and political considerations complicate the RCLO's work. The new Iraqi Constitution declares that no power is above the judiciary except the law,[78] and the IHT rules of procedure enjoin IHT judges to be independent and impartial.[79] However, the ideal of judicial independence is sometimes challenged by the political realities of contemporary Iraq. It would be unrealistic to expect the IHT judges to be entirely insensitive to the views of the various agencies, organizations, groups, and individuals, inside and outside Iraq, who have an interest in the IHT's operations and who can make their views known in a variety of ways. Similarly, sometimes IHT judges may interpret the advice of the RCLO or actions of the United States Government as "interference" rather than assistance.

IHT Proceedings

As of January 2008, the IHT has concluded two trials, and a third is ongoing. The first IHT trial, known as the Dujail trial, commenced on 19 October 2005.[80] It dealt with the execution of 148 Iraqi Shia from the town of Dujail following an assassination attempt on Saddam Hussein in 1982.[81] The Dujail trial attracted enormous attention in Iraq and in the world because Saddam Hussein was among the eight defendants.[82] A number of difficulties attended the proceedings, notably the assassination in separate incidents of three defense counsel, including Saddam Hussein's lead attorney.[83] The trial concluded on 5 November 2006 with the conviction of Saddam Hussein and six co-defendants.[84] Once the appeals were complete, Saddam Hussein and three other defendants had been sentenced to death; two other defendants were sentenced to fifteen years of imprisonment.[85] International reaction to the trial, verdict, and sentences was mixed.[86]

In the meantime, the IHT's second trial had commenced on 21 August 2006.[87] Saddam Hussein and Ali Hassan Al-Majid—better known internationally by the sobriquet "Chemical Ali"—were among the seven defendants in the Anfal trial.[88] Although this trial was less well-known outside Iraq than Dujail, the Anfal case was of a much larger scale.[89] The Anfal campaign was a series of conventional and chemical attacks carried out by the Iraqi army against Kurdish communities in northern Iraq beginning in the later stages of the Iran-Iraq War.[90] Kurds were subjected to systematic murder, torture,

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[78] IRAQI CONST., *supra* note 75, art. 19(1).

[79] IHT Rules of Procedure, *supra* note 50, R. 7.

[80] *Ad-Dujayl Case*, Iraqi High Tribunal Website, http://www.iraqihightribunal.org/en/iht_cases.php?id_cases=10 (last visited July 11, 2008) [hereinafter *Ad-Dujayl Case*].

[81] *Id.*

[82] *See id.*

[83] *See Timeline*, *supra* note 64.

[84] *See Ad-Dujayl Case*, *supra* note 80.

[85] *See id.*

[86] *See*, *e.g.*, *Saddam Sentence: Reaction in Quotes*, BBC NEWS, Nov. 5, 2006, http://news.bbc.co.uk/2/hi/middle_east/6118298.stm. International human rights organizations were among the most critical of the proceedings. *See, e.g.*, 18 HUMAN RIGHTS WATCH, JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL, Nov. 2006 [hereinafter JUDGING DUJAIL], *available at* http://hrw.org/reports/2006/iraq1106/iraq1106web.pdf (alleging "serious administrative, procedural, and substantive legal defects in the trial"); Press Release: Iraq: Amnesty International Deplores Death Sentences in Saddam Hussein Trial, Nov. 5, 2006, *available at* http://www.amnesty.org/en/report/info/MDE14/037/2006 (stating the Dujail trial was a "'shabby affair, marred by serious flaws'"). On the other hand, many political authorities, including a number of leaders whose governments oppose the death penalty, were more circumspect. *See Clark Backs Saddam Verdict but Opposes Death Penalty*, NEW ZEALAND HERALD, Nov. 6, 2006, http://www.nzherald.co.nz/section/2/story.cfm?c_id=2&ObjectID=10409377; *Saddam Sentence: Reaction in Quotes*, *supra*; *Saddam Trial 'Heroic', Says Howard*, THE AGE, Nov. 6, 2006, http://www.theage.com.au/news/world/saddam-trial-heroic-says-howard/2006/11/06/1162661578964.html; Canadian Press, *Tories' McKay Circumspect on Saddam Verdict*, CTV NEWS, Nov. 5, 2006, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061105/hussein_mackay_061105/20061105?hub=Canada.

[87] *See Anfal Case: Related Press Releases*, Iraqi High Tribunal, http://www.iraqihightribunal.org/en/iht_cases_press.php?id_cases=11 (last visited July 11, 2008).

[88] *See Anfal Case*, Iraqi High Tribunal, http://www.iraqihightribunal.org/en/iht_cases.php?id_cases=11 (last visited Jan. 20, 2008) [hereinafter *Ad-Dujayl Case*].

[89] *See id.*

[90] *See* Dave Johns, *The Crimes of Saddam Hussein: 1988: The Anfal Campaign*, FRONTLINE WORLD, Jan. 24, 2006, http://www.pbs.org/frontlineworld/stories/iraq501/events_anfal.html.

starvation, deportation, and mass executions that took an estimated 100,000 to 180,000 lives.[91] When the trial concluded on 23 June 2007, Ali Hassan Al-Majid and two other defendants were convicted and sentenced to death; two defendants were convicted and sentenced to life imprisonment; and one defendant was acquitted at the request of the prosecution.[92]

The third trial, relating to the regime's suppression of the 1991 post-Gulf War uprising in the southeastern provinces of Basra and Maysan, is currently underway.[93] Like the Anfal trial, the 1991 case is very broad in scope; fifteen defendants are charged with crimes against humanity relating to indiscriminate killing, execution, torture, confinement, and persecution affecting many thousands of people.[94] At least a dozen other cases of varying scope are pending referral to trial or are under investigation by the IHT.

Conclusion

Despite the obstacles, over time the RCLO has developed a close working relationship with the IHT, and attorney-advisors have advised, assisted, and supported their Iraqi colleagues' efforts to render justice with unfamiliar tools in a difficult environment. In recent months, the RCLO has increasingly transferred responsibilities to the IHT. The IHT's ability to bear these increasing burdens thus far is a positive reflection of the efforts of the RCLO.

The IHT's work has been criticized in some quarters.[95] Indeed, it may not have always matched the hopes of the attorney-advisors. Evaluating every criticism or controversy is beyond the scope of this article. However, the accomplishments of the IHT and RCLO are best appreciated from a broader perspective. In a country with essentially no tradition of effective democratic rule, where violence has been the medium of politics, where dissent and independent thought have been ruthlessly punished for decades, and where violence and conflict still plague the population, the IHT's commitment to public trials guided by the rule of law is a major achievement.[96] Importantly, it is also an Iraqi achievement, albeit one made possible by the RCLO. To paraphrase T.E. Lawrence, it may be better to let the Iraqis do it tolerably than have foreigners do it perfectly.[97] In the end it is the Iraqis' struggle, their challenge, and the RCLO has existed to help the Iraqis shape a better future for their nation.

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[91] *See id.*

[92] Omar Sinan, *Iraq to Hang 'Chemical Ali'*, ST. PETERSBERG TIMES, June 25, 2007, *available at* http://www.sptimes.com/2007/06/25/Worldandnation/Iraq_to_hang__Chemica.shtml. Saddam Hussein was not among those convicted, of course, having been executed the preceding December. *See Anfal Case*, *supra* note 88.

[93] *See* Mike Wooldridge, *High-Profile Trial Divides Iraq*, BBC NEWS, Aug. 21, 2007, http://news.bbc.co.uk/2/hi/middle_east/ 6957683.stm.

[94] *See* ENDLESS TORMENT, *supra* note 19.

[95] *See, e.g.*, Bassiouni, *supra* note 26, at 358–88 (questioning the legitimacy of the establishment of the original IHT statute and procedural and substantive provisions); Human Rights Watch, *Iraq: Anfal Proceedings Raise Concerns*, Mar. 25, 2007, *available at* http://hrw.org/english/docs/2007/03/23/iraq15555.htm (expressing concern over the indictment and inability of defense witnesses to testify in the Anfal trial); JUDGING DUJAIL, *supra* note 86 (alleging "serious administrative, procedural, and substantive legal defects in the [Dujail] trial"); Dave Johns, *Defining Justice: Victors' Justice*, FRONTLINE WORLD, Jan. 24, 2006, http://www.pbs.org/frontlineworld/stories/iraq501/defining_victors.html (summarizing international criticism of the IHT).

[96] *See* Tom Parker, *Symposium: Milosevic & Hussein on Trial: Panel 3: The Trial Process: Prosecution, Defense and Investigation: Prosecuting Saddam: The Coalition Provisional Authority and the Evolution of the Iraqi Special Tribunal*, 38 CORNELL INT'L L.J. 899, 909 (Fall 2005). Parker writes of the IHT:

> This is an Iraqi court seeking to address the needs of Iraqi victims and to apply international legal standards. Taken in isolation, whatever your political point of view, it is difficult to see how this could be regarded as a bad thing. Even though this may not be the best case scenario for some, surely it is better than the alternative: deadlock, inaction, and impunity. Every international tribunal established to date has struggled with limitations of one sort or another and yet rightly we persevere. The great lesson of international criminal justice has been that we should not allow the best to become the enemy of the good.

Id.

[97] In 1917, T.E. Lawrence wrote a guide for British officers serving in southwest Asia which included the following advice: "Do not try to do too much with your own hands. Better the Arabs do it tolerably than that you do it perfectly. It is their war, and you are to help them, not to win it for them." Robert L. Bateman, *Lawrence and His Message*, SMALL WARS J. BLOG, Apr. 27, 2008, http://smallwarsjournal.com/blog/authors/robert-bateman/. Bateman actually criticizes this sort of invocation of this quote outside of the particular context in which it was written; but Lawrence's words fit the RCLO nonetheless. *Id.*

The Service-Disabled Veteran-Owned Small Business in the Federal Marketplace

Lieutenant Commander Theron R. Korsak[*]

The willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional to how they perceive the veterans of earlier wars were treated and appreciated by our nation.[1]

I. Introduction

Since 2001, more than 35,000 American servicemen and women have been wounded in combat around the globe.[2] In addition to the combat wounded, other members of the armed forces have incurred injuries while in the line of duty.[3] Annually, the defense disability system handles about 20,000 new compensation and pension claims.[4] Many of these veterans are eligible for status as service-disabled.[5]

In recognition of the sacrifices of service-disabled veterans, Congress passed legislation to assist them in entering the federal marketplace as small business owners and operators.[6] More specifically, Congress shaped a legislative framework that provides a competitive advantage to these veterans in federal contracting.[7] The law puts into place a goal for federal agencies to annually award at least 3% of all procurement dollars to small business concerns owned and operated by service-disabled veterans.[8] Unfortunately, government agencies continually fail to meet the 3% goal, even though contracting officers have the tools required to administer the program.[9] To comply with Congress' intent, agency procurement officials must increase contracting opportunities for service-disabled veteran-owned small businesses.[10]

This article will introduce agency heads, contracting officers, Judge Advocates, and veterans to the laws and programs designed to assist service-disabled veteran-owned small businesses in federal contracting. To accomplish this goal, the first

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[1] Paul Chevalier, *Veteran Support for McCain*, HUDSON-LITCHFIELD NEWS, Apr. 20, 2007, *available at* http://www.johnmccain.com/Informing/News/NewsReleases (quoting Sen. John McCain who quoted General George Washington during a campaign speech in New Hampshire in the spring of 2007).

[2] U.S. DEP'T OF DEFENSE, DEFENSELINK, OIF/OEF CASUALTY REPORT, http://www.defenselink.mil/news/casualty.pdf (last visited June 18, 2008).

[3] Rudi Williams, *Veterans Affairs Strives to Find Jobs for Iraq, Afghanistan War Vets*, AM. FORCES PRESS SERV., Oct. 13, 2005, http://www.defenselink.mil/news.

[4] Jim Garamone, *Defense-VA Team Proposes Disability Process Changes*, AM. FORCES PRESS SERV., Oct. 23, 2007, *available at* http://www.defenselink.mil/news/newsarticle.aspx.

[5] 38 U.S.C. § 101(16) (2000) (stating that a veteran is considered to have a service-connected disability after the Department of Veteran Affairs has determined that he incurred an injury while serving on active duty, or that the disability was aggravated, in line of duty in the active military, naval, or air service).

[6] Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233; *see* Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2662 (codified at 15 U.S.C. § 657f); *see also* Veterans Benefit, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403.

[7] 38 U.S.C. § 8127(c), (d) (permitting contracting officer to conduct competitive set-asides or sole-source procurements for service-disabled veteran-owned small businesses).

[8] Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233; *see* Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2662 (codified at 15 U.S.C. § 657f); *see also* Veterans Benefit, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403.

[9] Memorandum from Angela B. Styles, Administrator, U.S. Office of Mgmt. & Budget, to Heads of Departments and Agencies, subject: Participation of Veterans in Federal Contracting (Apr. 29, 2003) [hereinafter Styles Memo], *available at* http://www.whitehouse.gov/omb/memoranda/m03-11.html.

[10] H.R. 5583, 107th Cong. (2002).

section of this article presents a summary of the laws intended to assist service-disabled veteran-owned small businesses. Following that discussion, section two focuses on socio-economic programs and eligibility requirements. Section three is a review of common procedural issues affecting service-disabled veteran-owned businesses. Section four explores policy conflicts that may impact contract awards to a service-disabled veteran-owned small business. Section five summarizes the role that federal agencies, quasi-government organizations, and industries play to meet the 3% goal. Finally, this article concludes with recommendations to increase contract awards to service-disabled veteran-owned small businesses.

II. Laws Designed to Assist Service-Disabled Veteran-Owned Small Businesses

Years prior to the conflicts in Afghanistan and Iraq, Congress recognized the sacrifices that men and women in uniform make when they join the armed services.[11] In 1974, it created a legislative framework to assist service-disabled veterans in federal contracting.[12] Unfortunately, over the next twenty-five years, Congress did not pass any significant legislation to assist them with entry into the federal acquisition field.[13] The status quo finally changed in 1999 when the 106th Congress passed the Veterans Entrepreneurship and Small Business Development Act.[14] As background to this discussion, the following section explores the laws intended to assist service-disabled veteran-owned businesses.

A. The Veterans Entrepreneurship and Small Business Development Act

The Veterans Entrepreneurship and Small Business Development Act (VESBD Act) established a goal for all federal agencies to annually award no less than 3% of all contracts to small business concerns owned and operated by service-disabled veterans.[15] In the years immediately following its enactment, the VESBD Act was largely ignored.[16] Federal agencies, such as the Department of Defense, have spent billions of dollars in their procurement programs; however, only a small fraction of dollars were awarded as contracts to service-disabled veteran-owned business concerns.[17]

To explain this failure, agency procurement officials contended that they lacked an effective means by which to implement the law.[18] To satisfy Congress's intent, the officials advocated for contracting methods to restrict competition exclusively among service-disabled veteran-owned businesses.[19] The proposed solution included the use of contracting methods such as competitive set-asides and sole-source contracts.[20]

Unfortunately, the VESMD Act lacked any of the tools necessary to meet Congress's goal, and the status quo of the previous twenty-five years remained.[21] The goal—to award at least 3% of all federal contracts to service-disabled veteran-owned small businesses—would remain elusive.[22] In 2003, the situation improved only slightly when Congress passed additional legislation as an attempt to remedy the problem.[23]

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[11] *Veteran-Owned Business History*, VETERAN'S BUS. J., Apr. 2007, at 12–13 [hereinafter *Veteran-Owned Business History*] (providing a timeline of initiatives designed to assist veterans in federal contracting).

[12] *Id.* In 1974, Congressman Edward Koch introduced legislation requiring the Small Business Administration to provide veterans with special consideration in federal contracting. *Id*. at 12.

[13] *See id.* at 12–13.

[14] Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233.

[15] *Id*.

[16] Styles Memo, *supra* note 9.

[17] U.S. Dep't of Defense, Office of Small Bus. Programs, *Department of Defense Program Goals & Statistics*, http://www.acq.osd.mil/osbp/statistics/goals.htm (last visited June 17, 2008) [hereinafter *DOD Goals & Stats.*].

[18] Styles Memo, *supra* note 9.

[19] *Id.*

[20] *Service-Disabled Veterans' Small Business Federal Procurement Preference Act: Hearing on H.R. 5583 Before the H. Comm. on Veterans Affairs*, 107th Cong. E1804–05 (2002) (statement of Rep. Lance Evans, Ranking Democratic Member, Comm. on Veterans Affairs).

[21] *DOD Goals & Stats.*, *supra* note 17.

[22] Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2662 (codified at 15 U.S.C. § 657f).

[23] *Id*.

B. The Veterans Benefit Act

In response to the failure of federal agencies to meet the 3% goal, the 108th Congress passed the Veterans Benefit Act (VB Act) of 2003.[24] The VB Act not only restated Congress's original intent to assist service-disabled veterans in federal contracting, but it also provided mechanisms to meet the law's objectives.[25] The law authorized contracting officers to conduct competitive contract set-asides and sole-source procurements among service-disabled veteran-owned small businesses.[26] Despite changes to the law, federal agencies still failed to achieve the 3% goal.[27] To reinforce Congress's commitment to assist service-disabled veterans, President Bush signed an executive order the next year.[28]

C. Executive Order 13,360

On 20 October 2004, the President signed Executive Order 13,360.[29] The order provided much-needed direction and a clear mandate to the heads of federal agencies.[30] Agency officials no longer could ignore the legislative framework that Congress created to assist service-disabled veteran-owned businesses.[31] In the order, the President outlined the respective roles for the Administrator of the Small Business Administration, Administrator of the General Services Agency, Secretary of Defense, Secretary of Veterans Affairs, and Secretary of Labor.[32] The President also directed all federal agency heads to develop a "strategic plan" to implement the policies as prescribed by Congress.[33] In the years immediately following the executive order the number of contracts awarded to service-disabled veteran-owned small businesses increased, but at a sluggish rate. The slow growth prompted further congressional direction.[34]

D. The Veterans Benefit, Health Care, and Information Technology Act

In December 2006, Congress passed the Veterans Benefit, Health Care, and Information Technology Act (VBHCIT Act).[35] The law placed an emphasis on a "veterans first" approach to contracting within the Department of Veterans Affairs.[36] Unlike other socio-economic programs that give no preference to veteran-only status, the VBHCIT Act authorizes

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[24] *Id*.

[25] *Id*. Contracting officers were exempt from the full and open competition requirements if at least two responsible service-disabled veteran-owned small businesses were expected to bid on a contract. *Id.*

[26] *Id*. Sole source procurements may be awarded up to $5 million for manufacturing contracts and up to $3 million for non-manufacturing contracts. *Id.*; *see also* ACTIVITIES REPORT OF THE COMMITTEE ON VETERAN'S AFFAIRS FOR THE 109TH CONGRESS, H.R. REP. No. 109-737 (2006).

[27] *DOD Goals & Stats.*, *supra* note 17.

[28] Exec. Order No. 13,360, 69 Fed. Reg. 206 (Oct. 26, 2004); *see also* 13 C.F.R. 125.19, 125.20 (2004).

[29] *Id*.

[30] *Id*.

[31] *Id*.

[32] *Id*.

> The Administrator of the Small Business Administration was directed to assist heads of agencies to implement the executive order and to coordinate with the Veterans Affairs Center for Veterans Enterprise to provide to service-disabled veteran-owned businesses information, assistance and training in Federal contracting law, procedures and practices; the Administrator of the General Services Agency was directed to establish a Government-wide Acquisition Contract reserved for service-disabled businesses and to include these businesses in the Federal Supply Schedule; the Secretary of Defense was directed to direct the Defense Acquisition University to develop training programs for service-disabled businesses and to make this training available on-line; the Secretary of Veterans Affairs was directed to assist the Veterans Affairs Center for Veterans Enterprise in verifying the accuracy of the service-disabled veteran contractor registration databases; and finally, the Secretary of Labor and the Secretary of Veterans Affairs were directed to ensure that veterans leaving the service were made aware of the benefits available to service-disabled veteran-owned businesses and the potential entrepreneurial opportunities.

Id.

[33] *Id.*

[34] *DOD Goals & Stats.*, *supra* note 17.

[35] Veterans Benefit, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403.

[36] Information Letter from C. Ford Heard, Dir., Dep't of Veterans Affairs, Office of Acquisition and Material Mgmt., to Under Secretaries for Health, Benefits, and Memorial Affairs et.al., subject: Veterans First Contracting Program, (June 19, 2007) [hereinafter Heard Letter] (on file with author)

the Department of Veterans Affairs to provide a preference to both veteran-owned and service-disabled veteran-owned small businesses.[37] Specifically, the law enables contracting officers from the Department of Veterans Affairs to include veteran and service-disabled veteran small business status as an evaluation factor in competitively negotiated solicitations.[38] The net effect of the change is to alter the contracting priority within the socio-economic programs managed by the Department of Veterans Affairs.[39] To fully understand how this and other recent changes affect service-disabled veteran-owned small businesses, Section III provides a basic understanding of these programs.

III. Socio-Economic Programs

Congress created small business programs to encourage the development of business within certain socio-economic groups.[40] To give qualified small businesses the ability to compete with larger and more established organizations, Congress passed laws to provide low interest loans, business development assistance, counseling, training, and contract preferences.[41] Qualifying businesses include firms owned and operated by service-disabled veterans, firms located within qualified historically underutilized business zones (HUBZones), firms owned and operated by the socially and economically disadvantaged, and firms owned and operated by women.[42] To understand the impact that socio-economic programs have on service-disabled veteran-owned small businesses, the next section examines several of the programs.[43]

A. Service-Disabled Veteran-Owned Small Business Program

Congress provided service-disabled veterans a preference in government contracting in recognition of their service to the country.[44] To aid federal agencies in determining who qualifies for status as a "service-disabled veteran," Congress designated the Department of Veterans Affairs as its lead agency.[45] As a general rule, a veteran is any person who served on active duty in the armed forces, and has completed his or her service under honorable conditions.[46] Therefore, a service-disabled veteran is an American serviceman or woman who incurred an injury, or aggravated a pre-service condition, while in the line of duty.[47]

(providing guidance to contracting officers concerning the award of contracts to service-disabled veteran-owned small businesses and veteran-owned small businesses in accord with Veterans Benefit, Health Care, and Information Technology Act).

[37] *See* Veterans Benefit, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403.

[38] *See* Heard Letter, *supra* note 36.

[39] *Id*. For socio-economic programs managed by the Department of Veteran Affairs, set-aside preferences for awarding contracts to small business concerns shall be applied in the following order of priority: (1) service-disabled veteran-owned small businesses; (2) veteran-owned small businesses; (3) Section 8(a) or HUBZone business program; and, (4) any other small business contracting preference. *Id*.

[40] Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995).

[41] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 19.202-2 (July 2007) [hereinafter FAR] (stating that a contracting officer must, to the extent practicable, encourage maximum participation by small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in acquisitions).

[42] *Id.* pt. 19.201(a).

[43] 113 C.F.R. § 125.13 (2007) (stating 8(a) Program participants, HUBZone, Small Disadvantaged, and Women-Owned small businesses may also qualify as "Service-Disabled Veteran-Owned" if they can meet the requirements of those other programs).

[44] *See* 38 U.S.C. § 101, 101(2) (2000); *see also* U.S. Dep't of Defense, Office of Small Bus. Programs, Frequently Asked Questions, http://www.acq.osd.mil/osbp/ programs /veterans/faq.htm (last visited Jan. 14, 2008) [hereinafter DOD, Frequently Asked Questions].

[45] *See* 38 U.S.C. § 101, 101(2); *see also* DOD, Frequently Asked Questions, *supra* note 44 (stating to be considered a service-disabled, the veteran must have an adjudication letter from the Department of Veterans Affairs).

[46] *See* FAR, *supra* note 41, pt. 19.1401(a); *see also* 38 U.S.C. §101, 101(2); DOD, Frequently Asked Questions, *supra* note 44 (stating a veteran is any former member of the armed forces who was discharged or released from duty under any conditions other than dishonorable, as well as active and former members of the Reserve and National Guard).

[47] *See* 38 U.S.C. § 101(2), (16); *see also* DOD, Frequently Asked Questions, *supra* note 44.

> The term "service-connected" means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service. . . . A veteran with a 0 to 100 percent disability rating is eligible to self-represent himself as service-disabled for the purpose of federal contracting.

Id.

A business concern is considered "service-disabled veteran-owned," if the disabled veteran's ownership interest is "unconditional and direct."[48] Regulations require that the veteran must be actively involved in the daily operation of the business, and his or her control must be "direct and substantial."[49] Additionally, the service-disabled veteran must hold the highest position in the company and possess experience consummate with that role.[50] Typically, a business is designated as "small" when its gross receipts are not in excess of an amount predetermined by the Commerce Department.[51] Only when all of these preconditions have been fulfilled may a small business be eligible for status as service-disabled veteran-owned.[52] Once qualified, a service-disabled veteran-owned small business may also be eligible for additional status under the terms of other socio-economic programs, thus potentially availing itself to additional contract preferences.[53] A program that almost all service-disabled veteran-owned small businesses may qualify for is the HUBZone Program.[54]

B. HUBZone Program

In 1997, Congress created the HUBZone Empowerment Contracting Program,[55] to encourage economic development in areas of the country where it has not traditionally occurred.[56] This socio-economic program is one for which many service-disabled veteran-owned small businesses may gain an additional status simply by locating its business in a qualifying area. To achieve HUBZone status, a service-disabled veteran-owned small business must certify to the Small Business Administration that it is actually located within HUBZone and at least 35% of its employees reside in *any* HUBZone.[57] Contracting preferences available to a certified HUBZone small business include competitive set-asides,[58] sole source procurements,[59] and price evaluations.[60]

Although qualified as a HUBZone small business, several statutory exemptions may limit the usefulness of enrollment into the program.[61] These exemptions can effectively negate any practical contracting advantage gained by the service-disabled veteran who locates his business within a qualifying HUBZone.[62] This consideration should not however be the determining reason not to locate a small business within a qualifying HUBZone. Practical advantages of locating a small

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[48] *See* 13 C.F.R. § 125.9 (2008); *see also* DOD, Frequently Asked Questions, *supra* note 44 (stating the business concern must be 51% "unconditionally and directly" owned by one or more service-disabled veterans, or in the case of any publicly owned business, not less than 51% of the stock of the company is owned by one or more service-disabled veterans).

[49] *See* 13 C.F.R. § 125.9 (stating the management and daily business operations must be controlled by one or more service-disabled veterans, or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran).

[50] *Id.* § 125.10; *see also* SDV Solutions, Inc. re: Four Points Tech., LLC., Small Bus. Admin. Office of Hearings and Appeals, SBA VET-116 (29 June 2007) (finding that service-disabled veteran lacked the managerial experience to qualify for status as a service-disabled veteran-owned small business).

[51] *See* Advanced Sys. Tech., Inc. v. United States, 69 Fed. Cl. 474, 475 n.1 (2006) (citing 13. C.F.R. §§ 121.101, 121.402 (2006)). "North American Industry Classification System (NAICS) Codes are used by government agencies and the Small Business Administration to establish size standards governing eligibility for small business preferences under government programs and procedures." *Id*.

[52] 38 U.S.C. § 101 (2000).

[53] 13 C.F.R. § 125.13 ("8(a) Program participants, HUBZone, Small Disadvantaged, and Women-Owned small businesses may also qualify as "Service-Disabled Veteran-Owned" if they can meet the requirements of those other programs.").

[54] FAR, *supra* note 41, pt. 19.1301.

[55] *See* Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, 111 Stat. 2592, 2617–20.

[56] FAR, *supra* note 41, pt. 19.1303.

[57] *See* Small Business Reauthorization Act of 1997, 111 Stat. at 2617–20 (defining "qualifying areas" on the basis of census data).

[58] FAR, *supra* note 41, pt. 19.305.

[59] *Id.* pt. 19.306.

[60] *Id.* pt. 19.305.

[61] *Id*. pt.19.304.

> This [FAR] subpart (HUBZone) does not apply when the requirements can be satisfied through contracts awarded to: (1) Federal Prison Industries, Inc.; (2) Non-profit agencies for the blind or severely disabled participating under the Javits-Wagner-O'Day Act; (3) Orders under indefinite delivery contracts; (4) Orders against Federal Supply Schedules; (5) Requirements currently being performed by an 8(a) participant or requirements SBA has accepted for performance under the authority of the 8(a) Program, unless SBA has consented to release the requirements from the 8(a) Program; (6) Requirements that do not exceed the micro-purchase threshold; and, (7) Requirements for commissary or exchange resale items.

Id.

[62] *Id.* pt. 19.1303.

business within a qualifying area include lower rent or property costs, tax exemptions or credits, an available workforce, development of good will within the community, and possible qualification for other socio-economic programs.[63] As an example, a service-disabled veteran located within a HUBZone may also qualify as a Small Disadvantaged Business.[64]

C. Small Disadvantaged Business Certification Program

Small business owners who are members of a socially[65] or economically disadvantaged group[66] may be eligible for disadvantaged business status under the Small Disadvantaged Business Certification Program.[67] Under this program's umbrella, qualified individuals are encouraged to create a small business.[68] If a service-disabled veteran can demonstrate that he can meet all requirements of a small disadvantaged business, he may be eligible to receive "small disadvantaged certification" from the Small Business Administration.[69] Once certified, the disabled-veteran may then be eligible for contract preferences as both a small disadvantaged business and a service-disabled veteran-owned small business.[70]

For the service-disabled veteran, the additional status of being a small disadvantaged business may not provide further benefits.[71] For instance, if a contract award is based solely on the small disadvantaged business status, contracting officers are precluded from giving any preference to small disadvantaged businesses in section 8(a) acquisitions,[72] in any negotiated acquisitions when the lowest technically acceptable source selection process is used,[73] and in contract actions where performance will occur outside of the United States.[74] Finally, the Small Disadvantaged Business Certification Program is distinctly different from the Women-Owned Small Business Program.

D. Women-Owned Small Business Program

In 1994, Congress created the Women-Owned Small Business Program[75] which set a goal for federal agencies to award at least 5% of all government acquisitions to woman-owned small businesses.[76] On its face, the program appeared to increase business opportunities for women;[77] however, executive agencies failed to reach that goal.[78] The difficulties women-owned

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[63] *See* Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, 111 Stat. 2592, 2617–20 (encouraging business development in socially and economically depressed areas).

[64] 13 C.F.R. § 124.105 (2008) (defining the net worth of the individual claiming disadvantage must be less than $750,000).

[65] *Id*. § 124.103(a) (defining socially disadvantaged persons as people who have been subjected to racial or ethnic prejudice or cultural bias with American society because of their identities as members of groups and without regard to their individual qualities).

[66] *Id*. § 124.104(a) (defining economically disadvantaged individuals as socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged).

[67] *Id*. § 124.1002.

[68] *Id*. § 124.105 (stating that a participant in the program must be at least 51% unconditionally and directly owned by one or more socially and economically disadvantaged individual who are citizens of the United States).

[69] *See id*. § 124.1001 (giving general requirements for the small disadvantaged business certification program); *see also id*. § 124.1014 (stating small disadvantaged business certification program status is generally valid for three years).

[70] FAR, *supra* note 41, pt. 19.1202-4; *see also id*. 19.1201. "Small disadvantaged business status may be used as an evaluation factor in competitive, negotiated acquisitions." *Id*. "Contracting officers should be aware that under the 8(a) program all businesses should be considered as small disadvantaged businesses." *Id*.

[71] *Id.* pt. 19.1202-2.

[72] *See* 13 C.F.R. § 124.105 (2008) (stating for section 8(a) contracting eligibility the net worth of the individual claiming disadvantage must be less than $250,000).

[73] FAR, *supra* note 41, pt. 19.1202-2.

[74] *Id*.

[75] *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; *see also* Policy Letter 99-1, Off. of Mgmt & Budget, Off. of Fed. Pol'y, subject: Government-Wide Small Business, HUBZone Small Business, Small Disadvantaged Business, and Women-Owned Small Business Goals for Procurement Contracts (29 Mar. 1999), *available at* http://www.whitehouse.gov/omb /fedreg/pp99-1.html.

[76] *Id*.

[77] Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355 108 Stat. 3243.

small businesses face appear very similar to those affecting service-disabled veteran-owned small businesses.[79] In both instances, the laws failed to provide procurement officials with the contracting tools to meet the Congressional mandate.[80]

To rally support for the program, in 2000 President Clinton issued Executive Order 13,157.[81] The President urged federal agencies to meet the 5% contracting goal and develop a long-term comprehensive strategy to expand opportunities for woman-owned small businesses.[82] The order had minimal effect, as federal agencies continue to fall short of the stated goal.[83] Lack of contracting authority and other procedural roadblocks continue to be the likely reasons for failure.[84] The law encourages, but does not require, contracting officers to award contracts to woman-owned small businesses.[85] At the present day, Congress has not taken any corrective action with respect to the woman-owned small businesses program.[86] Therefore, a woman-owned, service-disabled veteran-owned small business may not realize any advantage based solely on its status as woman-owned.

IV. Procedure

In addition to many regulations that a small business must comply with to qualify for status under a socio-economic program, there are also numerous procedural issues to consider.[87] To help small businesses, Congress designated both the Small Business Administration; and the Office of Small Business Programs, under the Department of Labor, as lead agencies.[88] The Small Business Administration is an independent federal agency designed to protect the interests of businesses meeting certain size requirements.[89] The Office of Small Business Programs administers the Department of Labor's socio-economic programs.[90] These agencies together are responsible for ensuring that procedures are followed and small businesses receive a fair proportion of federal contracts for supplies and services.[91] When competing for agency contracts, service-disabled veteran-owned businesses may commonly encounter procedural issues such as status, responsibility determinations, and protests.

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[78] *DOD Goals & Stats.*, *supra* note 17 (finding from 1994 through 1999 the Department of Defense never awarded more than a 2% of its contracts to woman-owned small business).

[79] Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233 (The Act lacked any meaning method for contracting officers to direct federal contracts towards service-disabled veteran-owned businesses).

[80] *See id.*; *see also* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243.

[81] Exec. Order No. 13,157, 3 C.F.R. 272 (2000).

> [T]he executive branch shall implement this policy by establishing a participation goal for [woman-owned small businesses] of not less than 5 percent of the total value of all prime contract awards for each fiscal year and of not less than 5 percent of the total value of all subcontract awards for each fiscal year.

Id. at 273.

[82] *Id*.

[83] *DOD,Goals & Stats.*, *supra* note 17 ("From 2000 through 2006 the Department of Defense never awarded more than three-percent of its contracts to woman-owned small business.").

[84] Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243.

[85] Exec. Order No. 13,157, 3 C.F.R. 272.

[86] Woman-Owned Small-Business Federal Contract Assistance Procedures, 72 Fed. Reg. 73,285, 73,300 (Dec. 27, 2007) (to be codified at 13 C.F.R. pt. 121, 125, 127, 134) ("The proposed rule allows an agency to set-aside contracts for women-owned small-business only after the agency has found 'evidence of relevant discrimination in that industry by that agency.'").

[87] FAR, *supra* note 41, pt. 19.14.

[88] U.S. Dep't of Lab., Office of Small Bus. Programs, Welcome Page, http://www.dol.gov/ osbp/welcome.htm (last visited July 22, 2008) [hereinafter Small Bus. Programs, Welcome Page]; Exec. Order No. 13,360, 69 Fed. Reg. 206 (Oct. 26, 2004).

[89] *See* Small Business Act of 1958, Pub. L. No. 85-536-50, 72 Stat. 384; *see also* 13 C.F.R. § 125.11 (2008) ("At time of contract offer, a service-disabled veteran-owned small business (SDVOSB) must fall within the size standard corresponding to the NAICS code. If the contracting officer is unable to verify that the SDVOSB is small, the issue is referred to the Small Business Administration for a formal size determination.").

[90] Small Bus. Programs, Welcome Page, *supra* note 88.

[91] *Id*.

A. Status

To receive HUBZone or disadvantaged small business preference, qualifying organizations must certify their status with the Small Business Administration.[92] In contrast, service-disabled veteran-owned businesses are generally not required to follow such procedures to certify service-disabled status.[93] Instead, small businesses owned by service-disabled veterans will register in the government's central contractor registration database prior to participating in a federal contracting program.[94] A service-disabled veteran-owned small business that fails to follow this procedure may preclude itself from participating in contract competitions reserved exclusively for them.[95] However, to take advantage of any preference, regardless of the socio-economic program, all small businesses must satisfy existing regulations and be able to provide the government with the products and services it requires.[96]

B. Responsibility Determinations

Responsibility determinations are procedural questions answered by a contracting officer.[97] The agency contracting officer will determine that the small business has the experience and ability to adequately perform the contract.[98] If a contracting officer finds a small business not "responsible" during the pre-award process,[99] the company may be required to obtain a certificate of competency from the Small Business Administration.[100] If the Small Business Administration issues a certificate of competency, then the contracting officer is generally bound by that decision and the acquisition is allowed to proceed.[101] After contract award, the "responsible" contractor is required perform in accordance with the terms of the contract.[102]

During its pre-award planning, a small business owned and operated by a service-disabled veteran must ensure that it is capable of performing the work sought, or run the risk of exclusion from competition for future contracts.[103] Prior to submitting an offer, the service-disabled veteran should recall that his service-disabled status alone does not exempt him from the "responsibility" requirement, regardless of what type of acquisition method the government intends to use in its procurement.[104]

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[92] *See* Singleton Enters.-GMT Mech., A Joint Venture v. United States, B-310552, 2008 U.S. Comp. Gen. LEXIS 3 (Jan. 10, 2008) (stating determination of service-disabled veteran-owned small business status is not a matter for the procuring agency but rather a matter reserved exclusively for the Small Business Administration); *see also* FAR, *supra* note 41, pt. 19.306 ("Small disadvantaged and HUBZone business must certify their status with the SBA prior to receiving a contract preference.").

[93] FAR, *supra* note 41, pt. 19.601.

[94] Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2662 (codified at 15 U.S.C. § 657f); *see also* Small Bus. Programs, Welcome Page, *supra* note 88 (stating once entered into the database, a service-disabled veteran-owned small business will complete an on-line representations and certifications application).

[95] FAR, *supra* note 41, pt. 19.1403.

[96] *Id*. pt. 19.601.

[97] Singleton Enters.-GMT Mech., 2008 U.S. Comp. Gen. LEXIS 3 (stating responsiveness is determined at the time of the bid opening); *see also* FAR, *supra* note 41, pt. 9.105-2(b) (stating the contracting officer must use the documents in the file to determine if the apparent winning offeror is responsible).

[98] FAR, *supra* note 41, pt. 9.103(b) ("Absent information 'clearly indicating' that the prospective contractor is responsible, the contracting officer [must] make a determination of nonresponsibility."); *see also* John C. Grimberg Co., Inc. v. United States, 185 F.3d. 1297 (Fed. Cir. 1999) (stating that a contracting officer must have enough information to make a responsibility determination).

[99] *Id*. pt. 19.602-1 ("Responsibility factors include, but are not limited to: capacity, capability, competency, credit, integrity, perseverance, tenacity and limitations on subcontracting.").

[100] FAR, *supra* note 41, pt. 19.601(a).

[101] *Id*.

[102] Singleton Enters. -GMT Mech., 2008 U.S. Comp. Gen. LEXIS 3, at*2(10 Jan 2008) (citing B-G Mech. Serv., Inc., B-265782 (Dec. 27, 1995)).

[103] FAR, *supra* note 41, pt. 19.602-1.

[104] *Id*.

C. Acquisition Methods

The 2003 Veterans Benefit Act authorized agency contracting officers to conduct competitive contract set-asides and sole source procurements exclusively among service-disabled veteran-owned small businesses.[105] A contracting officer is authorized to conduct a contract set-aside if he has a reasonable expectation that at least two responsible service-disabled veteran-owned small businesses will compete for the contract,[106] and the contract award could be made at a fair market price.[107] If the contracting officer does not receive at least two acceptable offers from service-disabled veteran-owned small businesses, an award could still be made to a sole offeror.[108] To award a contract on a sole-source basis, the contracting officer must ensure that the sole offeror is "responsible," and the award can be made at a fair market price.[109] In the case where the agency does not receive acceptable offers from any service-disabled veteran-owned small businesses, competition among all small businesses can be opened.[110] With either of these types of acquisitions, the contracting officer should verify the status of the successful offeror before awarding a contract to discourage a competing firm from filing a protest.[111]

D. Protests

On occasion, a service-disabled veteran-owned business engages in a protest.[112] Common reasons include status,[113] size determinations, and the acquisition method used by the agency.[114] Regulations promulgate procedures to follow when filing a protest.[115] An interested party may file its protest with the U.S. Court of Federal Claims of the Government Accountability Office.[116] The protestor must ensure that its protest is timely, is in writing, and that it sufficiently describes the allegation of wrongdoing.[117]

Generally a court will not substitute its judgment for that of the federal agency.[118] It may, however, take corrective steps to remedy a problem if the protestor demonstrates that the government's action was not in accordance with the law and the effect of the agency decision disadvantages the protestor.[119] If a court finds agency wrongdoing, a court may set aside the

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[105] Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2662 (codified at 15 U.S.C. § 657f).

[106] *See* MCS Portable Restroom Serv., B-299291, 2007 U.S. Comp. Gen. LEXIS 51 (Mar. 28, 2007) (stating that there is no particular method of market research to follow but some factors to consider when making a determination if at least two service-disabled veteran-owned small businesses will compete for a contract, are: procurement history, market surveys, and consultation with the agency small business specialist).

[107] FAR, *supra* note 41, pt. 19.14 ("To set-aside an acquisition for competition restricted to service-disabled veteran-owned small businesses (SDVOSB) the contracting officer must have a reasonable expectation that at least two or more SDVOSBs will submit an offer and the contract award can be made at fair market price."); *see also* IBV, Ltd., B-311244, 2008 U.S. Comp. Gen. LEXIS 35 (Feb. 21, 2008) (holding agency decision to cancel a set-aside for service-disabled veteran-owned business was unobjectionable after the agency contracting officer conducted market research and determined that the agency would not receive a fair market price from that type of business concern).

[108] MCS Portable Restroom Serv., B-299291, 2007 U.S. Comp. Gen. LEXIS 51 (finding the Veterans Benefit Act of 2003 read together with FAR pt. 19.1406(a), (b) provide an agency contracting officer the discretion to make a sole-source award to a service-disabled veteran-owned small businesses (SDVOSB) where the prerequisites that would allow for a SDVOSB set-aside have not been met).

[109] *See* FAR, *supra* note 41, pt. 19.14; *see also* IBV, Ltd., B-311244, 2008 U.S. Comp. Gen. LEXIS 35 (holding that agency decision not to award a contract to a sole service-disabled veteran-owned business was proper when the agency contracting officer conducted market research and determined that it would not receive a fair market price).

[110] FAR, *supra* note 41, pt. 19.1406.

[111] *Id*. pt. 19.1407.

[112] Singleton Enters.-GMT Mech., A Joint Venture v. United States, B-310552, 2008 U.S. Comp. Gen. LEXIS 3 (Jan. 10, 2007).

[113] *Id*. (determining that the managerial structure of a joint venture involving a service-disabled veteran-owned small business was not a matter for the procuring agency but rather a matter exclusively the Small Business Administration).

[114] *See id*. (quoting 13 C.F.R. § 125.24(b) (2006)) ("For competitive set-asides, '[a]ny' interested party [to include contracting officers] may protest the apparent successful offeror's service-disabled veteran-owned status."); *see also* 13 C.F.R. § 125.24 ("In the case of a sole-source acquisition, the Small Business Administration, or an agency contracting officer may protest a service-disabled veteran-owned small business' status.").

[115] FAR, *supra* note 41, pt. 19.302 (describing how to protest a firm's small business size representation); *see also id*. pt. 19.307 (describing how-to protest a firm's representation that it is a service-disabled veteran-owned small business concern).

[116] Knowledge Connections Travel, Inc. v. United States, 76 Fed. Cl. 6, 2007 U.S. Claims LEXIS 102, at ∗28–29 (Ct. Fed. Cl., Mar. 28, 2007) (quoting 28 U.S.C. § 1491(b) (2000)) (holding that under the Tucker Act, the United States Court of Federal Claims has jurisdiction to render judgment on a proposed contract before and after contract award, or for an alleged violation of a statute or regulation in connection with a procurement or proposed procurement).

[117] FAR, *supra* note 41, pt. 19.307.

[118] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

[119] Bannum, Inc. v. United States, 404 F.3d 1346, 1351 (Fed. Cir. 2005).

agency decision, particularly if the court finds that the agency contracting decision was "arbitrary, capricious, and an abuse of discretion."[120]

V. Policy Conflicts

At the intersection of socio-economic and agency procurement programs are policy conflicts,[121] which present an immediate challenge to an agency contracting officer.[122] Contract bundling,[123] simplified acquisitions,[124] and determining priority among the different socio-economic programs are issues that make the task difficult.[125]

A. Contract Bundling

An agency decision to combine several requirements into one solicitation is called consolidation.[126] Where the government may realize a substantial cost benefit by combining multiple contract requirements into a single award, it may "bundle the contract."[127] As a general rule, however, agencies shall avoid "unnecessary" and "unjustified" contract bundling that precludes small businesses from participating as prime vendors.[128]

When an agency decides to bundle a contract without regard to Congress's intent to promote socio-economic programs, contracting officers should be concerned. In particular, a bundling action taken to avoid full and open competition is patently illegal.[129] However, no matter what course of action is followed, a tension will always exist between the potential cost savings to the agency and the planned solicitation.[130] Therefore, contracting officers are often challenged to determine whether to combine contracts requirements into a single award.[131]

In addition to the difficulty that exists for contracting officers, agencies considering a consolidation action should recognize the impact that their decision will have on the small business community.[132] Whether termed "bundling" or

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[120] *Id*. at 35 (quoting Administrative Procedures Act of 1966, 5 U.S.C. § 706).

[121] U.S. GOV'T ACCT. OFF., REPORT TO CONGRESSIONAL REQUESTORS NO. 06-399, INCREASED USE OF ALASKA NATIVE CORPORATIONS' SPECIAL 8(A) PROVISIONS CALLS FOR TAILORED OVERSIGHT (2006) (finding the policy to assist economically and socially disadvantaged Alaskan natives has resulted in higher priced goods and services paid by the government).

[122] *See* Styles Memo, *supra* note 9.

[123] Matthew Weinstock, *OMB Orders Agencies to Reduce Bundling*, GovernmentExecutive.com (Oct. 30, 2002), http://govexec.com/dailyfed/1002/103002w1.htm ("For every $100 awarded on a 'bundled' contract, there is a $33 decrease to small businesses.").

[124] FAR, *supra* note 41, pt. 13.5.

[125] Federal Acquisition Regulation: Far Case 2006-034, Socioeconomic Program Priority, 73 Fed. Reg. 12,699 (Mar. 10, 2008) [hereinafter Socioeconomic Program Priority] ("Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have proposed rule changes to the FAR in an effort to resolve the issue of precedent among socio-economic programs.").

[126] *Contract Bundling and the Impact on Veteran Owned Small Businesses: Hearing Before the H. Sub. Comm. on Economic Opportunity of the H. Comm. on Veterans' Affairs,* 111th Cong. (2007) [hereinafter *Contract Bundling and the Impact on Veteran Owned Small Businesses*] (statement of Anthony R. Martoccia, Director, Officer of Small Business Programs Acquisition, Technology and Logistics, U.S. Department of Defense).

[127] FAR, *supra* note 41, pt. 2.101(b)(1)(i)-(iv).

> 'Bundling' means (1) Consolidating two or more requirements for supplies or services, previously provided or performed under separate smaller contracts, into a solicitation for a single contract that is likely to be unsuitable for award to a small business concern due to (i) The diversity, size, or specialized nature of the elements of the performance specified; (ii) The aggregate dollar value of the anticipated award; (iii) The geographical dispersion of the contract performance sites; or (iv) Any combination of the factors described in paragraphs (1)(i), (ii), and (iii) of this definition.

Id.

[128] 15 U.S.C. § 631(j)(3) (2000).

[129] Competition in Contracting Act, 41 U.S.C. § 253a(a).

[130] Nautical Eng'g, Inc., 2007 U.S. Comp. Gen. LEXIS 211 (Nov. 7, 2007) (holding the U.S. Coast Guard did not improperly bundle a ship maintenance and repair contract when the savings exceeded 10% of the anticipated contract award).

[131] *Id.* (requiring a contracting officer to determine whether multiple awards are appropriate when planning an acquisition for a indefinite delivery/indefinite quantity contract).

[132] *Contract Bundling and the Impact on Veteran Owned Small Businesses*, *supra* note 126.

"consolidation," the effect of an improper agency action on service-disabled veteran-owned small business is the same—the number of contracts available to compete for is reduced.[133] A multitude of improper agency decisions can culminate to drive small business out of the federal marketplace.[134] Only when executed correctly will both the government and small business benefit from contract consolidation.[135]

B. Simplified Acquisitions

The Simplified Acquisition Program is another tool available to procurement officials to direct contracting opportunities towards service-disabled veteran-owned small businesses.[136] Contracting officers may set aside the requirement for consideration among HUBZone and service-disabled veteran-owned small businesses when the estimated value of an agency requirement[137] is "at or below" the simplified acquisition threshold.[138] When using simplified acquisition procedures, the contracting officer may award a contract to either a HUBZone or service-disabled veteran-owned small business on a sole source basis.[139] Generally, a contracting officer's decision to set aside an acquisition in either or these cases is not reviewable by the Small Business Administration.[140]

The Simplified Acquisition Program includes a test program for the purchase of commercial items.[141] This test program increases the simplified acquisition threshold from the hundreds of thousands into the millions of dollars[142] and is designed to maximize agency efficiency and economy, while reducing administrative costs.[143] The program, however, has been widely abused by contracting officers and other procurement officials.[144] The impact of the abuse harms both service-disabled veteran-owned small businesses and other socio-economic programs by redirecting contracting opportunities to larger business concerns.[145]

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[133] *Id*.

[134] *Id*.

[135] *Id*.

[136] 13 C.F.R. § 125.21 (2006).

[137] FAR, *supra* note 41, pt. 13.003(b)(1). Each acquisition of supplies or services that has an anticipated dollar value exceeding $3,000 and not exceeding $100,000 is reserved exclusively for small business concerns and shall be set aside. *Id*.

[138] 13 C.F.R. § 125.21; *see also* FAR, *supra* note 41, pt. 13.003(b)(2) ("The contracting officer may set aside for HUBZone small business concerns or service-disabled veteran-owned small business concerns an acquisition of supplies or services that has an anticipated dollar value exceeding the micro-purchase threshold and not exceeding the simplified acquisition threshold.").

[139] 13 C.F.R. § 125.21. *But cf.* IBV, Ltd., B-311244, 2008 U.S. Comp. Gen. LEXIS 35 (Feb. 21, 2008) (holding that agency decision not to award a contract to a sole service-disabled veteran-owned business was proper when the agency contracting officer conducted market research and determined that it would not receive a fair market price).

[140] FAR, *supra* note 41, pt. 13.003(b)(2) ("The contracting officer's decision not to set aside an acquisition for HUBZone small business or service-disabled veteran-owned small business concerns participation below the simplified acquisition threshold is not subject to review under FAR Pt. 19.4.").

[141] *Id.* pt. 2.101(b).

> Commercial item" means (1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and (i) Has been sold, leased, or licensed to the general public; or, (ii) Has been offered for sale, lease, or license to the general public.

Id.

[142] *Id*. pt. 13.5 ("As a test program, simplified procedures may be used for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold but not exceeding $5.5 million ($11 million for acquisitions as described FAR Pt. 13.500(e).").

[143] *Id*. pt. 13.5000(d).

[144] U.S. DEP'T OF DEF., OFF. OF THE INSPECTOR GEN., D-2006-115, COMMERCIAL CONTRACTING FOR THE ACQUISITION OF DEFENSE SYSTEMS (29 Sept. 2006).

[145] *Id*.

C. Socio-Economic Program Conflicts

The central contractor registration houses hundreds of thousands of small business's registrations.[146] The Federal Acquisition Regulation does not give specific guidance or make clear the order of precedence a contracting officer should apply to determine socio-economic program priority.[147] Recently, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have proposed amendments to the Federal Acquisition Regulation to effectively resolve this problem.[148] This proposed change is intended to clarify the "relationship among various small business programs with regard to whether one has priority over another for acquisition purposes,"[149] which may impact certain small business contractors.[150] However, the councils believe that when the changes take effect the volume of business in the small business program will remain the same.[151]

For the service-disabled veteran-owned small business, the proposed changes to the regulations require contracting officers to consider set-asides for service-disabled veteran-owned small businesses before considering a sole source award.[152] In cases where the contracting officer does not receive any acceptable offers from any service disabled veteran-owned small businesses, the set-aside may be withdrawn.[153] The proposed rule changes are unclear, however, concerning whether the withdrawing of the set-aside precludes a sole source award to a single qualified service-disabled veteran-owned small business.[154] In the meantime, where the prerequisites that would allow for a service-disabled veteran-owned small business set-aside have not been met, contracting officers are advised to follow current law and use their discretion to make a sole-source award to a service-disabled veteran-owned small business.[155]

VI. Program Participants

Congress squarely placed the task of ensuring success of the service-disabled veteran-owned small business program on the shoulders of federal agencies.[156] To achieve the 3% goal in the near future, agency officials must take the program lead and administer the program in accord with existing law and regulations.[157] Additionally, to ensure that the service-disabled veteran-owned small business and other socio-economic programs remain vibrant, federal agencies, quasi-governmental organizations,[158] and the business community must all work together.[159]

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[146] Socioeconomic Program Priority, *supra* note 125 (stating that as of March 2008 there are 313,512 small business firms; 13,000 HUBZone firms; 9,947 8(a) firms and 9,614 service-disabled veteran-owned firms).

[147] *Id*. (proposing rules to determine the relationship among small business programs).

[148] *Id*. (ensuring that proposed rules changes are in accord with the Small Business Administration's interpretation of the rules and its regulations).

[149] *Id*. (stating the change may have a significant economic impact on a significant number of small business programs). "The proposed rule changes would create an order of precedence for 8(a), HUBZone, and service-disabled veteran-owned businesses." *Id*.

[150] *Id*. (determining that depending on what side of the new rule they fall some small business contractors will gain contracts and others will lose them).

[151] *Id*.

[152] *Id*. (proposing changes to FAR pt. 191405(b)).

[153] *Id*. (proposing changes to FAR pt. 191405(c)).

[154] *See* MCS Portable Restroom Serv., B-299291, 2007 U.S. Comp. Gen. LEXIS 51 (Mar. 28, 2007) (finding The Veterans Benefit Act of 2003 read together with FAR pt. 19.1406(a), (b) provide an agency contracting officer the discretion to make a sole-source award to a service-disabled veteran-owned small businesses (SDVOSB) where the prerequisites that would allow for a SDVOSB set-aside have not been met).

[155] *Id*.

[156] Exec. Order No. 13,360, 69 Fed. Reg. 206 (Oct. 26, 2004).

[157] *See* Styles Memo, *supra* note 9.

[158] Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233 (directing the creation of the National Veterans Business Development Corporation).

[159] *See* Styles Memo, *supra* note 9.

A. The Role of Federal Agencies

Executive Order 13,360 directs federal agencies to develop a strategic plan to further Congress's policies to assist service-disabled veteran-owned businesses.[160] In the order, the President instructed agency heads to designate a senior level agency official responsible to implement the strategic plan.[161] In carrying out this duty, the responsible agency official monitors strategic plan compliance and works diligently towards meeting stated goals.[162] To encourage maximum competition among service-disabled veteran-owned small businesses, the agency official must encourage contracting officers to use contract set-asides and sole-source procurements where appropriate.[163] To encourage prime contractors to sub-contract with service-disabled veteran-owned small businesses, the responsible agency official should ensure that agency sub-contracting plans are developed and closely monitored.[164] Finally, to make businesses aware of the strategic plan, the senior agency official must educate both contractors and other interested parties on the applicable law.[165] An organization that assists government agencies, large business, and service-disabled veterans to accomplish these tasks is the National Veterans Business Development Corporation.

B. The Role of the National Veterans Business Development Corporation

The Veterans Entrepreneurship and Small Business Act of 1999 created the National Veterans Business Development Corporation.[166] Founded in 2001, the National Veterans Business Development Corporation is a non-profit, quasi-governmental organization headed by a board of directors chosen by the President of the United States.[167] The mission of the National Veterans Business Development Corporation is to identify, to unite veteran-owned businesses, and to promote to industry the advantage of doing business with service-disabled veterans. [168] In addition to direct assistance, the National Veterans Business Development Corporation also advocates and strengthens veteran-owned businesses through lobbying efforts at both the state and federal levels.[169] Finally, the National Veterans Business Development Corporation provides veterans with advice and counsel to start, resource, develop and grow a small business.[170] With the creation of the National Veterans Business Development Corporation, veterans aspiring to start a small business have a resource to help them to succeed as small business owners and therefore, industry is better equipped to partner with them.[171]

C. The Role of the Industry

Federal agencies and veteran-owned small businesses depend on their prime contractors and other small business to meet the service-disabled veteran-owned small business program contracting goals.[172] Depending on the type of work to be performed under the contract, a service-disabled veteran-owned small business performing as a prime contractor may subcontract a certain portion of its business to other small businesses.[173] Large businesses acting as a prime contractor

[160] Exec. Order No. 13,360, 69 Fed. Reg. 206 (2006).

[161] *Id*.

[162] *Id*.

[163] 13 C.F.R. §§ 125.19, 125.20 (2008).

[164] *Id*. §§ 125.2, 125.3.

[165] Exec. Order No. 13,360, 69 Fed. Reg. 206.

[166] Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233.

[167] Veteranscorp.org, About the Veterans Corporation, http://www.veteranscorp.org/AboutTVC.aspx (last visited July 29, 2008) [hereinafter About the Veterans Corporation] ("Board members are chosen [by the President] because of their experience, knowledge and expertise they possess within both business and veteran's issues.").

[168] *Id.*

[169] *Id*.

[170] Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50.

[171] *Id*.; *see also* Ironclad/EEI, A Joint Venture v. United States, 78 Fed. Cl. 351 (Ct. Fed. Cl., Sept. 26, 2007) (stating a joint venture between a service-disabled veteran-owned small business and large businesses lacked standing to contest a Small Business Administration determination that it exceeded size limitations).

[172] 2 DEFENSE CONSULTING AND OUTSOURCING 1 (Sept. 2006), http://www.defense-consulting-outsourcing.com/article.cfm.

[173] *See id*. ("For construction contracts a service-disabled veteran-owned business must perform at least 15% of the work. In the case of services, the firm will complete at least 50% of the work. Finally, contracts involving supplies, at least 50% of the cost of manufacturing the items (not including labor).")

contributes to the success of the service-disabled veteran small business program through subcontracting.[174] In either case, subcontracting plans are the most direct method to ensure that service-disabled veteran-owned small businesses obtain a fair proportion of agency contracts.[175] As a cautionary measure, agency contracting officers are encouraged to develop a subcontracting plan into any solicitation in order to avoid potential protest from small business concerns, thus potentially spoiling the goodwill created within the alliance between large businesses and service-disabled veteran-owned small businesses.[176]

Another method for service-disabled veterans to effectively and equitably compete with large industry for an agency contract is to form a joint venture.[177] A service-disabled veteran-owned small business may enter into a joint venture with another small business provided the business arrangement is controlled and managed by the service-disabled veteran.[178] The service-disabled veteran-owned small business should be aware that to retain a contract preference he may not enter into a joint venture agreement with a large business.[179]

VII. Conclusion

Federal agencies have failed to comply with Congress's intent with respect to the service-disabled veteran-owned small businesses program.[180] To meet statutory guidelines, personnel involved in the procurement process must continue to work diligently within the boundaries of the law.[181] However, if the goal of awarding at least 3% of all federal contracts to service-disabled veteran-owned small businesses does not develop into a statutory benchmark, it will always remain just an aspiration.[182] To encourage compliance, Congress may consider assessing a monetary penalty or sanction on federal agencies.[183]

Penalties and sanctions aside, to increase federal contracting opportunities for service-disabled veteran-owned small businesses, agencies must faithfully implement their strategic plans, responsibly use simplified acquisitions procedures, appropriately bundle contracts, effectively adhere to subcontracting plans, and partner accordingly with large and small businesses,[184] quasi-governmental organizations and veterans.[185] Only when these and other similar tasks are accomplished, will the true spirit and intent of the law—recognition of the sacrifices of service-disabled veterans—be finally achieved.

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[174] *See* 13 C.F.R. 125.3 (2008) (describing subcontracting assistance in-general).

[175] *See id*. (describing the purpose of subcontracting plans is to provide maximum subcontracting opportunities for all small businesses concerns).

[176] *See* Nautical Eng'g, Inc., 2007 U.S. Comp. Gen. LEXIS 211 (Nov. 7, 2007) ("U.S. Coast Guard required the successful offeror to establish and maintain a mentoring or partnership agreement with at least two small firms and to contract out not less than 25% of its orders for ship repair and maintenance to small businesses.").

[177] FAR, *supra* note 41, pt. 19.4.

[178] Singleton Enters.-GMT Mech., A Joint Venture v. United States, B-310552, 2008 U.S. Comp. Gen. LEXIS 3 (Jan. 10, 2007) (citing 13 C.F.R. § 125.15(b) (2006) and FAR pt. 19.1403(c) (2007)) (stating service-disabled veteran must control the joint venture).

[179] *Id*. (quoting 13 C.F.R. § 125.15(b)) ("A service-disabled veteran-owned small business (SDVOSB) may enter into a joint venture with one or more other [small business concerns] for the purpose of performing a (SDVOSB) contract.").

[180] Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233; Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2662 (codified at 15 U.S.C. § 657f); Veterans Benefit, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461 120 Stat. 3403.

[181] *Id*.

[182] *DOD Goals & Stats.*, *supra* note 17.

[183] Transp. Security Agency, Small & Disadvantaged Bus. Office, Small Business Policy, Subcontracting Incentive Program, pt. 3.6.1.10.3 (2007), *available at* http://www.tsa.gov/join/smallbiz/smallbiz_policy.shtm (stating the Transportation and Security Agency may utilize positive incentives to the maximum extent practicable, and devise monetary penalties, for prime contractors who fail to meet stated goals).

[184] Press Release, ARINC, "Industry Day" at ARINC Launches Regional Effort to Recruit Veteran-Owned Businesses for DOD Supply Chain (Jan. 22, 2008), http://www.arinc.com/news/2007/10-25-07.html.

[185] 48 C.F.R. §§ 5.002 (a), (c) (2002).

> Contracting officers must publicize contract actions in order to (a) increase competition; (b) broaden industry participation in meeting Government requirements; and, (c) assist small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns in obtaining contracts and subcontracts.

Id.

Sharing the wealth—Coast Guard Law Enforcement Information Valuable to the National Intelligence Effort or How the Coast Guard Defeats the Wall

*Commander Peter J. Clemens**

The 9/11 Commission Report identified information sharing paucity within and between agencies of the federal government as a critical gap in the "back office" side of government operations.[1] Other commissions have identified the need to improve information sharing,[2] and Congress has passed several provisions that enable greater sharing of specific types of information.[3] Recognizing that information sharing is sometimes challenging but always rewarding, the Coast Guard has provided clear guidance enabling the sharing of information obtained during law enforcement and other operations with the national intelligence community. Likewise, this guidance enables intelligence originating from the intelligence community to be shared with operational commanders engaged in law enforcement.

The Coast Guard intelligence program has established a process to systematically review information reported from the field for national intelligence value. This process is designed to implement statutory requirements and improve the information's availability across the intelligence community. Unique among the nation's armed forces, the Coast Guard relies on a variety of statutory authorities to obtain information. The authority relied on, and the regulations specific to the information management system, dictate the authorized dissemination of the collected information. This article is narrowly focused on the legal basis for information sharing between the law enforcement and intelligence programs. This separation was often referred to as a "wall"[4] perceived to exist between intelligence activity and law enforcement activity. Although a wider world of information sharing exists within the rubric of maritime domain awareness, that wider world is not the focus here.

Background

The Coast Guard intelligence element became part of the intelligence community when President Bush signed the Intelligence Authorization Act of 2002 into law.[5] The authority to conduct intelligence activities, as contemplated by the National Security Act of 1947,[6] was added to the tool box of Coast Guard authorities enabling maritime missions that protect the nation from all hazards and threats found in the maritime environment. As the Coast Guard was developing its policies and procedures in 2002 and 2003 to guide the use of its newly acquired intelligence authorities,[7] the "wall,"[8] erected by court opinions[9] and related U.S. Department of Justice (DOJ) practice and opinions,[10] retained some vitality in at least confusing if

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[1] FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES § 13.3 "Unity of Effort in Information Sharing" (2004) [hereinafter FINAL REPORT].

[2] *See, e.g.*, THE COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES, Conclusion 20 (2005), *available at* http://www.wmd.gov/report/wmd_report.pdf.

[3] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) of 2001, Pub. L. No. 107-296, § 905, 115 Stat. 272 [hereinafter USA PATRIOT ACT]; Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; Intelligence Reform and Terrorism Prevention Act (Intelligence Reform Act) of 2004, Pub. L. No. 108-458, 118 Stat. 3638 [hereinafter 2004 Intelligence Reform Act].

[4] *See* A REVIEW OF THE FBI'S HANDLING OF INTELLIGENCE INFORMATION RELATED TO THE SEPTEMBER 11 ATTACKS, at 26 (Nov. 2004 – Released June 19, 2006 by the Office of the Inspector General, DOJ) [hereinafter FBI'S INTELLIGENCE HANDLING REVIEW] (quoting a memorandum by Richard Scruggs, Head of the DOJ's Office of Intelligence Policy and Review (OIPR), *available at* http://www.fas.org/irp/agency/doj/oig/fbi-911/chap2.pdf. Apparently, it was Scruggs who first used the phrase "Chinese Wall" to describe the separation between the Intelligence and Law Enforcement communities. *Id.*

[5] Intelligence Authorization Act (IAA) for Fiscal Year 2002, Pub. L. No. 107-108, 115 Stat. 1394 (2001) [hereinafter 2002 IAA].

[6] National Security Act (NSA) of 1947, Pub. L. No. 253, 61 Stat. 496 (1947) [hereinafter 1947 NSA]. Specifically, section 105 of the 2002 IAA amended the 1947 NSA to include the Coast Guard within the intelligence community, (50 U.S.C. § 401a(4)(H)), and section 1073 of 2004 INTELLIGENCE REFORM ACT amended 50 U.S.C. § 401a(4)(H) to § 401a(4)(K).

[7] *See* 2002 IAA, *supra* note 5.

[8] *See* FBI'S INTELLIGENCE HANDLING REVIEW, *supra* note 4.

[9] *See id.* at 22–24 (quoting United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980) (articulating that the "primary purpose test" when it construed the FISA warrant application "purpose" certification requirement. The original test required only that the government certify that the information sought

not actually limiting information sharing between law enforcement and intelligence personnel.[11] The Coast Guard was challenged to construct a process that recognized the differences in authority and the related rules associated with those authorities without creating an impassible or restrictive barrier. Information is a necessary ingredient in planning and performing enforcement operations. Additionally, due to the nature of the maritime environment, information obtained during routine Coast Guard operations is often uniquely valuable to the intelligence community. This information can support intelligence community analysis of a number of national security challenges. Information sharing is critical to the efficiency and efficacy of both the recipe to plan and conduct enforcement operations as well as the national intelligence effort.

Intelligence "Collection"

Collection as a verb must be understood in the context of an intelligence discipline. Collection is associated with reliance on intelligence authority, describing the conduct of intelligence activity with the objective to obtain information (e.g. collect intelligence) about the operating environment, the adversary, and the adversary's plans and intentions.[12] The term "collection" also refers to the narrower arena of human intelligence (HUMINT) collection. Although collection occurs via other means, the Coast Guard process discussed in this article does not affect other technology reliant collection disciplines. Collection in this sense can be contrasted against traditional law enforcement questioning which generally relies on seizure analysis under the Fourth Amendment.[13] The Coast Guard has the authority to conduct intelligence collection[14] as well as the authority to perform law enforcement questioning.[15] The collection legal analysis requires a two step inquiry: (1) is the information physically possessed, and (2) is continued possession intended to further an intelligence purpose?[16] Limitations on this authority are found in Executive Order 12,333, guidelines that implement Executive Order 12,333 within the agency,[17] as well as the Fourth Amendment, related case law, and other applicable law.[18] This two step analysis is critical to ensure that the limitations on intelligence authority do not become a barrier to conducting legitimate review of the material.

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was foreign intelligence. However, the *Truong* court added the additional requirement that the information sought be for the "primary purpose" of collecting foreign intelligence.)) "However, the court ruled that the government's primary purpose in conducting an intelligence investigation could be called into question when prosecutors had begun to assemble a prosecution and had led or taken on a central role in the investigation." *Id.* at 23; *see also* United States v. Johnson, 952 F.2d 565 (1st Cir. 1991) (applying the "primary purpose test" language in its decision).

[10] *See, e.g.*, Memorandum from Janet Reno, U.S. Att'y Gen., DOJ, to Asst. Att'y Gen. Criminal Div. et al., subject: Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations (July 19, 1995) (setting forth the policy that no information collected regarding foreign intelligence or foreign counterintelligence maybe shared for criminal investigative purposes without first being vetted by the OIPR), *available at* http://www.fas.org/irp/agency/doj/fisa/1995procs.html; *see also* Memorandum from Larry D. Thompson, U.S. Att'y Gen., DOJ, to Michael Chertoff, Asst. Att'y Gen. et al., subject: Intelligence Sharing, (Aug. 6, 2001) (reconfirming the DOJ's 1995 policies and procedures regarding information sharing between the intelligence and law enforcement communities), *available at* http://www.fas.org/irp/agency/doj/fisa/dag080601.html.

[11] Kate Martin, *Domestic Intelligence and Civil Liberties*, 24 SAIS REV. (Winter-Spring 2004).

[12] *See generally* U.S. COAST GUARD, COMMANDANT INSTRUCTION MANUAL 3820.12, COAST GUARD INTELLIGENCE ACTIVITIES glossary of terms (28 Aug. 2003) [hereinafter CIM 3820.12] (defining "collection" as "[t]he gathering or receipt of information, regardless of source, by a Coast Guard national intelligence component, coupled with an affirmative act by that component demonstrating intent to use or retain that information for intelligence purposes." CIM 3820.12 also defines "national intelligence" to include "foreign intelligence" which in turn defines "foreign intelligence" as "[i]information relating to the capabilities, intentions, or activities of foreign governments, or elements thereof, or foreign organizations or foreign persons, or international terrorist activities").

[13] *See* Katz v. United States, 389 U.S. 347, 357 (1967) (reviewing the general rule that warrantless searches are unreasonable except for ". . . specifically established and well-delineated exceptions"); *see also* Terry v. Ohio, 392 U.S. 1, 29 (1968) (discussing the fact that law enforcement personnel may, ". . . in light of his experience that criminal activity may be afoot . . ." make inquiries into such conduct). Both cases stand for the basic proposition that law enforcement conduct must conform to the requirements of the 4th amendment, i.e., searches and seizures must be affected by warrant, unless a lawful exception exists, and the search or seizure is reasonable under the circumstances.

[14] *See* 2002 IAA, *supra* note 5.

[15] *See* 14 U.S.C § 2 (2000) ("The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws, on, under, and over the high seas and waters subject to the jurisdiction of the United States . . ."); *see also* 14 U.S.C. § 89 ("The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States.").

[16] Exec. Order No. 12,333 § 2.3, 3 C.F.R. 200, *amended by* Exec. Order No. 13,355, 69 Fed. Reg, 53,593 (Aug. 27, 2004). *See generally* CIM 3820.12, *supra* note 12, glossary of terms.

[17] Coast Guard Intelligence Activities implement Executive Order 12,333 for the Coast Guard, other IC members must rely on their agency implementing policy for this analysis. *See* CIM 3820.12, *supra* note 12 (setting forth the Coast Guard's implementing instructions of Executive Order 12,333). Other applicable laws include the Foreign Intelligence Surveillance Act (FISA) of 1978, 50 U.S.C. § 1801–1871 (2000) [hereinafter FISA].

[18] *See* FISA, *supra* note 17.

By analogy, intelligence collectors may read the newspaper without limitation; however, if an intelligence collector wants to continue possession of the newspaper to further an intelligence purpose then further evaluation must be conducted to ensure that the authority limitations are complied with prior to actually retaining the information from the newspaper. In this way intelligence collectors may read, or review, information about a U.S. person[19] without violating a proscription from Executive Order 12,333.[20] However, they may not collect that information unless authorized to do so.[21]

Obtaining Law Enforcement Information

The Coast Guard has defined law enforcement intelligence as "information collected, stored, and used by Law Enforcement Intelligence Program personnel or non-intelligence components of the Coast Guard pursuant to Coast Guard law enforcement and/or regulatory authority."[22] In short hand, any information obtained while relying on an authority other than intelligence activity authority qualifies as law enforcement intelligence in the Coast Guard. Routine Coast Guard operations require interaction with a large number of foreign nationals and international travelers who are able to provide information on port conditions and operations. Any information obtained while conducting these routine Coast Guard operations is categorized as law enforcement intelligence.

Navigating the Channel between Law Enforcement and the Intelligence Community

The Coast Guard has the authority to operate in the information paradigms of both the law enforcement and intelligence communities.[23] It is critical to any analysis to recognize, in the first instance, which paradigm you are starting from when attempting to determine how information may be shared with the other paradigm. Knowing the starting point enables application of the necessary legal standards and ensures compliance with related policy requirements. The interface between these communities exists in the Coast Guard at Maritime Intelligence Fusion Centers (MIFC) located both in the Atlantic and Pacific area of operations, as well as at the Intelligence Coordination Center (ICC) located at the National Maritime Intelligence Center (collectively Coast Guard intelligence production centers). The production centers apply law and policy to ensure that the Coast Guard stays in "good water" while navigating this well marked channel. For law enforcement intelligence support personnel, information sharing and the subsequent intelligence derived from that information is focused on supporting Coast Guard enforcement personnel conducting operations. Analysts at the Coast Guard productions centers are challenged to navigate this interface and ensure information is shared between both communities. Analysts review information obtained by Coast Guard field personnel to determine if it may be responsive to national level intelligence requirements. Similarly they are in a position to review products from the intelligence community and bring them to the attention of field commanders who may benefit from those products.

Field personnel report unevaluated intelligence information to the Coast Guard production centers with a field intelligence report (FIR).[24] Field intelligence reports were created specifically to enable units to submit information of potential intelligence value to support Coast Guard missions. Field intelligence reports reflect the full range of Coast Guard maritime activity. These reports can provide domain awareness for port level activity. They can also report responses to questions asked by field personnel during enforcement operations, routine patrols, or other routine interactions with mariners. Field intelligence reports are analyzed to respond to Coast Guard information requirements. Concurrently, they are reviewed at each Coast Guard production center to determine if they meet national level intelligence needs. Intelligence analysts ensure that appropriate field level reports are available to the intelligence community, navigating this interface requires

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[19] *See* Exec. Order No. 12,333 § 3.4(i) (defining a "U.S. Person" as a "United States citizen, an alien known by the intelligence agency concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments.").

[20] *Id*. § 2.3(a).

[21] *See id.* § 2.3 ("Agencies within the Intelligence Community are authorized to collect, retain or disseminate information concerning United States persons only in accordance with procedures established by the head of the agency concerned. . . ."). Subsequently, the Coast Guard implemented CIM 3820.12 Procedure 2.B.2, *supra* note 12, which states, "[c]ollection of information shall meet the following criteria: . . . [b]e based on a function assigned to that Coast Guard national intelligence component."

[22] U.S. COAST GUARD, COMMANDANT INSTRUCTION 3820.14, POLICY FOR DISSEMINATION AND USE OF INTELLIGENCE INFORMATION (26 Feb. 2003) [hereinafter CI 3820.14].

[23] *See supra* notes 14, 15 and accompanying text.

[24] *See* U.S. COAST GUARD, COMMANDANT INSTRUCTION 3821.15, FIELD INTELLIGENCE REPORTS (20 Feb. 2004) (discussing policies and procedures for the use of FIRs).

knowledge of both the information handling rules associated with Coast Guard law enforcement information and knowledge of the intelligence collection inquiry required to ensure compliance with those policies.

Intelligence Collection

Field intelligence reports that are identified as being responsive to national level intelligence requirements can be collected within the constraints of Executive Order 12,333 guidance.[25] In this analysis the Coast Guard production center analyst acts as a collector and applies the two step collection review to determine if the FIR should be translated into an intelligence information report (IIR). The IIR is the vehicle to share information with the intelligence community. Intelligence information report's are transmitted to a variety of Defense intelligence partners and are available throughout the intelligence community for use within those intelligence production processes.

Practical Application

The narcotics smuggling trade has a long history of innovation.[26] Cocaine originating from South America is transported across, under, and over the maritime separation between North and South America.[27] Recently the narco-traffickers have demonstrated the utility of semi-submersible vessels to transport large amounts of cocaine.[28] This developing capability represents a set of new information requirements for both Coast Guard enforcement operations and Coast Guard intelligence.

Preventing the illegal importation of controlled substances is both a law enforcement challenge and a challenge for the intelligence community. The "war on drugs" has been and will likely continue to be a national priority.[29]

Coast Guard units that have interdicted shipments by semi-submersible have been able to provide information to the intelligence program with FIRs. The FIRs are reviewed at the production centers and, those that contain information responsive to national collection requirements, may be translated into IIR. Additionally, interviews of the suspects operating the semi-submersible vessels have resulted in numerous FIRs, some of which were translated into IIRs.

In an area of operations unrelated to narcotics smuggling, Coast Guard Field Intelligence Support Team (FIST) personnel interview foreign nationals that arrive in domestic ports on foreign flagged vessels.[30] These interviews often result in increased awareness of foreign port conditions. The FIRs originated by these FIST personnel enable focused enforcement efforts by Coast Guard boarding teams as the intelligence program identifies potential risk in the commercial fleets.

Responsive to Legal and Policy Mandates

The mandated information sharing requirements found in the USA PATRIOT ACT,[31] and the Homeland Security Act of 2002[32] are at the core of the memorandum of understanding (MOU) between the intelligence community, the federal law enforcement agencies, and the Department of Homeland Security.[33] This MOU also relies on two attorney general

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[25] *See* CIM 3820.12, *supra* note 12.

[26] *See generally* Admiral Thad Allen, Commandant, U.S. Coast Guard, Address at the National Press Club (Feb. 8, 2008) (discussing the fact that the drug traffickers have historically moved back and forth from aviation to maritime trafficking as needed. Admiral Allen also recognized the recent rise in the use of semi-propelled, semi-submersibles used to transport narcotics, a trend due largely to the successful maritime drug interdiction efforts of many agencies, including the Coast Guard) (transcript available at http://www.uscg.mil/comdt/speeches/docs/NPC.8%20Feb%202008.pdf, video available at http://cgvi.uscg.mil/media/main.php?g2_itemId=220656).

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *See generally* U.S. COAST GUARD, COMMANDANT INSTRUCTION 3831.10, FIELD INTELLIGENCE SUPPORT TEAMS (3 Nov 2006) (discussing policies and procedures governing FIST personnel).

[31] *See* USA PATRIOT ACT, *supra* note 3, §§ 203, 905.

[32] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 202, 221, 116 Stat. 2135.

[33] Memorandum of Understanding Between the Intelligence Community, Federal Law Enforcement Agencies, and the Department of Homeland Security Concerning Homeland Security Information Sharing. This MOU was promulgated by a Director of Central Intelligence memorandum as cover to the MOU

memoranda[34] that implement sections of the USA PATRIOT Act. This tight web of policy guidance predated the National Security Intelligence Reform Act of 2004[35] which created the Information Sharing Environment (ISE).[36] Nonetheless it implements the statutes and forms a solid basis for what the Director of National Intelligence now has labeled the "responsibility to provide"[37] supporting the development of the ISE.

Establishing the FIR as a simple mechanism for field level personnel to report anything perceived to have some intelligence value has enabled the Coast Guard to meet these legal and policy mandates without unduly burdening operators. The Coast Guard production centers bear some of the burden to ensure that information responsive to national intelligence requirements is systematically evaluated and provided to the intelligence community. This process augments the Coast Guard's traditional focus on interagency cooperation at the field level through participation in joint task forces. Joint Interagency Task Forces (JIATF), as well as Joint Terrorism Task Forces (JTTF) and other task forces (e.g. Organized Crime Drug Enforcement Task Force), remain vital to the flow of information between and among federal and non-federal partners. These less formal mechanism continue to be supported by the Coast Guard and the Attorney General guidance makes it clear that formal sharing mechanisms should augment but not replace such arrangements.[38]

The Two Way Street

Coast Guard Commanders also benefit from intelligence information that the Coast Guard Intelligence Program receives from the intelligence community. The Coast Guard policy for use and dissemination of intelligence information guides practitioners in the rules for utilizing all source intelligence at the field level.[39] This policy guides all Coast Guard personnel to applicable legal and policy standards when handling intelligence information.[40] The policy is intended to provide a baseline of knowledge and enable field personnel to avoid unauthorized disclosures of sensitive information.[41]

Conclusion

Rather than focus on the prescriptive formulae represented by the reference to a wall, the Coast Guard program leverages all authorities available to navigate the narrow, but well marked, channel through the shoal waters of sensitive intelligence information use and dissemination. The well marked channel enhances the information flow available to national level decision makers while ensuring Coast Guard personnel adhere to applicable law and policy. Concurrently the Coast Guard extends the use of national intelligence products applicable to Coast Guard operations worldwide and thereby improves the planning and conduct of Coast Guard operations.

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signed by Attorney General Ashcroft, 4 March 2003; Director of Central Intelligence Tenet, 4 March 2003; and Secretary of Homeland Security Ridge, 28 February 2003. The Department of Defense subsequently entered into the MOU. *Id.*

[34] Memorandum, Attorney General, to Heads of Department Components, subject: Guidelines for Disclosure of Grand Jury and Electronic, Wire, and Oral Interception Information Identifying United States Persons (Sept. 23, 2002); Memorandum, Attorney General, subject: Guidelines Regarding Disclosure to the Director of Central Intelligence and Homeland Security Officials of Foreign Intelligence Acquired in the Course of Criminal Investigations (Sept. 23, 2002).

[35] 2004 Intelligence Reform Act, *supra* note 3.

[36] *See id.* § 1016a(2)(establishing the concept of ISE. Section 1016a(2) defines ISC as ". . . an approach that facilitates the sharing of terrorism information, which approach may include any methods determined necessary and appropriate for carrying out this section").

[37] *See* Dir. Of Nat'l Intelligence, U.S. Intelligence Community Information Sharing Strategy 3 (22 Feb. 2008), *available at* http://www.fas.org/irp/dni/iss.pdf ("The DNI has called on the Intelligence Community to transform its culture to one where the 'responsibility to provide' information is a core tenet.").

[38] Memorandum, Attorney General, to Heads of Department of Justice et al., subject: Guidelines Regarding Disclosure to the Director of Central Intelligence and Homeland Security Officials of Foreign Intelligence Acquired in the Course of a Criminal Investigation (Sept. 23, 2002).

[39] CI 3820.14, *supra* note 17.

[40] *Id.*

[41] *Id.*

Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts

Major Jeffrey S. Thurnher[*]

Blackwater's an extraordinarily professional organization and they were doing exactly what they were tasked to do: protect the principal. The problem is in protecting the principal they had to be very aggressive, and each time they went out they had to offend locals, forcing them to the side of the road, being overpowering and intimidating, at times running vehicles off the road, making enemies each time they went out. So they were actually getting our contract exactly as we asked them to and at the same time hurting our counterinsurgency effort.[1]

I. Introduction

On 16 September 2007, a five vehicle convoy transporting American diplomats departed from the Green Zone, the heavily-protected diplomatic area of Baghdad.[2] On that hot Sunday morning, with temperatures approaching one hundred degrees, the diplomats headed to another area of Baghdad for a meeting with local Iraqis to discuss reconstruction efforts in Iraq.[3] The convoy consisted of three black GMC Suburbans, "each fitted with armored plates and bulletproof windows," and a lead and trail vehicle.[4] The diplomats rode in the Suburbans, while both end vehicles were gun trucks, known as "Mambas."[5] The Mambas carried the security detail and were armed with 7.62mm machine guns mounted on top.[6]

The journey to the meeting was uneventful and the diplomats' meeting concluded around noon.[7] On the return trip back to the Green Zone, the convoy's security team engaged its small arms weapons systems inside the crowded Nisour[8] Square area of Baghdad.[9] During that "chaotic half-hour in a busy square,"[10] approximately five members of the security team fired automatic weapons while an American security helicopter was summoned to hover overhead.[11] Neither the diplomats nor the security team suffered any casualties, but seventeen Iraqis died as a result of the skirmish.[12] While Iraqi citizens had been killed by American forces before, this incident caused an unusually unified and strong condemnation from the various elements of the Iraqi Government.[13]

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[1] Interview by PBS Frontline with Colonel (Retired) Thomas X. Hammes, USMC (Mar. 21, 2005) (transcript available at http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/hammes.html).

[2] *See Blackwater to Blame for Killings*, STAR-LEDGER (Newark, N.J.), Oct. 9, 2007, at 4.

[3] *See id.*; *cf.* David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1 (stating that it was a convoy of "four armored vehicles").

[4] *Blackwater to Blame for Killings*, *supra* note 2.

[5] *Id.*

[6] *See id.*

[7] *See id.*

[8] The spelling of the name of the square varies in different media reports. It is listed as "Nisoor" Square in several publications. *See*, *e.g.*, Christian Berthelsen & Raheem Salman, *Blackwater Case Discussed; Iraqis Interviewed in an FBI Probe Reveal Details of the Shooting and Talk About the Agents' Focus*, L.A. TIMES, Oct. 31, 2007, at A8.

[9] *See* Johnston & Broder, *supra* note 3, at A1.

[10] *See id.*

[11] Adam Zagorin & Brian Bennett, *Iraq Limits Blackwater's Operations*, TIME, Sept. 17, 2007, *available at* http://www.time.com/time/world/article/0,8599,1662586,00.html.

[12] *See* Johnston & Broder, *supra* note 3.

[13] *See* Amit R. Paley, *Iraq Moves to Repeal Immunity for Guards*, WASH. POST, Oct. 31, 2007, at A14.

The unique aspect of this engagement, and the main cause for the fervent criticism, was the direct involvement of an American private security contractor (PSC)[14] firm, Blackwater Worldwide[15] (Blackwater), which had been contracted by the United States to provide security for the American diplomats.[16] A PSC had never directly caused so many innocent Iraqi deaths before this incident.[17] The death of such a large number of Iraqis at the hands of contractors reverberated far beyond the borders of Iraq.[18] It also exposed significant flaws in the United States' policies governing control of PSCs on the battlefield.

The most significant of those exposed flaws was the lack of government control or accountability over these contractors. This flaw stemmed from many factors, including the failure to assign enough "American officials in Iraq to enforce the rules that apply to [PSCs],"[19] and a controversial order from the Coalition Provisional Authority (CPA), CPA Order 17, which gave PSCs immunity from prosecution in Iraqi courts.[20] Such faults threaten to significantly undermine the overall mission in Iraq.[21] These failures are significant and magnified with respect to America's effort in Iraq for two principle reasons: the scope of involvement of contractors in the campaign and the nature of the conflict in Iraq.

First, the United States has relied more upon contractors in Iraq than in previous operations.[22] The United States is estimated to have had over 180,000 contractors supporting its operations in Iraq in 2007.[23] Thus, contractors are one of the largest contributors of manpower in the deployed area.[24] These contractors have been considered part of the Department of Defense (DOD) "Total Force" since the 2006 Quadrennial Defense Review.[25] All these elements of force on the battlefield need to work cohesively.[26] However, as witnessed above, oversight of PSCs in Iraq must dramatically improve. Having such a large contractor force on the battlefield without adequate oversight is dangerous and irresponsible.[27]

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[14] The term private security contractor is often also referred to as private security firm, private military company, private military firm, or other descriptive terms. Some commentators have drawn distinctions between the various terms based upon the relevant functions of the organization. This article consistently refers to all contracted groups that provide security of persons, property, installations, or convoys as private security contractors unless otherwise stated.

[15] Blackwater Worldwide was previously known as Blackwater, U.S.A. *See* August Cole, *Next Test for Blackwater*, WALL ST. J., Nov. 13, 2007, at A6.

[16] *See* David Johnston & John M. Broder, *U.S. Prosecutors Subpoena Blackwater Employees*, N.Y. TIMES, Nov. 20, 2007, at A10.

[17] *See* Ginger Thompson, *From Texas to Iraq, and Center of Blackwater Case,* N.Y. TIMES, Jan. 19, 2008, at A4 ("The Sept. 16 shooting in Nisour Square is considered by the F.B.I., the Pentagon and the Iraqi government to be among the most egregious examples of unprovoked violence by private security contractors."). *See generally* John M. Broder & James Risen, *Blackwater Tops Firms in Iraq in Shooting Rate*, N.Y. TIMES, Sept. 27, 2007, at A1 (detailing other incidents involving private security contractors). There have been other significant engagements involving PSC personnel, such as one in which Blackwater employees killed an estimated twenty to thirty protesters seeking to overrun the Coalition Provisional Authority (CPA) regional headquarters in Najaf on 4 April 2004. *See* JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY 122–29 (2007). The September 2007 incident differed from those earlier engagements in that the majority of deaths in the September 2007 engagement have been deemed unjustified. *See generally* Assoc. Press, *Report: FBI Finds 14 Blackwater Killings Unjustified*, Nov. 14, 2007, http://www.cnn.com/2007/US/11/14/iraq.blackwater.ap/index.html ("[A]t least 14 of the 17 Iraqi civilians shot by Blackwater personnel guarding a U.S. Embassy convoy were unjustified and violated standards in place governing the use of deadly force."). However, as of July 2008, the Justice Department has still not released its final report. In May 2008, a federal grand jury heard evidence to determine "whether the contractors, who are immune from Iraqi law . . . can be charged with any crime in the United States." *See* Karen DeYoung & Del Quentin Wilber, *Grand Jury Probes Blackwater Shootings*, WASH. POST, 28 May 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/05/27/AR2008052702637.html?hpid=moreheadlines.

[18] *See generally* P.W. Singer, *Can't Win With 'Em, Can't Go to War Without 'Em: Private Military Contractors and Counterinsurgency*, FOREIGN POL'Y AT BROOKINGS, at 10 (2007) (Policy Paper No. 4), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2007/0927militarycontractors/0927militarycontractors.pdf (detailing how the incident was covered extensively throughout the Muslim world).

[19] John M. Broder & David Rohde, *State Department Use of Contractors Leaps in 4 Years*, N.Y. TIMES, Oct. 24, 2007, at A1.

[20] Signed in June 2004 shortly before the CPA disbanded, CPA Order 17 granted PSCs immunity from "Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a contract." *See* Coalition Provisional Authority, *Coalition Provisional Authority Order Number 17 (Revised), Status of the Coalition Provisional Authority, MNF–Iraq, Certain Missions and Personnel in Iraq*, 27 June 2004 [hereinafter CPA Order 17], *available at* http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf.

[21] *See* Broder & Rohde, *supra* note 19.

[22] *See* Singer, *supra* note 18, at 2.

[23] *See* JENNIFER K. ELSEA & NINA M. SERAFINO, CONG. RESEARCH SERV. REPORT, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES, RL 32419, at CRS-3 (July 11, 2007), *available at* http://www.fas.org/sgp/crs/natsec/RL32419.pdf.

[24] *See* Singer, *supra* note 18, at iii.

[25] *See* U.S. DEP'T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 81 (2006) [hereinafter 2006 QDR]; *see also* SCAHILL, *supra* note 17, at xvi.

[26] *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-121 (15 Dec. 2006) [hereinafter FM 3-24] ("Unity of effort must be present at every echelon of a [counterinsurgency] operation.").

[27] *See* ELSEA & SERAFINO, *supra* note 23, at CRS-31 ("A lack of strict accountability in case of an abuse by a contractor could severely undermine goodwill toward the United States or incur liability on the part of the United States for a breach of its international obligations."). *See generally* Singer, *supra* note 18, at 1 (stating that the lack of oversight basically turned contractors' rules for the use of force into "mere guidelines with no actual consequences").

Second, the United States is engaged in a counterinsurgency in Iraq.[28] One of the keys to defeating that insurgency is winning the support of the local populace.[29] The impact of elements accompanying the force can be just as significant as the impact of the military force itself.[30] The incident involving Blackwater clearly serves as a case in point. This deadly exchange had strategic implications which adversely affected the United States' efforts to defeat the insurgency in Iraq.[31] The local populace often does not distinguish the military from contractors involved in the operations.[32] In many Iraqi minds, the perceived failures of Blackwater contractors to safeguard Iraqi lives are attributed simply as American failures.[33]

As detrimental and tragic as it has been, the September 2007 Blackwater incident has at least prompted the U.S. Government to conduct a long overdue re-examination of its flawed approach to overseeing PSCs.[34] Immediately after the incident, both the DOD and the Department of State (DOS) studied and took steps to improve their supervision of PSCs.[35] Congress also implemented several measures to ensure that PSCs can be held more accountable for any misconduct in Iraq.[36]

Despite these initial changes, more must be done to control PSCs operating on a complex battlefield. Fundamentally, the current use and lack of oversight of PSCs are detrimental to winning a counterinsurgency. If the United States chooses to rely on PSCs in unstable counterinsurgency operations in the future, it must significantly change the manner of control it has over these forces. Some essential improvements include placing accountability for all contractors under one overarching command, implementing stronger screening and training programs, and strengthening the options for investigating and prosecuting contractor misconduct.

Drastic measures need to be taken to improve the overall United States policy for controlling PSCs and holding those contractors accountable for their actions. Part II of this article provides an overview of the history of PSCs on the battlefield and explains how the United States got itself into such a precarious position in Iraq. Part III addresses the law of war implications of using PSCs while comparing the methods and approaches of the various governmental agencies who hired PSCs in Iraq before the September 2007 Blackwater incident. Part IV examines in depth the changes made in the wake of the Blackwater incident to better control PSCs. Finally, Part V proposes the additional accountability measures over PSCs necessary to ensure American success in future counterinsurgency campaigns.

II. History of Private Security Contractors

There is a long tradition of governments hiring outside forces to augment their militaries.[37] "Private warriors" have participated in battles from the earliest of times.[38] Private firms specializing in providing security first appeared in sixteenth century Italy when "mercantilism meant rival commerce families hired security elements against each other to control their

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[28] *See generally* Sean D. Naylor, *Jumping the Fence; Tribal 'Awakening' Brings Troops—and Hurdles*, ARMY TIMES, June 4, 2007, at 14 (discussing splitting the Sunni tribal elements of the insurgency off from al-Qaeda).

[29] *See generally* FM 3-24, *supra* note 26, para. 1-14 ("Victory is achieved when the populace consents to the government's legitimacy and stops actively and passively supporting the insurgency.").

[30] *See generally id.* para. 2-14 ("Various agencies acting to reestablish stability may differ in goals and approaches, based on their experience and institutional culture. When their actions are allowed to adversely affect each other, the populace suffers and insurgents identify grievances to exploit.").

[31] *See generally* Sudarsan Raghavan & Josh White, *Blackwater Guards Fired at Fleeing Cars, Soldiers Say*, WASH. POST, Oct. 12, 2007, at A1 (quoting Major General (MG) Joseph Fil, Commander of 1st Cavalry Division, as saying, "It's yet another challenge, another setback.").

[32] *See generally id.* (quoting MG Joseph Fil as saying in reference to the incidents of PSC misconduct, "In the aftermath of these, everybody looks and says, 'It's the Americans.' And that's us.").

[33] *See id.*

[34] *See generally, e.g.*, Peter Spiegel, *Blackwater Founder Defends Role in Iraq*, L.A. TIMES, Oct. 3, 2007, at A1 (discussing congressional hearings into the Department of State's oversight of Blackwater), *available at* http://articles.latimes.com/2007/oct/03/nation/na-blackwater3; John M. Broder & David Johnston, *U.S. Military to Supervise Iraq Security Convoys*, N.Y. TIMES, Oct. 31, 2007, at A1 (discussing meetings between the Secretary of State and the Secretary of Defense regarding oversight of PSCs in Iraq).

[35] *See infra* Part IV.A.–C. for an in-depth discussion of these DOD and DOS improvements.

[36] *See infra* Part IV.D. for a discussion of congressional action regarding PSCs.

[37] *See* P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 19 (2003) ("Hiring outsiders to fight your battles is as old as war itself.").

[38] *Id.* at 20.

businesses."[39] The practice has evolved greatly from its origins, and most security firms are now "organized along corporate lines."[40]

The United States has fully participated in this rich tradition of using contractors on the battlefield. In the Revolutionary War, the Continental Army relied on civilians for "transportation, carpentry, engineering, food, and medical services."[41] The United States continued to use contractors in mainly logistical roles for most of the next two hundred years.[42] This policy changed significantly, however, during the Vietnam War when the United States began using contractors "side by side with troops."[43] During the Vietnam campaign, contractors were relied upon to support the complex weapons systems regularly being used.[44]

During Operations Desert Storm/Desert Shield, the United States started relying even more extensively on contractors.[45] The type of assignments handled by contractors became more "critical to the U.S. military's core missions."[46] Contractors started supporting the military in areas such as, "security, military advice, training, . . . policing, technological expertise, and intelligence."[47] A number of factors contributed to this change in practice, such as President Ronald Reagan's emphasis on privatizing many military positions in the 1980s.[48] This was coupled with a reduction in the size of the military in the 1990s after the collapse of the Soviet Union.[49] However, the end of the Soviet Union did not end the need for an American military. Instead, the United States found itself with a smaller military and yet engaged in multiple conflicts in Somalia, Haiti, and the Balkans.[50] To complete those missions, the military relied heavily on contractors to perform assignments that had previously belonged to military members.[51]

This trend towards outsourcing assignments to private contractors escalated dramatically with the invasion of Iraq in 2003. The United States' use of contractors in Iraq is "unprecedented in both its size and scope."[52] The exact number of contractors in Iraq is unknown, but estimates indicate that there were more than 180,000 contractors employed by the United States Government in early 2007.[53] This marks a momentous increase from the estimated 2,000 that were employed during the Bosnia campaign.[54] The number of contractors has consistently been even greater than the total number of American

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[39] Kevin A. O'Brien, *What Should and What Should Not Be Regulated?*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 29, 37 (Simon Chesterman & Chia Lehnardt eds., 2007).

[40] *Id.* at 38.

[41] Lieutenant Colonel Stephen M. Blizzard, *Increasing Reliance on Contractors on the Battlefield: How Do We Keep From Crossing the Line?*, 28 A.F. J. OF LOGISTICS 1, 6 (Spring 2004).

[42] *See id.*

[43] *Id.*

[44] *See id.* (citing *Vietnam: How Business Fights the War on Contract*, BUS. WK., Mar. 5, 1965, at 58–62).

[45] *See* U.S. GOV'T ACCOUNTABILITY OFF., REP. TO THE SUBCOMM. ON READINESS AND MANAGEMENT SUPPORT, COMM. ON ARMED SERVS., U.S. SENATE GAO-03-695: CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS 1 (June 2003) [hereinafter GAO 2003 REPORT], *available at* http://www.gao.gov/new.items/d03695.pdf.

[46] SINGER, *supra* note 37, at 15.

[47] *Id.*

[48] President Reagan formed the Presidential Commission on Privatization in 1987 to determine which functions of the federal government should be performed by contractors. *See* Paul Blustein, *Panel Urges "Privatization" of Many Federal Services*, WASH. POST, Mar. 18, 1988, at A9; *Panel Finishes List of Privatization*, CHI. TRIB., Mar. 19, 1988, at 3. In 1988, the commission recommended seventy-eight areas in which privatization would increase the efficiency of the federal government. Blustein, *supra*; *Panel Finishes List of Privatization*, *supra*. Those initial recommendations included calls to privatize military commissaries and naval oil reserves. Bluestein, *supra*; *Panel Finishes List of Privatization*, *supra*.

[49] The military reduced its workforce by several hundred thousand active-duty members and civilian employees during the 1990s. *See* Michael R. Gordon, *Military Services Proposing Slashes in Existing Forces*, N.Y. TIMES, May 12, 1990, at A1; Patrick E. Tyler, *Military Chiefs Detail Plans to Cut Troops, Weapons*, WASH. POST, May 12, 1990, at A1; Joseph Neff & Jay Price, *A Business Gets a Start*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 28, 2005, at A1.

[50] *See* Neff & Price, *supra* note 49.

[51] *See id.*

[52] Singer, *supra* note 18, at 2.

[53] *See* ELSEA & SERAFINO, *supra* note 23, at CRS-3.

[54] *See* Colonel Stephen J. Zamparelli, *Contractors on the Battlefield—What Have We Signed Up For?*, 23 A.F. J. OF LOGISTICS 8, 11 (Dec. 1999), *available at* http://www.aflma.hq.af.mil/lgj/cob.pdf.

uniformed military forces in Iraq.[55] The amount the government spent for these contractors is also staggering when compared to prior conflicts.[56] For instance, the government signed a $20 billion contract for a logistics firm, Kellogg, Brown and Root, to control much of the logistics operations in Iraq.[57] That contract amount is roughly three times the total amount America spent to win the first Gulf War.[58]

More significant than the sheer size and cost of the increased use of contractors is the breadth of assignments being given to these workers. The United States is tasking its contractors in Iraq in a manner not done in prior conflicts.[59] The biggest area of change is the reliance on contractors to perform security functions in an "unstable environment."[60] Contractors are being used to "protect individuals, buildings and other infrastructure, and transport convoys."[61] These companies are performing critical functions that closely resemble military missions on the battlefield.[62] Even though these security roles are not of the type that contractors have traditionally performed, they are now considered "vital" to the operations in Iraq.[63]

It is unclear why the United States ended up relying on such a large number of PSCs in so many pivotal roles.[64] Regardless of the reason, it is clear that large numbers of PSCs have been involved since the beginning of the Iraq mission. The CPA, which began operating within weeks after the invasion, relied heavily on these PSCs to perform its duties.[65] The CPA spent $27 million to have Blackwater provide protection for CPA chief Paul Bremer and other key CPA officials.[66] Blackwater may have been the most high profile private security contractor, but it was just one of at least nine firms providing security and protection for the CPA workforce.[67]

After the CPA disbanded in June 2004, the DOS continued this trend of relying on PSCs, when it took over the Blackwater contract and immediately extended it for another year.[68] The DOS, however, was not alone in its use of PSCs in Iraq. The United States Agency for International Development (USAID) began contracting with various security firms, such

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[55] *See* John Podhoretz, *Saved by the Surge, But Troop Cuts Look Risky*, N.Y. POST, Oct. 2, 2007, at 23 (establishing the number of troops as a result of the "surge" at 168,000).

[56] *See* Singer, *supra* note 18, at 2.

[57] *See id*.

[58] *See id.*

[59] *See* ELSEA & SERAFINO, *supra* note 23, at CRS-1.

[60] *Id.*

[61] *Id.* at 2. *See generally* Singer, *supra* note 18, at 2 (explaining how contractors guarded dining facilities in Kuwait during the initial phases of the Iraq campaign).

[62] *See generally* Singer, *supra* note 18, at 3 (explaining that these contractors are engaging in "armed roles within the battle space. . . . They use military training and weaponry, to carry out missions integral to the mission's success, in the midst of a combat zone . . . ."); *infra* Part III.A (discussing how this change of mission for PSCs endangers their status as civilians accompanying the force, under the law of war, and how it risks that they will lose their protections from being targeting).

[63] *See* ELSEA & SERAFINO, *supra* note 23, at CRS-3.

[64] One theory is that Secretary of Defense Donald Rumsfeld made contracting such security services a priority during the Iraq mission. *See generally* SCAHILL, *supra* note 17, at xv–xvi (describing the plans for using more private contractors as "The Rumsfeld Doctrine"). Another theory is that after the successful overthrow of the Iraqi regime, rebuilding Iraq in essence became a mission for the DOS. The DOS, in turn, desired and relied heavily upon civilian contractors to provide its protection. *See generally* Karen DeYoung, *State Department Struggles To Oversee Private Army: The State Department Turned to Contractors Such as Blackwater Amid a Fight with the Pentagon Over Personal Security in Iraq*, WASH. POST, Oct. 21, 2007, at A1 (explaining how the President in January 2004 granted the DOS "authority over all but military operations" and detailing how numerous DOS officials thought civilian contractors were better able and suited to provide protection for their diplomats than military forces would be). Other commentators theorize that contractors were necessary because the size of the military in Iraq was limited to too few service members for political reasons. *See generally* Singer, *supra* note 18, at 3 ("If a core problem that U.S. forces faced in the operation in Iraq has been an insufficient number of troops, it is not that the U.S. had no other choices, other than to use contractors to solve it. Rather, it is that each of them was considered politically undesirable."). Yet others contend that the United States simply "underestimated the number of troops that would be required for stability and security operations." David Isenberg, *A Government in Search of Cover: Private Military Companies in Iraq*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 82, 83 (Simon Chesterman & Chia Lehnardt eds., 2007).

[65] *See* Daniel Bergner, *The Other Army*, N.Y. TIMES MAG., Aug. 14, 2005, at 29.

[66] *See* Broder & Rohde, *supra* note 19.

[67] *See* ELSEA & SERAFINO, *supra* note 23, at CRS-8.

[68] The estimated over $100 million contract with Blackwater, established the company as the primary firm protecting all of the American diplomatic officials in Iraq. *See* Broder & Rohde, *supra* note 19; DeYoung, *supra* note 64; *see also infra* Part III.C (discussing the DOS's use of PSCs in Iraq).

as Kroll, Inc. and DynCorp International (DynCorp), from the start of its mission in Iraq.[69] The DOD also relied extensively on PSCs in Iraq beginning at an early stage of the mission.[70]

The United States integrated the use of PSCs into almost every facet of its operation in Iraq. Not only were these PSCs incorporated into part of its total force,[71] but many commentators have concluded that the Iraq mission "would not be possible without" them.[72] The problem is that such widespread reliance on a contractor force demands significant accountability over that force. As one can see below, the United States failed to have strict accountability over its PSCs, in part, because it failed to produce a unified approach to dealing with these forces on the battlefield. Instead, the various agencies of government contracting for security had their own unique approaches for holding their contractors accountable, each with a varying degree of success.

III. Comparison of United States Approaches to Private Security Contractors

When America invaded Iraq in early 2003, it did not have a set plan on how to employ and control PSCs on the battlefield.[73] The need to plan for controlling such large numbers of PSCs had not been anticipated.[74] Without prior planning, a patch-like approach to using PSCs was established.[75] Unfortunately, this divided approach allowed the situation to deteriorate to the point where the Blackwater incident could occur. This approach also potentially endangered the law of war protections of these civilians.

A. Law of War Analysis of Civilian Protections Applied to Private Security Contractors

Before dissecting the various approaches used by the different government agencies employing PSCs in Iraq, it is necessary to first examine the basic role these forces play on the battlefield in the context of the law of war. The law of war essentially divides individuals on the battlefield into one of two categories: combatants or civilians.[76] While combatants can be lawfully targeted at all times, civilians are expected to be protected from attacks on the battlefield. The danger of using these PSCs in security roles is that they may be subject to losing their protected civilian status.

The notion of exercising distinction and protecting civilians on the battlefield from direct attack has long been a part of the law of war.[77] Although there had been various efforts to protect civilians throughout history, the international community took a more significant step after World War II with the signing of the Fourth Geneva Convention (GC IV).[78] The primary

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[69] *See, e.g.*, David DeVoss, *Iraq's 'Dirty Harrys*,*'* L.A. TIMES, Sept. 23, 2007, at M6; Nicolas Pelham, *Business People 'Essential' in Iraqi Politics: Profile Saad Janabi: The Entrepreneur and Presidential Contender Believes Nobody is Better Placed to Reconstruct the Country*, FIN. TIMES (London), July 13, 2004, at 9; *see also infra* Part III.D (discussing the USAID's use of PSCs in Iraq).

[70] *See* Steve Fainaru, *Where Military Rules Don't Apply*, WASH. POST, Sept. 20, 2007, at A1; *see also infra* Part III.B (discussing the DOD's use of PSCs in Iraq).

[71] *See* 2006 QDR, *supra* note 25; Isenberg, *supra* note 64, at 85.

[72] *See* Singer, *supra* note 18, at 3; Neil King Jr. & August Cole, *Few Alternatives to Blackwater*, WALL ST. J., Oct. 17, 2007, at 6.

[73] *See generally* GAO 2003 REPORT, *supra* note 45, at 2.

[74] *See* Jeremy Joseph, *Striking the Balance: Domestic Civil Tort Liability for Private Security Contractors*, 5 GEO. J.L. & PUB. POL'Y 691, 697. *But see generally* GAO 2003 REPORT, *supra* note 45, at 2 (contending that as early as 1998, the DOD knew it had problems with overseeing contractors, but that it did little to correct its failings).

[75] Agencies have had their own approaches to overseeing PSCs that has resulted in "tension" and a "bureaucratic tug-of-war" between them. Broder & Johnston, *supra* note 34 .

[76] Alexandre Faite, *Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law*, 4 DEFENCE STUDIES 5 (Summer 2004), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/pmc-article-310804/$File/PMC-article-A-faite.pdf. A generally accepted view is that there are two distinct categories of combatants, lawful and unlawful combatants. As will be discussed later in this article, the United States expects its PSCs to be civilians rather than either category of combatant.

[77] For instance, in 1862, the Union Forces in the Civil War adopted the Lieber Code, which discussed many of these principles regarding protecting civilians. Headquarters, U.S. War Dep't, Gen. Orders No. 100, Instructions for the Government of the Armies of the United States in the Field art. 22 (24 Apr. 1863), *available at* http://fletcher.tufts.edu/multi/texts/historical/lieber-code.txt. In particular, the Lieber Code provided that an "unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit." *Id.*

[78] Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

purpose of that convention was the protection of civilians during battle.[79] The convention itself, however, failed to define who should be deemed a civilian.[80] Without such a definition, many nations thought the convention was not successfully serving its purpose. Thus in 1977, the Additional Protocol I (Protocol I) to the 1949 Geneva Convention was written to help clarify who was entitled to protection as a civilian.[81]

Protocol I seeks to define civilians through its Article 50 by specifying who should be excluded from the definition. It clarifies that "members of the armed forces," "members of . . . militias," and those who "spontaneously take up arms to resist the invading forces" should not be considered civilians.[82] Given their nature and role, PSCs would arguably not fit into any of those excluded categories.[83] Thus, the Protocol I seems to indicate that PSC employees should be deemed as civilians.[84] As civilians accompanying the force, employees of PSCs would normally not be considered lawful targets under the law of war.[85]

These PSC employees can, however, lose their civilian protections "for such time as they take a direct part in hostilities."[86] An exact definition of what it means to take a direct part in hostilities does not appear in the Geneva Conventions nor in the Protocol I.[87] Instead, there are two various approaches to determining what constitutes taking a direct part in hostilities. The majority approach, followed by most of the international community,[88] adopts the notion that taking a direct part is achieved by "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[89] The majority approach distinguishes those actions that cause "actual harm" from actions that merely represent "participation in the war effort," such as, for instance, the actions of a munitions factory

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[79] *See id.*; REPORT BY THE INT'L COMM. OF THE RED CROSS, MEETING OF EXPERTS, GENEVA: GENERAL PROBLEMS IN IMPLEMENTING THE FOURTH GENEVA CONVENTION, ¶ 1(a), (27–28 Oct. 1998) [hereinafter ICRC Experts Meeting], *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/7E9D0ED1449F156AC1256B66005C349E.

[80] *See* GC IV, *supra* note 78; ICRC Experts Meeting, *supra* note 79; Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 381 (2004) ("[T]he Geneva Conventions do not include an express definition of civilians.").

[81] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Although the United States signed Protocol I as a party to the Protocol, the U.S. Senate has not yet ratified it. Some provisions of Protocol I have, however, been accepted by the United States as customary international law. *See* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987); INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 396 (2008); Memorandum, W. Hays Park, Chief, Int'l Law Branch et al., to Mr. John H. McNeill, Assistant Gen. Counsel (Int'l), Office of the Sec'y of Defense, subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (9 May 1986). Customary international law can be described as rules, often unwritten, that result from a general and consistent practice accepted by states. *See* STATUTE OF THE INT'L COURT OF JUSTICE art. 38, para. 1(b), 26 June 1945, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

[82] Protocol I, art. 50 defines a civilian in these terms: "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol." Protocol I, *supra* note 81, art. 50. The corresponding articles from the Third Convention referenced in the Protocol I, art. 50, are as follows: art. 4 (A) (1), which describes "Members of the armed forces of a Party to the conflict"; art. 4 (A) (2), which describes "Members of other militias . . . [that] fulfill" several conditions, such as having a responsible commander, wearing a fixed distinctive emblem, carrying weapons openly, and following the law of war; art. 4 (A) (3), which describes "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power"; and art. 4 (A) (6), which describes "inhabitants of a non-occupied territory, who . . . spontaneously take up arms." *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. The other article referenced in the Protocol I, art. 50, is Protocol I, art. 43, which describes "armed forces." Protocol I, *supra* note 81, art. 43.

[83] PSCs would more likely fit into a category not excluded from the definition of civilian by Protocol I, art. 50, namely: "Persons who accompany the armed forces without actually being members thereof, such as . . . supply contractors . . . provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card . . . ." *See* GC III, *supra* note 82, art. 4(A)(4). As such, these PSCs would also receive the benefits of being deemed "prisoners of war" should they fall "into the power of the enemy." *Id.* art. 4 (A).

[84] Additionally, there is a presumption in favor of deeming an individual a civilian in Protocol I, art. 50: "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian." Protocol I, *supra* note 81, art. 50(1).

[85] Civilians "shall not be the object of attack." *Id.* art. 51(2).

[86] *Id.* at 51(3).

[87] *See* Faite, *supra* note 76, at 7.

[88] Out of the approximately 194 member states of the United Nations, 167 of them are signatories to the Protocol I. Int'l Comm. of the Red Cross, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P (last visited Aug. 12, 2008).

[89] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 619 (Yves Sandoz et al. eds., 1987) [hereinafter PROTOCOL COMMENTARY].

employee.[90] Thus, the civilian who causes actual harm in a conflict would "become a legitimate target" for such time as they engage in those acts.[91]

The second approach, primarily followed by the United States, has a more expansive view of which civilians can be intentionally targeted. This approach focuses instead on the function of a civilian employee participating in the war effort and the "importance of his or her duties."[92] Depending on the functions performed by the civilian, he or she may become a lawful target. For example, under this approach, a civilian may be targeted for supporting a highly sensitive or important weapons system, regardless of whether the civilian causes any actual harm.[93] The more significant the contributions of the civilian employees are, the greater the likelihood that these employees will be deemed combatants.[94]

Regardless of which of the "direct part in hostilities" approaches is used, there is a significant risk that American government employed PSCs in Iraq may lose their civilian protections and become lawful intentional targets in Iraq.[95] They might be subject to losing those protections because their missions are so vital or because they cause actual harm while performing those missions.[96] The United States has consistently maintained that the actions of its PSCs have not amounted to taking a direct part in hostilities, and thus do not warrant the removal of law of war protections as civilians.[97] However, as will be shown below, as the mission in Iraq has adapted and the roles for PSCs have expanded, this has become a progressively more difficult assertion.

B. Department of Defense Approach in Iraq Before 16 September 2007

At the beginning of the Iraq conflict, the DOD envisioned a limited role for PSCs.[98] The military did not anticipate there would be concerns over issues, such as whether contractors were taking a direct part in hostilities. However, as security conditions worsened and the use of PSCs became widespread, the DOD quickly realized the need to adjust to operating

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[90] *Id.*

[91] *Id.* There is significant debate regarding Protocol I, art. 44, which some argue allows individuals to switch back and forth between being a combatant and being a civilian. "[C]ombatants are obliged to distinguish themselves from the civilian population . . . Recognizing, however, that there are situations . . . where owing to the nature of hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant . . . ." Protocol I, *supra* note 81, art. 44(3). Much of the debate exists with regard to how long of a time period a person must wait to switch and how often a person can lose and regain their protections.

[92] Memorandum of Law, Dep't of the Army, Office of the Judge Advocate General, Int'l Law Dep't, subject: Law of War Status of Civilians Accompanying Military Forces in the Field (6 May 1999) [hereinafter Law of War Memorandum] (on file with author).

[93] *See id.*

[94] *See id.*

[95] If these PSCs are deemed to be taking a direct part in hostilities, there is also a potential risk that they might be labeled unlawful combatants and prosecuted for their actions. The United States might, in that situation, be liable for a breach of international law. *See* Major J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 158 (2005). Of course, the reality in Iraq is that PSCs are often targeted by insurgents, without consideration of their status under the law of war. The most notorious example of the intentional targeting of PSCs occurred in Fallujah on 31 March 2004 when four Blackwater employees were mutilated and then killed by insurgents. *See* Dana Priest & Mary Pat Flaherty, *Slain Workers Were in Iraq Working Security Detail*, WASH. POST, Apr. 2, 2004, at A16.

[96] There is significant debate about whether the missions PSCs have thus far performed in Iraq constitute taking a direct part in hostilities. Given the significant reliance on PSCs and the importance of their assignments, some might argue that the United States has strained to deny that its use of PSCs has not risen to the level of taking a direct part in hostilities. That discussion is outside the scope of this article. The issue is merely raised here to provide context and to serve as a backdrop for the later analysis of the actions of the DOD and the other agencies in assigning missions for their PSCs. As can be seen below, the United States has found new ways to classify its use of PSCs to claim that the forces are deserving of retaining their protections as civilians. *See infra* Part III.B–D.

[97] For example, in a January 2006 memorandum, the DOD Deputy General Counsel opined that using armed PSCs to protect military facilities, personnel, property, and convoys in Iraq and authorizing them in certain situations to use deadly force did not constitute "taking a direct part in hostilities." *See* Memorandum, Office of the General Counsel, U.S. Dep't of Defense, to Staff Judge Advocate, U.S. Central Command, subject: Request to Contract for Private Security Companies in Iraq (10 Jan. 2006) [hereinafter OGC Memo]; *see also infra* Part III.B–D. That same OGC memorandum also sought to continue to portray the conflict in Iraq as an international armed conflict, under Common Article 2 of the Geneva Conventions. *See* OGC Memo, *supra.* Such a designation would mean that the full body of the law of war, such as all the above described protections, would apply. *Id.* All four Geneva Conventions have the same Article 2, hence the term Common Article 2. *See, e.g.*, GC IV, *supra* note 78, art. 2. Although the United States has maintained that its PSCs have not taken a direct part in hostilities, DOD did, however, adjusted its contracting procedures in 2006 to allow for situations in which PSCs could perform missions that are tantamount to taking a direct part in hostilities. *See infra* Part III.B.2.

[98] *See* U.S. GOV'T ACCOUNTABILITY OFF., REPORT TO CONGR. COMMITTEES GAO-05-737: REBUILDING IRAQ: ACTIONS NEEDED TO IMPROVE USE OF PRIVATE SECURITY PROVIDERS 4 (July 2005) [hereinafter GAO 2005 REPORT], *available at* http://www.gao.gov/new.items/d05737.pdf.

outside the bounds of existing guidance.[99] While the DOD's oversight of contractors did improve over time, it continued to be limited by the failure of the United States to set an overall strategy for overseeing PSCs. Although the DOD's approach may not have been ideal,[100] it was more robust than other agencies' approaches.

1. Initial DOD Attempts to Work with Private Security Contractors

The DOD did not significantly plan for the use of PSCs when troops first entered Iraq in March 2003. The government's role had always been to "provide for the common defense."[101] Contractors were not expected to perform inherently governmental functions, such as security in a complex battlefield.[102] The then-existing Army guidance on contractors accompanying the force clearly did not anticipate the need for PSCs to accompany the force.[103] In fact, one of those manuals, Army Field Manual (FM) 3-100.21, even stated, "The general policy of the Army is that contract employees will not be armed."[104]

The use of PSCs quickly became a reality in Iraq, however. During these early periods of the mission, the DOD failed to create "standardized rules" for the handling of these PSCs.[105] Deploying units did not receive training on working with PSCs.[106] Those units then received little meaningful guidance once they arrived.[107] Instead, units were left to establish rules themselves in areas such as what rules of engagement (ROE) or rules for the use of force (RUF) would apply to PSCs in their area of responsibility.[108] Routinely, new PSCs would simply read and sign a copy of the combatant commander's ROE.[109] Subsequent changes to the ROE would simply be briefed to the PSCs before missions in an ad hoc fashion.[110]

Contracting was another area in which the DOD was not fully prepared. There was a significant influx of PSC contracts needed in those early periods. There was also great uncertainty as to what types of security missions PSCs could be assigned, given the existing regulations and the general understanding of the law of war.[111] Ultimately, the task of writing these

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[99] *See generally* Isenberg, *supra* note 64, at 88 ("Although the US military had compiled an extensive list of service and departmental regulations, doctrine, and field manuals to govern contractors' behaviour on the battlefield, they were more oriented to those providing logistical services and did not cover the new activities of [PSCs].").

[100] For instance, a DOD Inspector General study revealed that for many of the initial contracts in Iraq, the DOD cannot be assured that it received "fair and reasonable prices for the goods and services, or that the contractors performed the work the contract required." OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEFENSE, REPORT, ACQUISITIONS: CONTRACTS AWARDED FOR THE COALITION PROVISIONAL AUTHORITY BY THE DEFENSE CONTRACTING COMMAND-WASHINGTON, REP. NO. D-2004-057, at ii (18 Mar. 2004), *available at* http://www.dodig.osd.mil/Audit/reports/fy04/04-057.pdf.

[101] *See* SINGER, *supra* note 37, at 226.

[102] An inherently governmental function is defined in part as, "Functions inherent to, or necessary for the sustainment of combat operations, that are performed under combat conditions or in otherwise uncontrolled situations, and that require direct control by the military command structure and military training for their proper execution, are considered inherently governmental." *See* U.S. DEP'T OF ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE 21 (29 Oct. 1999) [hereinafter AR 715-9].

[103] *See generally id.*; U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD (Jan. 2003) [hereinafter FM 3-100.21]; Joseph, *supra* note 74, at 697.

[104] FM 3-100.21, *supra* note 103, para. 6-29. Such long-standing restrictions on the carrying of weapons had helped reduce the risk that contracted employees could be deemed to be taking a direct part in hostilities.

[105] The rules were not even consistent on whether contractors could possess weapons, when weapons became a necessity for contracts. *See* Isenberg, *supra* note 64, at 88 (citing Jim Wolf, *U.S. Lacks Standardized Rules for Iraq Contractors*, ABC NEWS, June 24, 2004).

[106] *See* GAO 2005 REPORT, *supra* note 98, at 29.

[107] *See generally id.* (explaining that units such as the 82nd Airborne Division and the 1st Marine Expeditionary Force received "no guidance . . . for dealing with [PSCs]").

[108] Often units did not even develop "any written procedures for dealing with" PSCs. *See id.*

[109] These ROE were often not tailored to PSCs and instead "applied to security contractors and coalition forces military personnel alike." Isenberg, *supra* note 64, at 88–89. As discussed above, the DOD did not want these PSCs to be taking a direct part in hostilities. They should have been issued tailored RUF to ensure that they maintained their protected civilian status. *See supra* Part III.A.

[110] *See* Isenberg, *supra* note 64, at 89. Not until April 2004 was there a concerted effort by the Coalition Joint Task Force-7, the headquarters element for coalition forces in Iraq, to comprehensively address RUF for PSCs. *See If You Must Shoot, Be Polite*, GUARDIAN (London), Apr. 22, 2004, http://www.guardian.co.uk/theguardian/2004/apr/22/features11.g22.

[111] *See, e.g.,* OGC Memo, *supra* note 97 (detailing a response to an inquiry from the U.S. Central Command's Staff Judge Advocate (SJA) regarding appropriate contract assignments for PSCs in Iraq).

contracts and overseeing them fell to contracting officers and their representatives who had only limited supervision.[112] Unfortunately, these officials rarely had the capabilities or resources to adequately supervise these PSCs in an unstable environment.[113] Oversight tended to be erratic.[114]

Military units in Iraq initially had great difficulty tracking PSCs moving through their areas. Lacking any official system or guidance, those units were forced to coordinate with PSCs informally.[115] Military commanders consistently complained about the lack of communication and warning over PSC convoys moving within their area of responsibility.[116] The communication problems led to confrontations between coalition forces and PSCs, a situation referred to as "blue on white engagements."[117] These engagements had become so common that many PSCs stopped reporting them.[118] These continuing and dangerous engagements also served as one of many catalysts for significant change in the DOD's approach to regulating PSCs.

2. Changes to Provide Better Regulation of Private Security Contractors in a Fluid Environment

The DOD began implementing a series of changes starting in 2004 to better account for PSCs and to provide more accurate guidance to deploying units. These changes were inspired in part by the desire to eliminate blue on white engagements, as discussed above, and in part to provide regulations that more accurately reflected the conditions the units were facing. They were also motivated by the intense scrutiny surrounding the mission of PSCs that followed the brutal killing of four Blackwater employees in Fallujah on 31 March 2004.[119] As the world began focusing on PSCs in Iraq, the DOD began taking steps to better regulate its PSCs.[120]

Because of deficiencies in coordinating the movement of PSCs, the DOD worked together with the DOS in May 2004 to create the Reconstruction Operations Center as a central tracking facility for such movement throughout the country.[121] Despite some improvement, problems with coordination remained an issue.[122] To further reduce the risk of blue on white engagements, the Multi-National Forces in Iraq (MNF-I) commander instituted new procedures detailing how PSCs should

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[112] There was little external oversight from the "DOD Office of the Inspector General, Defense Contract Management Agency, and the Defense Contract Audit Agency." *See* Isenberg, *supra* note 64, at 86–87.

[113] *See generally id.* at 86–87 (explaining that there was a "lack of official government agencies dedicated to the oversight of" PSCs in Iraq). During the Iraq conflict, the workload for Army contracting officials increased by an estimated 600%, but the number of contracting officials has remained fairly static. *See* COMMISSION ON ARMY ACQUISITION AND PROGRAM MANAGEMENT IN EXPEDITIONARY OPERATIONS, REPORT, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING 4 (31 Oct. 2007) [hereinafter Gansler Report], *available at* http://www.army.mil/docs/Gansler_Commission_Report_Final_071031.pdf. Although the Gansler Report specifically avoided examining or discussing PSC contracts, the message from the report that there were too few contracting officials in Iraq is nonetheless applicable. *Id.*

[114] *See* Isenberg, *supra* note 64, at 86–87.

[115] Some of these problems stemmed from DOD employed PSCs. However, the most significant source of coordination problems arose from non-DOD PSCs, or subcontracted PSCs, who would travel through an area of responsibility belonging to a unit and not inform the unit. Military units coordinated informally with these forces primarily "based on personal relationships." Without a command and control relationship over these PSCs, commanders could not mandate being informed of PSC movements throughout their area of responsibility. The informal system varied greatly in its effectiveness. *See* GAO 2005 REPORT, *supra* note 98, at 22.

[116] *See* Ann Scott Tyson, *Gates Seeks Changes on Iraq Contractors*, WASH. POST, Oct. 19, 2007, at A16; GAO 2005 REPORT, *supra* note 98, at 4.

[117] GAO 2005 REPORT, *supra* note 98, at 27.

[118] *See id.* at 28.

[119] *See* Priest & Flaherty, *supra* note 95, at A16.

[120] Some changes were forced upon the DOD. In response to Fallujah incident, Congress included several provisions into the Fiscal Year 2005 National Defense Authorization Act, which directed the DOD to improve some of its existing policies on its contractor workforce. It mandated, for instance, that the Secretary of Defense direct each service branch to issue guidance on policies for dealing with contractors in deployed environments. The guidance needed to cover areas such as RUF and how to keep contractors from engaging in inherently governmental functions. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1205, 118 Stat. 1811 (2004) [hereinafter NDAA 2005]. This serves as an example of the United States' attempts to ensure its contractor force would not take a direct part in hostilities.

[121] The Reconstruction Operations Center is actually a series of seven centers that serve as the "interface between the military and contractors" in the various regions of Iraq. *See* GAO 2005 REPORT, *supra* note 98, at 23. It was intended to improve coordination problems by providing a "common operating picture" for the various elements moving through Iraq. *Id.* The Army began setting up the centers in May 2004 and they were fully operational by October 2004. *Id*.

[122] The fact that PSCs were not mandated to use the Reconstruction Operations Center contributed somewhat to the continued problems. Military units not following their procedures also contributed. Blue on white engagements continued to be a problem particularly at checkpoint areas. *See id.* at 25–27.

interact with military convoys in a December 2004 order.[123] The order reduced the number of such engagements, but the number of such engagements remained significant.[124] Even with enhanced communication, it was difficult to eliminate these blue on white engagements without having these PSCs under greater DOD command and control.[125]

Another DOD improvement was to revamp the obsolete regulations and guidance that it had on the books for dealing with contractors on the battlefield.[126] The military released DOD Instruction (DODI) 3020.41 on 3 October 2005.[127] It was intended to be the "comprehensive source of DoD policy and procedures concerning DoD contractor personnel."[128] Unlike earlier guidance, this instruction recognized for the first time that contractors may be employed to provide "security services for other than uniquely military functions."[129] The instruction warned that PSCs were to be used "cautiously" and only in combat zone areas like Iraq.[130] Unfortunately, however, the instruction failed to properly outline what factors constituted a cautious use of the PSC force.

The DOD forces in Iraq quickly sought a clarification of what constituted a cautious use of a PSC.[131] In January 2006, the DOD Office of General Counsel (OGC) attempted to clarify that issue in a memorandum by explaining that PSCs could be used to protect military facilities, personnel, property, and convoys where the "risk of direct contact or confrontation . . . is not probable."[132] While the guidance greatly expanded the areas that DOD PSCs could be utilized on the battlefield, it did not completely comport with the reality of operations in Iraq. For example, the OGC memorandum articulated that PSCs should not be used for "convoy security operations where the likelihood of hostile contact is high."[133] Arguably that might preclude their use on any convoy in Iraq. Thus, the guidance still failed to provide complete and meaningful direction.

In September 2006, the DOD further refined its position on the acceptable uses of PSCs with the issuance of DODI 1100.22.[134] That instruction reinforced the long-standing rule that contractors may only be used when the service being provided is not an inherently governmental function.[135] In determining if an act is inherently governmental, the instruction relied on a new approach. It resolved that services involving "substantial discretion" are to be treated as inherently

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[123] The order established rules, such as prohibiting contractor vehicles from passing military convoys and requiring that contractor vehicles not approach within two hundred meters of military convoys. *See id.* at 28.

[124] *See id.*

[125] *See infra* Part V.A.

[126] *See generally* Isenberg, *supra* note 64, at 88–89.

[127] U.S. DEP'T OF DEFENSE, INSTR. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES (3 Oct. 2005) [hereinafter DODI 3020.41].

[128] *Id.* para. 1.

[129] Under the instruction, the PSCs also became responsible for certifying that their employees had been sufficiently trained on weapons and the RUF. *See id.* para. 6.3.5.

[130] It also specified that contracts should not be issued for guarding "U.S. or coalition military supply routes, military facilities, military personnel, or military property" unless approved by the combatant commander. *Id.* para. 6.3.5.2. The DOD wanted to ensure that PSCs remained as civilians accompanying the force and entitled to protected civilian status. It sought carefully to allow contractors to only indirectly participate in the war effort. *Id.* para. 6.1.1. This demonstrates the continued American attempts to keep PSCs from being classified as taking a direct part in hostilities.

[131] The deteriorating security situation in Iraq led the Central Command SJA to inquire whether and when PSCs could be employed to protect U.S. facilities, personnel, property, and convoys. *See* OGC Memo, *supra* note 97, para. 2.

[132] *Id.* para. 4(c).

[133] *Id.* para. 4(c)(3). The OGC argued that such measures would ensure that PSCs would not be taking a direct part in hostilities. *Id.* para. 4(c)(2). However, it predicated this belief on a novel idea that international armed conflict can be divided into three separate phases. *Id.* para. 4(a)(1). The law of war is somehow applied differently in each phase. *Id.* para. 4(a)(1). The OGC analogized the current situation in Iraq to "stability operations or even law enforcement in foreign internal defense operations." *Id.* para. 4(a), (c). It is not exactly clear whether or how the three phases analysis will fit within the established law of war doctrine, but it is yet another signal that the United States is committed to having its PSCs retain their civilian protected status.

[134] The instruction was further refined with Change 1 on 6 April 2007. U.S. DEP'T OF DEFENSE, INSTR. 1100.22, GUIDANCE FOR DETERMINING WORKFORCE MIX (7 Sept. 2006) (C1, 6 Apr. 2007) [hereinafter DODI 1100.22].

[135] *See id.* para. 6.1.2.

governmental.[136] Thus, conversely, those services that do not require such substantial discretion are authorized to be contracted in certain situations.[137]

Although DODI 1100.22 proficiently outlines the various categories of services that can be contracted, it is not a panacea on the issue either. The instruction mistakenly relies in part on the notion that services where "there is a potential of binding the United States to a course of action" should be handled by the military rather than by contractors.[138] This is an admirable goal. However, as can arguably be seen from the fallout of the Blackwater incident, PSCs can quickly bind the United States to certain courses of actions.[139] Thus, it remains uncertain if this latest guidance is sufficient for the complex situation in Iraq.[140]

The DOD also attempted to improve some of its contracting mechanisms. One significant change was the June 2006 amendment to the primary set of contracting rules, the Defense Federal Acquisition Regulation Supplement (DFARS).[141] The amendment dramatically adjusted the contracting landscape by, for the first time, allowing defense contracts to stipulate that contractors can use deadly force in certain situations.[142] The amendment allowed any civilian contractor to use deadly force when necessary for self-defense.[143] Furthermore, it specifically authorized PSCs to use deadly force when necessary not only for self-defense, but also to perform their security missions.[144]

This change has given contracting officers more flexibility in preparing contracts. However, it has also somewhat blurred the distinctions between combatants and civilians on the battlefield with regard to PSCs. The DFARS now envisions and seemingly authorizes situations in which civilian contractor personnel might take a direct part in hostilities.[145] The amendment accurately explained that civilians will "lose their law of protection from direct attack" during those time periods in which they take a direct part in hostilities.[146] Yet, the mere inclusion of this language marks a change from past practices.[147] Despite those potential concerns, the amendment at least provided a more accurate reflection of the current security situation in Iraq. Likewise, the DOD's approach to enforcing these PSC contracts has adapted over time.

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[136] *See id.* para. 6.2.2. For instance, the instruction explains that combat operations cannot be legally contracted because they "involve substantial discretion, and can significantly affect the life, liberty, or property of private persons or international relations." *Id.* para. E2.1.3.1 It also explained that operations in "unpredictable . . . high threat situations" where "there is a potential of binding the United States to a course of action" should not be contracted. *Id.* para. E2.1.4.1.

[137] Specifically, in order for the services to be allowed to be contracted, the decisions needing to be made by the contractor's employees must be ones that can be "limited or guided by existing policies, procedures, directions, orders, or other guidance that identify specific ranges of acceptable decisions or conduct and [must] subject the discretionary authority to final approval or regular oversight by government officials." *Id.* para. E2.1.4.1.5. The instruction gives an example of one such situation, namely a physical security mission for a building located on a secure compound in a hostile area. *Id.* para. E2.1.4.1.5.1. That type of mission would be appropriate to be contracted. *Id.* The instruction further provides a mechanism for the combatant commander to contract for security services in other than uniquely military functions. *Id.* para. E2.1.4.1.5.2. To take advantage of the mechanism, the combatant commander must articulate clear rules for the use of deadly force, set limits on the use of force, and ensure the contracts describe the threat and describe a plan of how the contractor will get assistance. *Id.*

[138] *Id.* para. E2.1.4.1.

[139] Although Blackwater served under a DOS contract and thus did not fall under the restrictions of this instruction, the point that PSC actions can be binding is nevertheless valid.

[140] It is also uncertain how this instruction's guidance comports with the law of war analysis. The "substantial discretion" test outlined in the instruction seems to directly counter the United States' previous approach to examining when a civilian has taken a direct part in hostilities. DODI 1100.22, *supra* note 134, para. E2.1.3.1. As described above, the United States has relied upon the function and the importance of a civilian's duties when determining if she is taking a direct part in hostilities. A person who maintains a high value weapons system was considered to be taking a direct part in hostilities under that analysis. DOD Instruction 1100.22, however, specifically rejects the notion that a civilian providing "technical advice on the operation of [a] weapon system" is taking a direct part in hostilities. *Id.* para. E2.1.3.3.2. This might be perceived as establishing a double standard, particularly given America's superior abilities to strike far away targets. Regardless, the instruction provides another example of the United States attempting to carefully manage when its civilians can be deemed to be taking a direct part in hostilities.

[141] Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed Forces, 71 Fed. Reg. 34,826 (June 16, 2006) (to be codified at 48 C.F.R. pts. 212, 225, and 252).

[142] Although there were other substantial changes as part of the amendment, this provision is the most significant and relevant here. Prior to this amendment, the DFARS prohibited contractors from using force and from "directly participating in acts likely to cause actual harm to enemy armed forces." *Id.*

[143] *Id.* at 34,829.

[144] *Id.*

[145] "Civilians who accompany the U.S. Armed Forces lose their law of war protection from direct attack if and for such time as they take a direct part in hostilities." *Id.*

[146] *Id.* at 34,287.

[147] The DFARS amendment did, however, attempt to limit the scenarios in which contractors might be deemed to be taking a direct part in hostilities. It required combatant commanders to prevent the tasking of PSCs for "any inherently Governmental military functions, such as preemptive attacks, or any

3. Department of Defense Enforcement Mechanisms

Traditionally, the DOD's approach to disciplining contractors has been to rely on either the contractor or the commanders' inherent authority. In Iraq, ensuring appropriate discipline of contractors has proven to be a challenge.[148] Some of the enforcement methods that the DOD has at its disposal are discussed below.

a. Inherent Authorities of Commanders

Commanders have the inherent authority to protect the health and safety, welfare, and discipline of their troops and installation.[149] In Iraq, commanders used that authority to establish policies for their Forward Operating Bases (FOBs). Violations of those policies occasionally resulted in discipline, such as the barring of a PSC employee from facilities or from a FOB.[150] Misconduct that occurred off the FOB, however, was not subject to the commander's authority. Thus limited, commanders have left the majority of the discipline decisions in Iraq to the purview of the contractors themselves.[151]

Additionally, commanders inherently have some ability to shape contracts. In Iraq, commanders used those powers to mandated that all DOD PSC contracts include a requirement for the contractor to register with the Iraqis.[152] As the campaign progressed, commanders were also able to include strengthened RUF provisions into contracts.[153] However, this control did not extend to the numerous PSCs that were employed under several layers of subcontracts or were not directly controlled by DOD entities.[154]

b. Use of Extraterritorial Jurisdiction Crimes

Despite the absence of applicable local host country laws in Iraq, there are several means in which PSC employees are subject to criminal prosecution.[155] The main available method is to prosecute under U.S. extraterritorial jurisdiction acts.[156] One of these acts, the Military Extraterritorial Jurisdiction Act (MEJA), provides for prosecutions of felony offenses committed overseas in certain situations.[157] The MEJA originally only covered persons who were "employed by or accompanying the armed forces outside the United States."[158] Its coverage was extended by a 2005 congressional amendment, which enabled prosecutions of contractors employed by any federal agency to the extent that "such employment

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other attacks." *Id.* at 34,826–27. This could be viewed as an attempt by the United States to more narrowly define inherently governmental acts to mean only preemptive or other types of aggressive attacks. Such actions would be more consistent with prior practices.

[148] The ability to enforce discipline was further limited by the lack of local host country laws that could apply. Coalition Provision Authority Order 17 ensured that local host country laws were of no deterrent effect to PSCs who received immunity by virtue of the order. *See* CPA Order 17, *supra* note 20.

[149] *See generally* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY paras. 2-1b, 3-8e (7 June 2006) [hereinafter AR 600-20].

[150] For example, an Army official reported that "his unit had barred some private security employees from using the unit's dining facilities because the private security employees insisted on carrying loaded weapons into the dining facility," which was contrary to the commander's policy. *See* GAO 2005 REPORT, *supra* note 98, at 21.

[151] In most cases, "disciplining contractor personnel [was] the contractor's responsibility." Isenberg, *supra* note 64, at 86.

[152] *See* Fainaru, *supra* note 70.

[153] The DOD required its PSCs to register with the Iraqi Ministry of Interior. The Ministry had adopted licensing and registration requirements from the CPA. The CPA had issued CPA Memorandum 17 to correspond with CPA Order 17. It established "some initial minimum standards for regulating [PSCs]." It also contained an annex that addressed the RUF for PSCs. *See generally* Isenberg, *supra* note 64, at 86; Coalition Provisional Authority, *Coalition Provisional Authority Memorandum Number 17*, *Registration Requirements for Private Security Companies*, 26 June 2004, *available at* http://www.cpa-iraq.org/regulations/20040626_ CPAMEMO_17_ Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf.

[154] *See* GAO 2005 REPORT, *supra* note 98, at 20–21.

[155] *See* ELSEA & SERAFINO, *supra* note 23, at CRS-17 to CRS-19.

[156] Prosecution is possible under the special maritime and territorial jurisdiction, if the offense takes place on a federal facility, or under an extraterritorial jurisdiction act like the War Crimes Act or the Military Extraterritorial Jurisdiction Act (MEJA). *See id.*

[157] The MEJA was originally enacted in 2000. Military Extraterritorial Jurisdiction Act of 2000 (MEJA), Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. §§ 3261–3267 (2000)) [hereinafter MEJA].

[158] *Id.* § 3261.

relates to supporting the mission of the Department of Defense overseas."[159] Although enforcement under the MEJA has been an option to the DOD throughout the conflict, its use has remained extremely rare.[160]

c. Uniform Code of Military Justice Authority

Another option for the DOD is to prosecute contractor misconduct through Article 2(a) of the Uniform Code of Military Justice (UCMJ). Initially, the UCMJ authority in that provision only allowed prosecutions of contractors in times of "declared war."[161] Recognizing that the authority might not apply in Iraq as it was not a declared war, Congress expanded the authority with the National Defense Authorization Act for Fiscal Year 2007.[162] That act extended coverage to include not only periods of declared war but also "contingency operation[s]."[163]

Several issues exist with the potential use of this authority. First, not all of the services have fully exercised these powers yet. The DOD only published implementing guidance on 10 March 2008.[164] Second, it is unclear whether this authority could be used to cover Blackwater or other DOS contractors that arguably might not be truly "accompanying an armed force in the field."[165] Lastly, there are significant concerns about whether an act allowing military prosecutions of civilians will prove to be constitutional.[166]

Many commentators, though, have criticized the DOD for failing to effectively use its options for prosecuting misconduct.[167] Additionally, the DOD clearly had difficulties adapting to the conditions in Iraq and issuing appropriate guidance. Despite these challenges, the DOD procedures seem to have been more successful than other governmental agencies' procedures. As seen below, not all the other agencies had as robust guidance for overseeing PSCs as the DOD did, nor did others have as many options for disciplining misconduct.

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[159] *See* NDAA, *supra* note 120, § 1088. This amendment was sought in part because of a perceived loophole in the existing law. *See* Chia Lehnardt, *Private Military Companies and State Responsibility*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 139, 141 (Simon Chesterman & Chia Lehnardt eds., 2007). An investigation of a prisoner abuse scandal at the Abu Ghraib detention facility in Iraq in 2004 revealed that some contractors in the facility may have been guilty of misconduct. *Id.* None of those contractors were prosecuted under MEJA. *Id.* There was a concern that MEJA might not apply because the contractors were not hired by the DOD. *Id.* The concern was that they might not technically have fit the definition of being "employed by or accompanying the armed forces." *See infra* Part IV for a discussion of how MEJA potentially failed to cover all PSCs in Iraq despite this 2005 amendment.

[160] In fact, it appears that these acts have only successfully been used twice for incidents in Iraq or Afghanistan. David A. Passaro, a contractor doing interrogation work for the CIA in Afghanistan, was convicted in August 2006 under the extraterritorial nature of the USA Patriot Act for killing a detainee. *See* Julie E. Barnes, *CIA Employee Convicted in Afghan Abuse*, CHIC. TRIB., Aug. 18, 2006, at C4. Additionally a DOD contractor was prosecuted for the possession of child pornography in 2007 under the MEJA. *See* ELSEA & SERAFINO, *supra* note 23, at CRS-19. There are a variety of reasons why MEJA enforcement has been so rare. *See infra* Part V.C. for a discussion of ways to enhance enforcement under MEJA.

[161] UCMJ art. 2(a)(10) (2005).

[162] *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083 (2006) [hereinafter NDAA 2007]; *see also* ELSEA & SERAFINO, *supra* note 23, at CRS-20 to CRS-21.

[163] NDAA 2007, *supra* note 161, § 552*;* UCMJ art. 2(a)(10) (2008).

[164] *See* Memorandum, Secretary of Defense, to Secretaries of the Military Departments, subject: UCMJ Jurisdiction Over DOD Civilian Employees, DOD Contractor Personnel, and Other Persons Serving with or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (10 Mar. 2008) [hereinafter UCMJ Implementing Guidance]. The implementing instructions outline a procedure whereby the DOD must notify the Department of Justice (DOJ) of their intention to prosecute a contractor for misconduct under UCMJ art. 2(a)(10) authority. *Id.* The DOJ then has fourteen days to review the case to determine if they have authority and would prefer to prosecute the case. *Id.* The review period can be extended as necessary. *Id.* Only after the DOJ declines, and the DOD determines that the person's misconduct was "adverse to a significant military interest of the United States," can the commander begin UCMJ procedures. *Id.*

[165] The Article 2(a) implementing instructions apply only to DOD civilian and contractor employees and "other persons serving with or accompanying the armed forces overseas." *Id.* The instructions do not mention DOS PCSs. *Id.* Given that omission and other factors, it seems likely that the Article 2(a) authority would not apply over non-DOD PSCs. The concern is that these forces are employed by DOS. They would be viewed to be accompanying DOS rather than accompanying an armed force. Thus, Article 2(a) most likely does not misconduct by these DOS PSCs, such as Blackwater. *See* ELSEA & SERAFINO, *supra* note 23, at CRS-20 to CRS-21.

[166] *See* ELSEA & SERAFINO, *supra* note 23, at CRS-20.

[167] *See* Isenberg, *supra* note 64, at 88 ("[C]ontractors suspected of reckless behaviour are sent home, sometimes with the knowledge of US officials, raising questions about accountability and stirring fierce resentment among Iraqis.").

C. Department of State Approach in Iraq Before 16 September 2007

The DOS does not have a rich history of contracting for security.[168] Only after the embassy bombing in Beirut in 1983[169] and the subsequent passage of the Diplomatic Security and Antiterrorism Act of 1986[170] could the DOS even consider hiring contractors for security work.[171] Even still, the DOS relied almost exclusively upon Marines for protection of its overseas missions until 1994.[172]

In Iraq, the DOS did not have much involvement with contracting until the CPA shut down in June 2004.[173] Once the CPA ceased to exist and the Ambassador became the Chief of Mission in Iraq, the DOS basically extended the CPA's contract with Blackwater for one year to provide security for its own diplomatic corps.[174] The sole source contract to Blackwater, justified by "urgent and compelling reasons," was valued at over $100 million.[175] At the conclusion of that contract, DOS established an umbrella "worldwide personal protective services" contract with three firms, Blackwater, DynCorp, and Triple Canopy.[176] The DOS's approach to managing its PSC contracts varied from the DOD's approach in a few keys areas.

First, the DOS bound its PSCs to less well-defined RUF than the DOD.[177] The DOS allowed PSC vehicle convoys to engage in aggressive driving measures to protect its diplomats. Such measures included convoys driving on the wrong side of the road, driving over medians, and throwing water bottles to warn approaching traffic.[178] Unlike the DOD RUF, the DOS did not specify that PSCs should fire only "aimed shots" while "making every effort to avoid civilian casualties."[179] These unclear rules ultimately led to some DOS employed PSCs engaging in more dangerous behaviors than other agencies' PSCs.[180] These actions have also had the "unintended consequence" of causing great consternation among the Iraqi people and government.[181]

Second, the methods DOS used to oversee its PSC contracts marks another variation from the DOD's approach. The DOS's Bureau of Diplomatic Security (DS) was tasked with providing guidance and supervising Blackwater and the other DOS PSCs in Iraq.[182] A Regional Security Officer oversaw a team of only three dozen DS officials in Iraq.[183] Unfortunately, with a force of observers and managers that small, the DS could not accompany all Blackwater convoys, nor could they

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[168] *See* Spiegel, *supra* note 34.

[169] Lou Cannon & Juan Williams, *161 Marines Killed in Beirut: U.S. May Station Many* Offshore, WASH. POST, Oct. 24, 1983.

[170] Omnibus Diplomatic Security and Antiterrorism Act of 1986, 22 U.S.C. § 4806 (2000).

[171] *An Uneasy Relationship: U.S. Reliance on Private Security Firms in Overseas Operations: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. 2 (2008) (statement of Patrick F. Kennedy, Under Sec'y for Mgmt., Bureau of Mgmt., DOS), *available at* http://hsgac.senate.gov/public/_files/022708Kennedy.pdf.

[172] *See* Spiegel, *supra* note 34.

[173] *See* SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, IRAQ RECONSTRUCTION: LESSONS IN CONTRACTING AND PROCUREMENT 18 (July 2006) [hereinafter SIGIR REPORT], *available at* http://www.sigir.mil/reports/pdf/Lessons_Learned_July21.pdf.

[174] *See* Broder & Rohde, *supra* note 19.

[175] *See* DeYoung, *supra* note 64.

[176] *See id.*

[177] *See generally* Broder & Rohde, *supra* note 19.

[178] *See* DeVoss, *supra* note 69.

[179] DEP'T OF STATE, REPORT OF THE SECRETARY OF STATE'S PANEL ON PERSONAL PROTECTIVE SERVICES IN IRAQ 3, Oct. 2007, [hereinafter DOS PANEL REPORT], *available at* http://www.state.gov/documents/organization/94122.pdf. The DOS did however specify clearly that its PSCs were only to use deadly force "if there is no safe alternative and the guards or the people they are protecting face 'imminent and grave danger.'" Steve Fainaru, *How Blackwater Sniper Fire Felled 3 Iraqi Guards*, WASH. POST, Nov. 8, 2007, at A1.

[180] For example, Blackwater security teams have allegedly at times employed uncertified armor piercing munitions and CS gas. Although it must be noted that the DOS apparently never authorized such uses. *See* SCAHILL, *supra* note 17, at 77–78; James Risen, *2005 Use of Gas by Blackwater Leaves Questions*, N.Y. TIMES, Jan. 10, 2008, at A1.

[181] *See* DeVoss, *supra* note 69.

[182] *See* DeYoung, *supra* note 64.

[183] The roughly three dozen DS officials were responsible for supervising the estimated 900 Blackwater employees and accounting for the daily convoys across Iraq. *See id.*

monitor all the of convoys' communications.[184] These same DS officials assessed all escalation of force incidents and conducted investigations when necessary.[185] Many commentators have complained, however, that these investigations were often too cursory.[186] Although the DOD also suffered from a lack of personnel to adequately oversee its contracts, the problems were more pronounced with the DOS.

Third, the DS has fewer enforcement mechanisms at its disposal than do military commanders. The DS lacked the inherent authority powers of military commanders. It is also uncertain whether the MEJA provisions applied to DOS PSCs. There is a potential loophole in that the MEJA only applied to contractors employed in a manner that supports the mission of the DOD overseas.[187] Arguably, the DOS PSCs, such as Blackwater, are supporting the DOS rather than the DOD. Thus, the DOS relied almost exclusively on the contractor to enforce misconduct. There was also a perception that DS officials would support contractor positions almost blindly.[188] For instance, the DOS inexplicably allowed some of its PSCs to operate without Iraqi licenses, even though other agencies, such as the DOD, did not.[189] Other agencies and Iraqi government officials often complained that the DOS's weak oversight made Blackwater almost "untouchable."[190] This undermined efforts to improve the overall coordination between the various security players in Iraq.

D. The United States Agency for International Development Approach in Iraq Before 16 September 2007

The USAID initially contracted with Knoll, Inc. and DynCorp to provide bodyguards for its employees.[191] Later its security needs were absorbed under the DOS security contracts.[192] In general, the USAID's handling of its own security contracts did not differ significantly from the DOS methods of oversight discussed above, although the USAID generally had even fewer individuals than the DOS to effectively monitor the PSCs actions.[193] The bigger issue, and the one that differentiates the USAID's approach from others, is their extensive use of contractors to implement its programs.[194]

The USAID provides economic and humanitarian assistance to Iraq, but the majority of the work is done by contractors or contracted agencies. In essence, the USAID develops a plan and contracts with a firm to implement the plan.[195] Many of the workers implementing the plans, and those who need protection as they travel across Iraq, are employed by companies that are contracted by the USAID.[196] The USAID does not provide the security for these workers.[197] Instead, it expects the contractors to hire their own security from PSCs. In fact, the USAID does not even account at all for these PSCs that are travelling through Iraq daily, much less provide oversight.[198]

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[184] *See* Broder & Rohde, *supra* note 19. But it should be noted that Blackwater allegedly requested cameras be installed in each security vehicle to allow monitoring and oversight, but the DOS denied their request. *See* Nicholas Kralev, *Blackwater Call for Cameras Denied*, WASH. TIMES, Oct. 24, 2007, at 1.

[185] *See* Broder & Risen, *supra* note 17.

[186] *See generally* DOS PANEL REPORT, *supra* note 179, at 6 (explaining that the "scope of investigations has not been broad"); Fainaru, *supra* note 179.

[187] This reflects the language of the MEJA after the 2005 Amendment. Prior to the amendment, it was an even weaker case for MEJA applying; because the previous language required the contractor to be "employed by or accompanying the armed forces." DOS PSCs clearly were not employed by the DOD and arguably were not accompanying the armed forces in Iraq. *See* MEJA, *supra* note 157; NDAA 2005, *supra* note 120, § 1088; *see also supra* note 156 and accompanying text.

[188] *See* Fainaru, *supra* note 70 (quoting H.C. Lawrence Smith, Deputy Director of the Private Security Company Association of Iraq, as saying that Blackwater "has a client who will support them no matter what they do.").

[189] *See id.*

[190] *See id.* (quoting Matthew Degn, former senior advisor to the Iraqi Interior Ministry).

[191] *See* DeVoss, *supra* note 69.

[192] *See* ELSEA & SERAFINO, *supra* note 23, at CRS-7.

[193] *See generally* DeVoss, *supra* note 69.

[194] *See generally* Steve Fainaru, *Iraqis Detail Shooting by Guard Firm*, WASH. POST, Nov. 26, 2007, at A1.

[195] *See generally* USAID, OUR COMMITMENT TO IRAQ (Nov. 2005), *available at* http://www.usaid.gov/iraq/ pdf/commitment_iraq.pdf.

[196] *See generally* Fainaru, *supra* note 179.

[197] *See* ELSEA & SERAFINO, *supra* note 23, at CRS-7.

[198] *See id.*

When allegations of wrongdoing have been raised about these PSCs, the USAID has taken a hands-off approach.[199] The USAID does not investigate alleged incidents involving PSCs hired by its contractors.[200] Such investigations are instead left to the contractor.[201] Additionally, the USAID expects but does not enforce its contractors' PSCs obtain an Iraqi license or report any escalation of force incidents to the central Reconstruction Operations Center. The USAID's decision to not actively oversee these PSCs has created large "gaps in oversight"[202] and has caused significant accountability problems.[203]

Overall, while the military may have had a more robust system of oversight, there were significant problems with maintaining and "monitoring contracts" in all facets of the Iraqi campaign.[204] Many commentators have complained that none of the American agencies even counted or recorded the number of PSCs it had operating in Iraq for the first few years.[205] Lack of a unified oversight system coupled with host nation laws made ineffective by CPA Order 17 has caused numerous problems among the coalition forces and with the Iraqi people. Given such a cloudy PSC oversight system, a serious incident like the one involving Blackwater was inevitable.

IV. Changes After the Blackwater Incident on 16 September 2007

The Blackwater incident greatly affected the landscape of PSCs in Iraq. While this was not the first time that PSCs had caused problems,[206] the Iraqi Government chose to use this incident as a catalyst for change.[207] In the days after the incident, the Iraqi government prevented Blackwater from leaving the Green Zone, sought to revoke Blackwater's license, and attempted to end its ability to operate in Iraq.[208]

During this period of uncertainty, the U.S. Embassy in Iraq restricted its diplomats from leaving the Green Zone.[209] Astonishingly, the actions of perhaps as few as five Blackwater employees had "handicapped the daily operations of the State Department" in Iraq and effectively put the U.S. Embassy on "lockdown."[210] Not until five days later, when the Secretary of State called for a "full and complete review" of America's use of PSCs, were diplomats permitted to leave the Green Zone

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[199] *See* Fainaru, *supra* note 179.

[200] *See id.*

[201] *See id.*

[202] *See id.*

[203] The most "egregious" accountability lapse was the USAID contract with Custer Battles to secure the Baghdad International Airport. Custer Battles employees "chartered a flight to Beirut with $10 million in dinars in their luggage, set up sham Cayman Islands subsidiaries . . . and regularly overcharged" the government. Laura A. Dickinson, *Contract as a Tool for Regulating Private Military Companies*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 217, 219 (Simon Chesterman & Chia Lehnardt eds., 2007).

[204] *See* SIGIR REPORT, *supra* note 173, at 95. *See generally* Isenberg, *supra* note 64, at 85.

[205] *See* Lehnardt, *supra* note 159, at 141.

[206] In fact, there had been many prior incidents in which Blackwater employees, and employees of other PSCs, have been accused of using excessive force. *See* Memorandum from Majority Staff, H. Comm. on Oversight and Government Reform to the Members of the H. Comm. on Oversight and Gov't Reform, subject: Additional Information about Blackwater USA (Oct. 1, 2007), *available at* http://oversight.house.gov/documents/20071001121609.pdf. For instance, the chairman of the House of Representatives Committee on Oversight and Government Reform examined the matter and issued a report on 1 October 2007. *Id.* That report listed nearly two-hundred escalation of force incidents involving Blackwater from the beginning of 2005 through September 2007. *Id.*

[207] *See* Sabrina Tavernise & James Glanz, *Guards' Shots Not Provoked, Iraq Concludes*, N.Y. TIMES, Sept. 21, 2007, at A1 (The Iraqi Ministry of Interior proposed a "radical reshaping of the way American diplomats and contractors . . . are protected."). *See generally e.g.*, Jim Michaels, *Iraq to Take Closer Look at All Foreign Security Contractors*, USA TODAY, Sept. 19, 2007, at 8A; Ned Parker, *U.S. Restricts Movement of its Diplomats in Iraq*, L.A. TIMES, Sept. 19, 2007, at A1; *Iraqis Arrest 43 Over Private Guards Shooting*, AGE (Austl.), Nov. 21, 2007, *available at* http://www.theage.com.au/articles/2007/11/20/1195321781729.html (describing the Iraqi government arrest of PSCs stemming from an unauthorized use of force on an Iraqi civilian women).

[208] The Iraqi government ordered Blackwater to remain in the Green Zone. *See* Sabrina Tavernise, *U.S. Contractor Banned by Iraq Over Shootings*, N.Y. TIMES, Sept. 18, 2007, at A1; Parker, *supra* note 207. Technically, it appears that Blackwater had allowed its license to expire already before the incident. *See* Parker, *supra* note 207. Additionally, the Iraqi government threatened to overturn CPA Order 17. *See* Tavernise & Glanz, *supra* note 207. In fact, the Iraqi cabinet did approve "draft legislation" that would repeal CPA Order 17 on 30 October 2007, but its Parliament has not, as of as of July 2008,passed the legislation. *See* Paley, *supra* note 13. "However, the Iraqi government has continued to demand repealing the immunity for PSCs as part of a Status of Forces agreement being negotiated between the United States and the Iraqi government. It appears the Iraqi efforts might succeed in being a part of the final agreement. Sabrina Tavernise, *U.S. Agrees to Lift Immunity for Contractors in Iraq*, N.Y. TIMES, 2 July 2008, *available at* http://www.nytimes.com/2008/07/02/world/middleeast/02iraq.html?ref=world.

[209] *See* Parker, *supra* note 207.

[210] Tavernise & Glanz, *supra* note 207.

with their Blackwater security.[211] Subsequently, it did not take long for American officials across a wide spectrum of agencies to begin discussing changes necessary to more effectively control PSCs in the future.

A. Secretary of Defense Tightens Controls Over Private Security Contractors After Blackwater Incident

The DOD took immediate steps to re-examine its accountability and control over PSCs on the battlefield. Within the first few days after the Blackwater incident, Defense Secretary Robert M. Gates sent a "team to Iraq to speak with key players about the U.S. military's relationship with and oversight of [PSCs]."[212] This team advised Secretary Gates on prudent steps to ensure that PSCs would not endanger the success of the overall mission.[213] The DOD did more than simply listen; it took swift action on many of the recommendations.

1. Combatant Commanders Take Greater Responsibility for Private Security Contractors

On 25 September 2007, less than ten days after the Blackwater incident, the DOD issued a memorandum dealing with the management of its contractor force.[214] The memorandum, signed by the Deputy Secretary of Defense, Gordon England, addressed perceived oversight failures.[215] While the memorandum advised commanders to rely on the guidance from DOD Instruction 3020.41, it also outlined new responsibilities for the geographic combatant commanders.[216]

The memorandum introduced some groundbreaking expectations on disciplining PSCs. While Secretary England reinforced the idea that commanders should work with the Department of Justice (DOJ) towards punishing individuals under the MEJA, he also sought to have commanders exercise their new UCMJ authority over these PSCs.[217] Secretary England directed his commanders to fully exercise their UCMJ authority[218] over "DOD contractor personnel (regardless of their nationality)."[219] The memorandum authorized commanders to "disarm, apprehend, and detain DOD contractors suspected of having committed a felony offense in violation of the [rules for the use of force] . . . and to conduct the basic UCMJ pretrial process and trial procedures currently applicable to the courts-martial of military service members."[220]

This memorandum represents a clear intent on the part of the DOD to immediately use its congressionally authorized powers to control PSCs. Commanders in Iraq have only just begun exercising these new powers,[221] and it remains to be seen

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[211] *Travel with Blackwater Convoys Resumes in Iraq*, DETROIT FREE PRESS, Sept. 22, 2007, at 7.

[212] Sharon Behn, *Pentagon Hints Contractors Can be Tried in Military Courts*, WASH. TIMES, Sept. 27, 2007, at 1.

[213] *See generally* Eric Schmitt & Thom Shanker, *Pentagon Sees One Authority Over Contractors*, N.Y. TIMES, Oct. 17, 2007, at A1 ("Mr. Gates has been told by senior American commanders in Iraq that there must be a single chain of command overseeing the private security contractors working for a variety of United States government agencies in the war zone.").

[214] *See* August Cole, *Private Security Providers Become a Pentagon Focus*, WALL ST. J., Sept. 27, 2007, at 9. *See generally* Memorandum, Deputy Sec'y of Defense, to Secretaries of the Military Departments, subject: Management of DoD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States (25 Sept. 2007) [hereinafter Deputy Sec. Def. Memo].

[215] *See generally* Deputy Secretary of Defense Memo, *supra* note 214 (explaining that the Blackwater incident "identified a need to better ensure that relevant DoD policies and processes are being followed").

[216] Per the memorandum, those commanders became "responsible . . . for oversight and management of DoD contractors . . . ." *Id.* Secretary England expected his commanders to ensure that PSCs properly license and train their employees. *Id.* The commanders must periodically review their RUF to "minimize the risk of innocent civilian casualties . . . ." *Id.* Secretary England specifically demanded that commanders "prevent contractor personnel who are suspected of [wrongdoing] . . . from being allowed to leave the country" until an investigation is finalized. *Id.* The memorandum even empowered commanders to punish PSC officials who arrange for employees to leave the country early. *Id.*

[217] *See id.*; *supra* Part III.B.3.c.

[218] UCMJ art. 2(a)(10) (2008).

[219] *See* Deputy Sec. Def. Memo, *supra* note 214.

[220] *See id*.

[221] To date in Iraq, only one civilian contractor has been convicted under the UCMJ. Alaa "Alex" Mohammad Ali, a translator working for the U.S. Army, was charged with assault with a dangerous weapon. Jane's Tri-Service News, *Civilian Contractor Faces US Court Martial in Test Case*, May 21, 2008, http://www.janes.com/news/defence/triservice/jdw/jdw080520_1_n.shtml. He allegedly stabbed another contractor in February 2008 at a forward operating base in the Anbar province of Iraq. *Id.* His case was referred to a general court-martial. *Id.* In June 2008, he was convicted of "wrongfully taking a soldier's knife, obstructing justice by disposing of it after the incident and lying to investigators." Alexandra Zavis, *Army Interpreter Sentenced at Court-Martial***,** L.A. TIMES, June 24, 2008, *available at* http://www.latimes.com/news/nationworld/world/la-fg-interpreter24-2008jun24,0,2444605.story. He was sentenced to five months in confinement. *Id.*

how often and how effectively commanders will exercise this authority.[222] The DOD's desire to implement change is nevertheless extremely evident.

2. Contract Improvements Enable Better Oversight of Private Security Contractors

After the Blackwater incident, the DOD also sought to improve the actual terms of these PSC contracts. The military attempted to exercise contractual controls by changing the DFARS and by including more specific language about ROE and RUF directly into its contracts.

In January 2008, the DOD amended the DFARS to further ensure that PSCs are not violating the law of war.[223] These changes place a heavier emphasis on having the contractor comply with the law of war.[224] Not only does the change add a definition for the law of war that was not present before,[225] it also mandates a two-tiered training program in the law of war for PSCs.[226] At a minimum, all PSCs deploying with the force will be required to attend a basic law of war training program run by the military.[227] Depending on the nature of the assignment, some PSCs must also attend an advanced training session conducted by the judge advocate in the area of responsibility.[228] The fallout from the unlawful use of force incidents, such as the Blackwater one, is almost assuredly the impetus for these new training requirements.

Beyond simply requiring training, the changes to the DFARS impose more stringent obligations on PSC officials to report any abuses they observe and to follow the orders of the combatant commander.[229] With this change, PSCs have an affirmative duty to report to the commander any credible "suspected or alleged conduct" which violates the law of war.[230] This responsibility was likely added to prevent reoccurrences of PSCs trying to fix situations involving unjustified uses of force simply by paying the injured party and removing the offending employee from the area in lieu of reporting the incident.[231] The rule also mandates that all DOD PSCs will comply with the combatant commander's "orders, directives, and instructions."[232] The DFARS amendments will give military commanders on the ground significantly more control over DOD PSCs in Iraq.

The DOD also began strengthening the terms of its contracts to ensure better accountability over PSCs. For example, in October 2007, a few weeks after the Blackwater incident, the Joint Contracting Command-Iraq issued a solicitation for a contract to secure "trucking and shipping services."[233] The solicitation had the unusual feature of specifying "the rules under which weapons can be used" in the contract terms.[234] It explained distinctly that the PSC would not be using the ROE under

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[222] The author contends that commanders and their Judge Advocates will recommend exercising these powers only sparingly; in part, because the procedures require the DOD to wait for the DOJ to decide about a case before authorizing a commander to take action. Commanders, who may be used to quickly administering UCMJ discipline, will likely not want to wait the amount of time it might take for a DOJ case review. *See* UCMJ Implementing Guidance, *supra* note 164.

[223] *See* Defense Federal Acquisition Regulation Supplement; DOD Law of War Program, 73 Fed. Reg. 1853 (proposed Jan. 10, 2008) (to be codified at 48 C.F.R. pt. 252) ("DOD is proposing to amend the [DFARS] to address requirements for DOD contractors to institute effective programs to prevent violations of law of war by contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States.").

[224] *See id.* This also showcases the continued emphasis of the DOD to keep its PSCs from being deemed to be taking a direct part in hostilities.

[225] The proposed rule defines the law of war as the element of "international law that regulates the conduct of armed hostilities. The law of war encompasses all international law for the conduct of hostilities binding on the United States . . . including treaties and international agreements to which the United States is a party, and applicable customary international law." *Id.*

[226] *See id.*

[227] *See id.* The provision does allow this basic training to be web-based training in certain situations with the approval of the contracting officer. *See id.*

[228] *See id.*

[229] *See id.*

[230] *Id.*

[231] *See generally* Ned Parker, *The Conflict in Iraq: Security Contractor Criticized*, L.A. TIMES, Sept. 18, 2007, at A1 ("Past private security misdeeds had been swept under the rug."); Brian Bennett, *America's Other Army*, TIME, Oct. 18, 2007, at 18 (describing Blackwater paying $20,000 to a victim's family).

[232] *See* Defense Federal Acquisition Regulation Supplement; DOD Law of War Program, 73 Fed. Reg. at 1853; *see also infra* Part V.A. for a discussion about how this authority has unfortunately not been extended to mandate that all PSCs in Iraq must follow the combatant commander's orders.

[233] Walter Pincus, *Contract Tightens Rules of Engagement*, WASH. POST, Oct. 22, 2007, at A21.

[234] *Id.*

which the military forces operate.[235] Instead, it specified that the contractor may only fire a weapon in self-defense or to "prevent life threatening offenses against civilians."[236] By including such strict requirements as those seen above into the actual contracts, the DOD expects to better control the PSCs in its employment.

B. State Department Moves Quickly to Better Account for Private Security Contractors

As the agency that had hired Blackwater, the DOS faced perhaps the greatest scrutiny of its oversight procedures and the greatest urgency to correct flaws in those procedures. Immediately after the incident, the Secretary of the DOS, Secretary Rice, telephoned Iraqi Prime Minister Nouri Maliki to express her regrets.[237] Secretary Rice pledged to quickly reform DOS procedures to prevent such acts from reoccurring.[238] Within days, the DOS agreed with the Maliki government to cooperate in a joint commission to review the PSC industry.[239] Secretary Rice's initial steps persuaded the Iraqi government to once again allow Blackwater to escort American diplomatic convoys.[240] Those preliminary actions, however, were merely the first of many sweeping changes to the DOS's procedures for overseeing PSCs.

Secretary Rice appointed a high-level review panel to examine the department's oversight procedures.[241] On 5 October 2007, Secretary Rice subsequently took swift action on many of their recommendations.[242] Some of the key adjustments to the DOS's practices included the requirement to use audio and video recording devices in each convoy and having a DS agent accompany every convoy.[243] Secretary Rice essentially committed the DOS to dramatically increasing the number of DS officials assigned to Iraq in order to supervise all of these convoy missions.

Secretary Rice also enacted recommendations dealing with the RUF that should apply to these contractors. The DOS panel realized it needed to mirror its rules more closely with the military's rules for its PSCs.[244] Specifically, Secretary Rice directed that its PSCs only fire aimed shots, that they be made to exercise "due regard for the safety of innocent bystanders," and that they minimize civilian injuries.[245] These adjustments should help the DOS better control its PSCs.

Coordination between the DOS and the MNF-I command was also an area needing to be strengthened.[246] The DOS implemented changes to ensure that its offices in Iraq more liberally exchanged information with MNF-I and coordinated convoy routes with them before the vehicles left the diplomatic areas.[247] This action was intended to appease military commanders who had often complained about being unaware of DOS convoys traversing their area of responsibility.[248] This synchronization of efforts should help minimize those issues in the future.

Investigations are the last major area in which the DOS tried to improve its procedures. The DOS sought to enhance the abilities of its investigative forces and improve the likelihood of successful investigations in the future.[249] To that end, the

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[235] *See id.*

[236] *Id.*

[237] *See* Parker, *supra* note 231.

[238] *See* Tavernise, *supra* note 208.

[239] *See* Fainaru, *supra* note 70.

[240] *See* Ned Parker, *Blackwater Gets OK to Resume Escorts*, L.A. TIMES, Sept. 22, 2007, at A8.

[241] *See* Assoc. Press, *Rice Orders Training, Oversight for Guards*, WASH. TIMES, Oct. 24, 2007, at 1. The panel identified areas in which the DOS needed to "strengthen [its] coordination, oversight, and accountability aspects" of its use of PSCs. DOS PANEL REPORT, *supra* note 179, at 3.

[242] *See* Assoc. Press, *supra* note 241.

[243] *See* DOS PANEL REPORT, *supra* note 179, at 9.

[244] *See id*.

[245] *See id.*

[246] *See id.* at 10.

[247] *See id.* ("The Regional Security Office and MNF-I should establish a permanent working group to develop commonly agreed operational procedures; establish a robust liaison element; exchange information; ensure optimal situational awareness; and ensure that any issues are discussed and quickly resolved."). In essence, these measures are intended to strengthen the Reconstruction Operations Center and its capabilities to effectively coordinate PSC movements across Iraq.

[248] *See* Schmitt & Shanker, *supra* note 213.

[249] *See* DOS PANEL REPORT, *supra* note 179, at 9.

panel suggested the creation of a "Go Team" that would be prepared to quickly proceed to the scene of any escalation of force incident which causes serious injury or death.[250] The team would gather the preliminary statements and evidence and prepare an initial report.[251] The DOS anticipated that these procedures would aid in what are often the most complex and difficult situations in which to conduct investigations.

C. Interagency Work to Provide Better Accountability

Although both the DOS and the DOD separately made adjustments in the manner in which they control PSCs, the most lasting and meaningful changes will likely stem from the dramatic interagency actions that took place after the incident. The most significant of these interagency improvements occurred on 5 December 2007 when the deputy secretaries from the DOS and DOD signed a historic memorandum of agreement (MOA) concerning the handling of PSCs.[252]

The MOA was signed after a series of high level meetings held in the wake of the Blackwater incident.[253] The MOA is intended to "clearly define the authority and responsibility for the accountability and operations" of PSCs in Iraq.[254] The MOA has many strengths. Under the agreement, all PSCs operating in Iraq are bound by a specific RUF.[255] The extensive rules cover procedures for the use of non-deadly and deadly force and for the de-escalation of force.[256] The RUF require contractors to fire only "well-aimed shots with due regard for the safety of innocent bystander[s]."[257] While the rules are fairly similar to the proposed adjustments contemplated by the DOS,[258] they are significant in that this is the first effort to articulate a single standard for both agencies' PSCs.

The MOA also outlines a significant shift in the area of movement coordination and control. The DOD identified this change as the most important element to the agreement.[259] The DOS is now required to give the military in Iraq advance notice of movement of all its PSC protected convoys.[260] The notice is expected to be provided twenty-four hours in advance unless a short notice mission is required.[261] If the military determines that the chosen route is too dangerous, the DOS must comply with the military's recommendations to "alter or abort" the mission.[262] The agreement provides for close coordination not only before movement but also in the event of a serious incident.[263] This coordination will better allow the military to secure the scene and safely extract the PSCs.[264] These new policies should help diminish the likelihood of future blue on white incidents.

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[250] *See id.* The panel put a premium on the speedy arrival of such investigative teams. The DOS learned from the investigation of the September 2007 Blackwater incident how difficult an investigation can be if the investigators do not arrive at an early stage. *See* Lara Jakes Jordan & Matt Apuzzo, *FBI Finds Blackwater Trucks Patched*, B. GLOBE, Jan. 13, 2008, at A1; *infra* Part V.C.

[251] *See* DOS PANEL REPORT, *supra* note 179, at 9.

[252] Memorandum of Agreement Between the Department of Defense and the Department of State on USG Private Security Contractors (5 Dec. 2007) [hereinafter MOA Between DOD and DOS], *available at* http://www.defenselink.mil/pubs/pdfs/Signed MOA Dec 5 2007.pdf.

[253] The impetus for the MOA was Secretary Gates' declaration in lieu of the Blackwater incident that all PSCs in Iraq should come under a single command, presumably the DOD. *See* Schmitt & Shanker, *supra* note 213. Gates harshly criticized the mission of PSCs as being "in conflict" with the main objective of defeating an insurgency in Iraq. Tyson, *supra* note 116. The DOS did not agree to turn over total control of its PSCs, instead contending that its internal changes would adequately improve the oversight of its PSCs. *See* Schmitt & Shanker, *supra* note 213. The MOA was essentially a compromise between the two agencies on how best to strengthen oversight of PSCs. Karen DeYoung, *State Dept. Contractors in Iraq Are Reined In*, WASH. POST, Dec. 6, 2007, at A24.

[254] MOA Between DOD and DOS, *supra* note 252.

[255] *See id.* annex A, para. IV.

[256] *See id.*

[257] *See id.*

[258] *See supra* Part IV.B.

[259] Press Conference, U.S. Dep't of Defense, Remarks by Geoff Morrell, Pentagon Press Secretary (Oct. 30, 2007) (transcript available at http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4075).

[260] *See* MOA Between DOD and DOS, *supra* note 252, annex A, para. VI.

[261] *See id.*

[262] *See id.*

[263] *See id.* annex A, para. VII.

[264] *See id.*

The MOA falls short, however, of providing one overarching command for all PSCs.[265] Even though the MOA is a vast improvement over the status of PSC accountability as it stood on 16 September 2007, the agencies missed their opportunity to provide more concrete, structural changes to protect against future incidents in Iraq and elsewhere.[266]

D. Congressional Action

Much like the DOS and the DOD, Congress took substantial steps towards providing better accountability of PSCs in the wake of the Blackwater incident. Congress had long taken an interest in the administration's heavy reliance on PSCs on the battlefield in Iraq.[267] After the September 2007 incident, the House of Representatives quickly held committee hearings to address perceived failures of the DOS to properly control Blackwater and other contractors.[268] The House and Senate also passed reform legislation which placed additional oversight responsibilities on the administration.

1. Congressional Hearings Highlight Oversight Responsibilities

Less than three weeks after the Blackwater incident, several key DOS officials were called to testify before the House Oversight and Government Reform Committee.[269] The hearing drew intense interest from the media and the public.[270] Under forceful questioning by committee members, DOS officials conceded that they "could not say with certainty whether any Blackwater guard could be prosecuted under U.S. law."[271] The discovery of such "murky"[272] legal issues surrounding PSCs drew harsh criticism[273] and likely influenced many members of Congress to support reform legislation.[274]

2. MEJA Expansion and Enforcement Act of 2007

The first piece of such reform-oriented legislation in response to the Blackwater incident came in the form of a House resolution introduced by Representative David Price of North Carolina.[275] The legislation, entitled the "MEJA Expansion and Enforcement Act of 2007," was passed overwhelmingly by the House of Representatives the day following the Oversight

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[265] William H. McMichael, *DOD, State Sign Pact on Contractors in Iraq*, NAVY TIMES, Dec. 6, 2007, *available at* http://www.armytimes.com/news/2007/12/military_contractors_071205w/.

[266] *See infra* Part V.A. for a discussion on why the agencies should have settled on a plan closer to Secretary Gates' initial proposals calling for a unified command structure.

[267] For instance, Congress held hearings in February 2007 investigating the death of the four Blackwater employees in Fallujah in 2004. *Iraqi Reconstruction: Reliance on Private Military Contractors and Status Report: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 1–3 (2007), *available at* http://oversight.house.gov/documents/20071113181443.pdf.

[268] *See Hearing on Blackwater USA: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 5–9 (2007) (preliminary transcript available at http://oversight.house.gov/documents/20071127131151.pdf); Warren P. Strobel, *Blackwater Chief Answers Critics; Blackwater's Founder Defends His Private Security Firm Against Congressional Critics Who Questioned the Killing of Civilians in Baghdad*, MIAMI HERALD, Oct. 3, 2007, at A3.

[269] *See* Strobel, *supra* note 268; Bryan Bender, *US Control Over Guards in Iraq Urged*, B. GLOBE, Oct. 3, 2007, at A1.

[270] *See generally* Spiegel, *supra* note 34 ("The high-profile inquiry, held in a packed hearing room in which spectators had waited hours to get seats . . . .") Much of the attention was directed toward Blackwater founder Erik Prince. *See id.* He testified about Blackwater's techniques for disciplining saying, in part, "If there is any sort of discipline problem . . . we fire him." *Id.*

[271] *See id.*

[272] *See id.* (quoting Richard J. Griffin, Assistant Sec'y of the DOS's DS, as he described the nature of the legal questions concerning PSCs).

[273] For instance, during the hearing Representative Carolyn Maloney fiercely argued that if one of the Blackwater guards who had allegedly committed misconduct had lived in the United States at the time of the misconduct, "he would have been arrested, and he would be facing criminal charges. If he was a member of our military, he would be under a court martial. But it appears to [her] that Blackwater has special rules." *See Hearing on Blackwater USA: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 60 (2007) (statement of Rep. Carolyn Maloney, Member, H. Comm. on Oversight and Gov't Reform) (preliminary transcript available at http://oversight.house.gov/documents/20071127131151.pdf); Strobel, *supra* note 268, at A3.

[274] *See generally* Aamer Madhani, *No Pass for Contractors*, CHI. TRIB., Oct. 5, 2007, at C1 (explaining that the MEJA Expansion and Enforcement Act of 2007 "was introduced last January but languished until the recent high-profile event").

[275] *See* MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong.; *U.S. Embassy Security Practices in Iraq Overhauled*, NAT'L PUB. RADIO, Oct. 5, 2007, *available at* http://npr.org/templates/story/story.php?storyID=15043814&sc=emaf. Many other measures have been introduced in Congress dealing with PSCs, such as the Stop Outsourcing Security Act. Stop Outsourcing Security Act, H.R. 4102, 110th Cong. (2007) The act calls for the end of the use of PSCs in deployed environments. *Id*. None of these other significant reform bills has yet to pass either house of Congress.

Committee's hearing.[276] The legislation was intended to close the potential loophole in which Blackwater and other PSCs working under non-DOD contracts might not fall within the jurisdiction of MEJA.[277] The act would extend MEJA coverage to include any contractor working "in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation."[278]

The bill, which would also require the formation of a new FBI unit to conduct investigations of PSC misconduct overseas,[279] was subsequently introduced in the Senate by Senator Barack Obama of Illinois.[280] Facing opposition from the executive branch, the Senate has yet to enact the legislation.[281] Although the MEJA Expansion and Enforcement Act did not pass in 2007, several provisions of the National Defense Authorization Act for Fiscal Year 2008 (NDAA FY 2008) dealt with the controlling of and reporting on PSCs.[282]

3. National Defense Authorization Act for Fiscal Year 2008

As part of the NDAA FY 2008, Congress required the DOS, the DOD, and the USAID to enter into a memorandum of understanding, similar to the MOA that the DOS and the DOD signed on 5 December 2007, to cover operations in Iraq and in Afghanistan.[283] The NDAA FY 2008 also required that the DOS and the DOD jointly issue regulations outlining the "selection, training, equipping, and conduct of" PSCs in combat operations areas.[284] Lastly, the NDAA FY 2008 added a reporting requirement, directing the Government Accountability Office (GAO) to issue an annual update on the number of contracts, the number of PSCs, and the number of casualties being suffered by these contractors.[285] While the NDAA FY 2008 and the other measures taken by Congress will greatly improve the oversight of PSCs, there are more measures that are required to prevent future incidents like the one involving Blackwater.

V. Additional Changes that Need to be Made

The landscape of PSC oversight has changed rapidly since the Blackwater incident caused such a worldwide uproar, but many improvements are still required. Counterinsurgencies depend on a cohesive team effort.[286] The United States needs to be certain that its contracted forces are not undermining the overall efforts of the mission.[287] Future changes should be seen as systemic changes to be applied worldwide in all overseas operations, instead of as simple patches for problems that have arisen in Iraq. To prevent PSCs from undermining such future counterinsurgency efforts, the United States must do the following: convert to a system of having all PSCs in a combat zone more firmly placed under the authority of a single chain of command, likely the combatant commander; revamp the vetting and training programs for PSCs; and improve the options for investigating and disciplining PSC misconduct. Finally, the United States should reconsider its use of PSCs altogether as it moves forward from the Iraq conflict.

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[276] *See* Madhani, *supra* note 274.

[277] *See id.*; *supra* Part III.C.

[278] H.R. 2740, § 2.

[279] The bill calls for the creation of Theater Investigative Units of the FBI to respond and quickly begin investigations of serious incidents. *See id.* § 3; Josh Meyer & Julian E. Barnes, *Congress Moves to Rein in Private Contractors*, L.A. TIMES, Oct. 4, 2007, at A6.

[280] *See* Meyer & Barnes, *supra* note 279.

[281] *See id.*

[282] *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3.

[283] The memorandum must cover items such as identifying responsibilities for each agency with regard to contracting, procedures for contractor movement, identifying common databases for the sharing of contractor information, and establishing procedures for using the UCMJ to prosecute contractor misconduct. *See id.* § 861.

[284] The DOD will need to make the regulations available via a single website that it must maintain. *See id.* § 862.

[285] *See id.* § 863.

[286] *See* FM 3-24, *supra* note 26, at 1-121.

[287] *See id.* at 2-14.

A. Place All Private Security Contractors Under One Chain of Command

While the MOA between the DOS and the DOD does an outstanding job of ensuring coordination between the military and the DOS PSCs, it falls short of placing all PSCs under one chain of command.[288] This leaves future counterinsurgency operations vulnerable to being undermined by PSCs. Secretary of Defense Gates explained that it was vital that the military had the "means and the mechanisms" to understand all actions transpiring in its areas.[289] Commanders need to be able to tightly control their areas of responsibility. The current system fails to require all PSCs follow military commanders' orders and fails to provide those commanders with a means to discipline contractors who violate the rules.

The change to the DFARS, as discussed previously, requires all DOD PSCs comply with the combatant commander's orders.[290] Unfortunately, there is currently no similar provision with regard to DOS or other agency employed PSCs. Such a provision needs to be mandated for all PSCs in all combat zones. The DOD needs to have their orders respected by the PSCs in order to spearhead a unified counterinsurgency effort.[291] Otherwise, the DOD will have a difficult time influencing the actions of these PSCs and preventing them from engaging in acts that are harmful to the counterinsurgency mission.

Equally important is the ability to discipline PSCs. The current interagency arrangement fails to provide the military the ability to discipline non-DOD PSCs who violate orders or regulations.[292] Without such authority and control over PSCs, the DOD will not likely be able to ensure these firms actually follow the rules. A member of the Reconstruction Operations Center explained the difficulties in trying to influence PSCs that did not fall under the DOD saying, "I'm not gonna go chasing after non-DOD organizations, going, 'Uh, you didn't submit an incident report for this.'"[293] The DOD, without this power, would constantly have to struggle to get the DOS or other agency to take sufficient disciplinary action. The most efficient system would be to instead place these armed PSCs under the control of one authority, presumably the military.[294]

B. Revamp the Vetting and Training of Private Security Contractors

The United States needs to recalibrate how it vets and trains its PSCs.[295] Although the MOA between the DOD and the DOS requires specific training requirements for its PSCs, it relies too heavily on the individual contractors to regulate themselves.[296] Many PSCs want more regulation, as a way to "distinguish themselves from . . . rogue outfits that give the

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[288] The MOA does provide that all DOS employed PSCs must coordinate their movements with and get approval from MNF-I. *See* MOA Between DOD and DOS, *supra* note 252. It does not, however, place those contractors under the control of military. *Id.* The MOA also does not apply to PSCs from other agencies either. *Id. The* NDAA FY 2008 makes the USAID sign a memorandum of understanding with the DOD and the DOS that would allow greater coordination between the PSCs of those agencies in Iraq and Afghanistan, but it does not require placing those forces under the control of one element. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008). Nor does the NDAA FY 2008 make such cooperation a permanent fixture of future counterinsurgency operations. *Id.*

[289] Tyson, *supra* note 116.

[290] *See* Defense Federal Acquisition Regulation Supplement; DOD Law of War Program, 73 Fed. Reg. 1853 (proposed Jan. 10, 2008) (to be codified at 48 C.F.R. pt. 252); *supra* Part IV.A.

[291] Such an arrangement is not without faults. It would clearly hamper the DOS' ability to move its workers around the battlefield. This potentially restricted movement might slow the DOS response time to various diplomatic crises. Having the DOS movement essentially controlled by the military would also prove to be a substantial culture shock for the DOS. These agencies would likely face disagreements over resources and the willingness to support certain missions. While some may perceive the placing of all PSCs under the DOD's control as naïve or unworkable, it is difficult to dispute that having a single unified command would enable a better understanding of which forces are moving across the battlefield.

[292] Secretary England's September 2007 memorandum reinforces that military commanders should exercise UCMJ authority to discipline DOD employed contractors. *See* Deputy Sec. Def. Memo, *supra* note 214. The DOD has not received similar authority over non-DOD employed contractors, however.

[293] *See* Fainaru, *supra* note 70.

[294] This is not meant to understate the added burden that would be placed on the military to monitor all these extra contracts. It is meant to address the problem purely from a leadership prospective. A unity of command approach provides the strongest method of ensuring all elements on the battlefield are working together. Clearly, adding these responsibilities to military commanders would increase the workload of the units. The military would certainly need additional manpower to perform these monitoring missions. However, any increases in work would be offset to some extent by the elimination of the work the units currently have to do to identify which agency's PSC committed misconduct in their sector and to convince that agency to appropriately discipline the PSC. Such military manpower discussions are outside the bounds of this article. As are discussions of who might settle potential complaints from other agencies if they contended the military was not attending to their needs as quickly as they desired.

[295] Thus far in the Iraqi campaign, America has failed to ensure that its PSCs are properly qualified and trained for their assignments. For instance, despite a mandate in DOD Instruction 3020.41 that all contractor employees must receive training in human rights and humanitarian law, none "of the sixty publicly available Iraq contracts" in 2007 contained such a provision. *See* Dickinson, *supra* note 203, at 221.

[296] The MOA between DOD and DOS requires PSCs to conduct their own training and to maintain their own training records. There is no set standard for the quality of the training. *See* MOA Between DOD and DOS, *supra* note 252, annex A, para. V. Such self-regulation was particularly dangerous in the

industry as a whole a bad name."[297] The United States should therefore push for an independent and international accreditation or licensing program that would set uniform standards in terms of training and screening of PSCs.

The United States should require its PSCs to be independently accredited or licensed.[298] A likely source of this independent accreditation would be one of the several existing PSC trade associations. In fact, some of the associations have already begun limited regulatory and accrediting mechanisms.[299]

However, thus far the United States has not required any of its PSCs in Iraq to receive these accreditations as part of a contract.[300] Licensing or accrediting would help "ensure transparency of the company and the contract."[301] While the United States has attempted some licensing for firms that are headquartered in the United States itself, it has failed to "adequately monitor" these firms once the "license is issued."[302] Plus, many of the firms operating in Iraq are from outside the United States, and the firms "recruit globally."[303] Only an international accreditation system is likely to succeed in providing quality, trained PSCs to perform the security missions.[304] Thus, the United States should make a concerted effort to encourage the use of these independent, international systems by utilizing them routinely as part of their contracts.

While the industry may not have been mature enough at the onset of the Iraq invasion to provide such a scheme of vetting of PSCs, that can no longer be an excuse. Additionally, while the costs of vetting and monitoring PSCs in Iraq may be expensive,[305] "poor monitoring and oversight lead to corruption and waste that is itself quite expensive."[306] The time is right for the industry to develop a program to accredit PSCs and provide at least minimum guarantees that they meet appropriate standards. As the largest user of these forces, the United States should pioneer the way by requiring independent, international accreditations in its PSC contracts.

C. Improve Investigations and Discipline Options

The United States also needs to improve how it investigates and disciplines PSC misconduct. Many Iraqis and much of the international community and American public share a very troubling perception that Blackwater and other PSCs are above the law.[307] Given the extremely rare occurrences of any contractor being disciplined, it is easy to see why this complaint exists. The United States needs to take firm action to ensure that offending PSC employees can be held accountable for misconduct.

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early stages of the Iraq mission when many of the firms bidding on contracts had never actually engaged in private security work before. *See generally* Bergner, *supra* note 65, at 32 (describing the origins of the PSC, Triple Canopy).

[297] Dickinson, *supra* note 203, at 230. *See generally An Uneasy Relationship: U.S. Reliance on Private Security Firms in Overseas Operations: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. 5 (Feb. 27, 2008) (statement of James D. Schmitt, Senior Vice President, ArmorGroup North America, Inc.), *available at* http://hsgac.senate.gov/_files/022708Schmitt.pdf [hereinafter Schmitt Testimony] ("[PSCs] will gladly follow the U.S. government regulatory requirements provided to them. In essence it is what the industry has requested for some time.").

[298] Similar accreditation requirement provisions exist extensively already in the United States "domestic context[s]" of private prison industries and health maintenance organizations (HMOs). *See* Dickinson, *supra* note 203, at 223.

[299] The International Peace Operations Association for instance has established a code of conduct and even initiated an effort to establish a rating system for PSCs whereby PSCs are compared against standards. *See* International Peace Operations Association Home Page, http://ipoaworld.org/eng/ (last visited Aug. 14, 2008); James Cockayne, *Make or Buy? Principal-Agent Theory and the Regulation of Private Military Companies*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 196, 202 (Simon Chesterman & Chia Lehnardt eds., 2007).

[300] *See* Dickinson, *supra* note 203, at 223.

[301] O'Brien, *supra* note 39, at 44.

[302] Lehnardt, *supra* note 159, at 150.

[303] Anna Leander, *Regulating the Role of Private Military Companies in Shaping Security and Politics*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 49, 61 (Simon Chesterman & Chia Lehnardt eds., 2007).

[304] *See generally* O'Brien, *supra* note 39, at 47.

[305] *See* Cockayne, *supra* note 299, at 206.

[306] Dickinson, *supra* note 203, at 226.

[307] *See* Behn, *supra* note 212, at 1.

To this end, the United States needs to swiftly improve its ability to investigate potential misconduct. The MOA between the DOD and the DOS does significantly improve coordination and cooperation in investigations.[308] However, passage of the MEJA Expansion and Enforcement Act of 2007[309] or something equivalent is necessary. The United States needs an organized and dedicated team of investigators, that includes agents such as the Federal Bureau of Investigation (FBI),[310] designated and available within a short notice time period for serious incidents in combat areas.[311]

If trained investigators do not begin working a situation and arrive on the scene quickly, the investigation is substantially less likely to succeed. The investigators involved in the review of the Blackwater incident did not arrive until two weeks after the incident.[312] By that point, some of the Blackwater employees involved in the incident had been given apparent immunity and repairs had already been made to the vehicles involved in the incident.[313] Unfortunately, that investigation will likely be severely hampered by those miscues stemming from the late arrival of the investigating team. Having a dedicated team of professional investigators available for these types of investigations will help prevent having such problems in the future and will strengthen potential prosecutions.[314]

The United States should similarly have a dedicated team of prosecutors available to try these complex cases. Given the complexity and cost of trying these cases, U.S. Attorneys are hesitant to prosecute PSCs.[315] One alternative is to have a specialized group of Assistant U.S. Attorneys or section of DOJ handle all of these complex cases.[316] These attorneys can gain valuable experience as they work through a repetition of these cases. The other players, such as the FBI investigations teams, the DOD, and the DOS officials, will also benefit by only having one system with which they have to work to help prepare for prosecutions.

America also needs to be able to better prosecute those who commit offenses while operating as part of these governmental PSCs overseas. Although the recent expansions of UCMJ authority will help protect America's interests in combat zones, the MEJA still represents one of the best methods for prosecuting misconduct.[317] The MEJA needs to be expanded to cover all PSCs operating in Iraq and in combat areas. The United States needs to pass the relevant provisions of the MEJA Expansion and Enforcement Act of 2007 or something equivalent to ensure that future misconduct is covered under U.S. law.[318]

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[308] The MOA outlines plans for the DOD and the DOS to "closely coordinate the immediate response." The two agencies agree to share information and to assist one another in conducting the investigation when necessary. *See* MOA Between DOD and DOS, *supra* note 252, annex A, para. VII.

[309] *See* MEJA Expansion and Enforcement Act 2007, H.R. 2740, 110th Cong.

[310] Use of the FBI for investigations in Iraq has been done in the past. The DOS requested their expert assistance from the DOJ after the September 2007 Blackwater incident. *See* Jordan & Apuzzo, *supra* note 250. The author contends that the FBI is the best suited for this mission given their experience and close relationship with U.S. attorneys. However, any dedicated and trained team of federal investigators would suffice.

[311] This is different than the recommended "Go Teams" by the DOS panel. That panel envisioned that the DOS would internally create a team under its Regional Security Office in Baghdad to quickly gather information. *See* DOS PANEL REPORT, *supra* note 179, at 9.

[312] Karen DeYoung, *Immunity Jeopardizes Iraq Probe; Guards' Statements Cannot Be Used in Blackwater Case*, WASH. POST, 30 Oct. 2007, at A1.

[313] Initial DOS teams offered immunity to Blackwater employees to get the employees to give statements. FBI agents are now precluded from using those statements. Also, repairs made to the Blackwater vehicles after the incident have made it impossible for FBI investigation teams to verify if damage to those vehicles had been caused by hostile insurgent actions. *See* Jordan & Apuzzo, *supra* note 250.

[314] This approach can be compared to the use of dedicated safety inspection teams from the United States Army Combat Readiness/Safety Center at Fort Rucker, Alabama. A centrally located team is deployed to various locations around the world to investigate vehicle accidents and other serious incidents. These teams create a precedent for the successful use of dedicated investigation teams. *See* US Army Combat Readiness/Safety Center, https://crc.army.mil/home/ (last visited Aug. 14, 2008).

[315] P.W. Singer, *The Law Catches Up to Private Militaries, Embeds*, DEFENSETECH.ORG (Jan. 3, 2007), http://www.defensetech.org/archives/003123.html ("The reality is that no US Attorney likes to waste limited budgets on such messy, complex cases 9,000 miles outside their district, even if they were fortunate enough to have the evidence at hand.").

[316] A similar idea was recommended by a panel of experts which including senior military officials, contractors, congressional staffers, DOD and intelligence community officials, NGO representatives, and academics who met informal for an "off-the-record workshop" at Princeton University in June 2007. Princeton University Program in Law and Public Affairs, *Princeton Problem-Solving Workshop Series in Law and Security: A New Legal Framework for Military Contractors* (June 8, 2007), *available at* http://lapa.princeton.edu/conferences/military07/MilCon_Workshop_Summary.pdf.

[317] *See generally* SINGER, *supra* note 37, at 240.

[318] *See* MEJA Expansion and Enforcement Act 2007, H.R. 2740, 110th Cong.

D. Reduce the Reliance on Private Security Contractors

Although not an improvement to the current system, one idea that should be given greater consideration is a rethinking of the entire notion of using PSCs on the battlefield. The practice of contracting out security functions has dangerous overtones, especially when the government and PSCs have different goals.[319] Ultimately, these differences could lead to a dire situation than the one involving Blackwater. Even though it seems an unlikely move given the current desire and willingness of the administration to privatize such functions,[320] the United States' abilities to win counterinsurgencies would improve if it scaled back on its use of PSCs.

There is a concern among many commentators that the United States' use of PSCs is an abdication of "an essential responsibility."[321] The fear is that when a government "delegate[s] out part of its role in national security" it will be not be as responsible or accountable to the people.[322] The country might be willing to more readily use force when PSCs are a percentage of those that will be fighting or dying. One Pentagon official reportedly explained the phenomenon in these terms, "The American public doesn't get quite as concerned when contractors are killed."[323] This seemingly callous approach to using force is not in the long-term best interests of the United States.

Moreover, the widespread use of PSCs in vital missions in Iraq has blurred the distinction between civilians and combatants on the battlefield. The U.S. practices in Iraq have cast doubt on long standing principles of the law of war. U.S.-employed PSCs now risk losing their protections as civilians based on the missions expected of them.

Finally, there is a limit as to how reliant a country should become on PSCs,[324] and America may have already reached that limit. The DOS essentially admitted it could not operate without Blackwater's assistance after the September 2007 incident.[325] The fear is that the government cannot "quickly replace an outsourced service if the [PSC] fails . . . ."[326] The United States must ensure that it does not again find its options so limited.

VI. Conclusion

Colonel (Retired) Thomas X. Hammes makes a sound point when he says, "I still think, from a pure counterinsurgency standpoint, armed contractors are an inherently bad idea, because you cannot control the quality, you cannot control the action on the ground, but you're held responsible for everything they do."[327] The United States has seen first hand in Iraq that failing to monitor PSCs can significantly affect counterinsurgency operations. American forces in Iraq have taken significant steps in the aftermath of the Blackwater incident to improve its oversight of PSCs, but major steps remain. While it is essential not to handcuff PSCs to the point that they are no longer effective, the United States must take prudent steps to strengthen its oversight of PSCs if it wants to succeed in future counterinsurgency operations around the world.

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[319] "Even if they claim to be acting in the public good . . . , the mechanisms by which [PSCs] are held accountable as well as who they are accountable to (stock holders or boards of trustees, for example) may hold them to very different standards than state entities and through different processes." Deborah Avant, *The Emerging Market for Private Military Services and the Problems of Regulations*, *in* FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 181, 186 (Simon Chesterman & Chia Lehnardt eds., 2007); *see also* Tyson, *supra* note 116 (detailing how Secretary Gates believes that the mission of PSCs in Iraq are "fundamentally at odds with the broader U.S. military objective of stabilizing Iraq").

[320] "[PSCs] will continue to play a significant and increasing role in international security in the next decades." *See* SINGER, *supra* note 37, at 214.

[321] *See id.* at 226.

[322] *See id.* Conversely, other commentators contend that the use of PSCs benefits the United States by shielding it from potential claims and liability. Although those benefits may be tangible, the United States would be setting a poor example to the international community if it was intentionally attempting to shirk responsibility by the use of such contractors.

[323] Cockayne, *supra* note 299, at 212 (quoting Michael Duffy, *When Private Armies Take to the Front Lines*, TIME, Apr. 12, 2004, at 32). It is not exactly clear why such a perception exists. One of the reasons may be that generally the U.S. Government allows the PSCs to report the deaths. Another reason is that the media has with few exceptions generally taken less of an interest in contractor deaths than it has service member deaths. The public may be largely unaware of the numbers of contractors who have been injured and killed.

[324] *See* SINGER, *supra* note 37, at 158.

[325] *See generally* King & Cole, *supra* note 72, at 6.

[326] *See* SINGER, *supra* note 37, at 159.

[327] Steve Fainaru, *Warnings Unheeded on Guards in Iraq*, WASH. POST, Dec. 24, 2007, at A1 (quoting Colonel (Retired) Thomas X. Hammes, Retired, U.S. Marines).

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (June 2007 - October 2008) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C20	176th JAOBC/BOLC III (Ph 2)	18 Jul – 1 Oct 08
5-27-C20	177th JAOBC/BOLC III (Ph 2)	7 Nov 08 – 4 Feb 09
5-27-C20	178th JAOBC/BOLC III (Ph 2)	20 Feb – 6 May 09
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5F-F1	203d Senior Officer Legal Orientation Course	8 – 12 Sep 08
5F-F1	204th Senior Officer Legal Orientation Course	20 – 24 Oct 08
5F-F1	205th Senior Officer Legal Orientation Course	26 – 30 Jan 09
5F-F1	206th Senior Officer Legal Orientation Course	23 – 27 Mar 09
5F-F1	207th Senior Officer Legal Orientation Course	8 – 12 Jun 09
5F-F3	15th RC General Officer Legal Orientation	11 – 13 Mar 09
5F-F52	39th Staff Judge Advocate Course	1 – 5 Jun 09

5F-F52S	12th SJA Team Leadership Course	1 – 3 Jun 09
5F-F55	2009 JAOAC (Ph 2)	5 – 16 Jan 09
5F-JAG	2008 JAG Annual CLE Workshop	6 – 10 Oct 09
NCO ACADEMY COURSES		
5F-F58	27D Command Paralegal Course	2 – 6 Feb 09
600-BNCOC	1st BNCOC Common Core (Ph 1)	6 – 27 Oct 08
600-BNCOC	2d BNCOC Common Core (Ph 1)	5 – 24 Jan 09
600-BNCOC	3d BNCOC Common Core (Ph 1)	5 – 24 Jan 09
600-BNCOC	4th BNCOC Common Core (Ph 1)	9 – 27 Mar 09
600-BNCOC	5th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
600-BNCOC	6th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 26 Sep 08
512-27D30	1st Paralegal Specialist BNCOC (Ph 2)	30 Oct – 9 Dec 08
512-27D30	2d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	3d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	1 Apr – 5 May 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	5th Paralegal Specialist ANCOC (Ph 2)	26 Aug – 26 Sep 08
512-27D40	1st Paralegal Specialist ANCOC (Ph 2)	30 Oct – 9 Dec 08
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	2 Apr 2 May 09
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	12 May – 3 Jul 09
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	12 May – 3 Jul 09
WARRANT OFFICER COURSES		
7A-270A1	20th Legal Administrators Course	15 – 19 Jun 09
7A-270A2	10th JA Warrant Officer Advanced Course	6 – 31 Jul 09
7A-270A3	9th Senior Warrant Officer Symposium	2 – 6 Feb 09
ENLISTED COURSES		
512-27D/20/30	20th Law for Paralegal Course	23 – 27 Mar 09
512-27D-BCT	27D BCT NCOIC/Chief Paralegal NCO Course	20 – 24 Apr 09
512-27D/DCSP	18th Senior Paralegal Course	15 – 19 Jun 09
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DC5	28th Court Reporter Course	26 Jan – 27 Mar 09
512-27DC5	29th Court Reporter Course	20 Apr – 19 Jun 09
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC6	8th Senior Court Reporter Course	14 – 18 Jul 09
512-27DC7	10th Redictation Course	5 – 16 Jan 09
512-27DC7	11th Redictation Course	30 Mar – 10 Apr 09

ADMINISTRATIVE AND CIVIL LAW		
5F-F202	7th Ethics Counselors Course	13 – 17 Apr 09
5F-F21	7th Advanced Law of Federal Employment Course	26 – 28 Aug 09
5F-F22	62d Law of Federal Employment Course	24 – 28 Aug 09
5F-F23	63d Legal Assistance Course	27 – 31 Oct 08
5F-F23	64th Legal Assistance Course	30 Mar – 3 Apr 09
5F-F23E	2008 USAREUR Legal Assistance CLE	3 – 7 Nov 08
5F-F24	33d Administrative Law for Installations Course	16 – 20 Mar 09
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F24E	2009 USAREUR Administrative Law CLE	14 – 18 Sep 09
5F-F26E	2008 USAREUR Claims Course	14 – 17 Oct 08
5F-F28	2008 Income Tax Law Course	8 – 12 Dec 08
5F-F28E	2008 USAREUR Tax CLE Course	1 – 5 Dec 08
5F-F28H	2009 Hawaii Income Tax CLE Course	12 – 16 Jan 09
5F-F28P	2009 PACOM Tax CLE	6 – 9 Jan 09
CONTRACT AND FISCAL LAW		
5F-F10	161st Contract Attorneys Course	23 Feb – 3 Mar 09
5F-F10	162d Contract Attorneys Course	20 – 31 Jul 09
5F-F103	9th Advanced Contract Law Course	16 – 20 Mar 09
5F-F11	2008 Government Contract Law Symposium	2 – 5 Dec 08
5F-F12	79th Fiscal Law Course	20 – 24 Oct 08
5F-F12	80th Fiscal Law Course	11 – 15 May 09
5F-F13	5th Operational Contracting Course	4 – 6 Mar 09
5F-F14	27th Comptrollers Accreditation Fiscal Law Course	13 – 16 Jan 09
5F-F15E	2009 USAREUR Contract/Fiscal Law Course	2 – 6 Feb 09
8F-DL12	1st Distance Learning Fiscal Law Course	19 – 22 May 09
CRIMINAL LAW		
5F-F301	13th Advanced Advocacy Training Course	27 – 29 May 09
5F-F31	14th Military Justice Managers Course	25 – 29 Aug 08
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09

5F-F33	52d Military Judge Course	20 Apr – 8 May 09
5F-F34	30th Criminal Law Advocacy Course	15 – 26 Sep 08
5F-F34	31st Criminal Law Advocacy Course	2 – 13 Feb 09
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
5F-F35	32d Criminal Law New Developments Course	3 – 6 Nov 08
5F-F35E	2009 USAREUR Criminal Law CLE	12 – 16 Jan 09
INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	5th Intelligence Law Course	22 – 26 Jun 09
5F-F42	91st Law of War Course	9 – 13 Feb 09
5F-F42	92d Law of War Course	6 – 10 Jul 09
5F-F43	5th Advanced Intelligence Law Course	24 – 26 Jun 09
5F-F44	4th Legal Issues Across the IO Spectrum	13 – 17 Jul 09
5F-F45	8th Domestic Operational Law Course	27 – 31 Oct 08
5F-F47	51st Operational Law Course	23 Feb – 6 Mar 09
5F-F47	52d Operational Law Course	27 Jul – 7 Aug 09
5F-F47E	2008 USAREUR Operational Law CLE	9 – 12 Sep 08
5F-F47E	2009 USAREUR Operational Law CLE	27 Apr – 1 May 09
5F-F48	2d Rule of Law	8 – 12 Jun 09

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (010) Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	14 Oct – 12 Dec 08 26 Jan – 27 Mar 09 26 May – 24 Jul 09 3 Aug – 2 Oct 09
0258	Senior Officer (070) Senior Officer (010) (Newport) Senior Officer (020) (Newport) Senior Officer (030) (Newport) Senior Officer (040) (Newport) Senior Officer (050) (Newport) Senior Officer (060) (Newport) Senior Officer (070) (Newport) Senior Officer (080) (Newport)	22– 26 Sep 08 (Newport) 20 – 24 Oct 08 (Newport) 26 – 30 Jan 09 (Nejwport) 9 – 13 Mar 09 (Newport) 4 – 8 May 09 (Newport) 15 – 19 Jun 09 (Newport) 27 – 31 Jul 08 (Newport) 24 – 28 Aug 09 (Newport) 21 – 25 Sep 09 (Newport)
2622	Senior Office (Fleet) (010) Senior Office (Fleet) (020)	3 – 7 Nov 08 (Pensacola) 12 – 16 Jan 09 (Pensacola)

	Senior Office (Fleet) (030) Senior Office (Fleet) (040) Senior Office (Fleet) (050) Senior Office (Fleet) (060) Senior Office (Fleet) (070) Senior Office (Fleet) (080) Senior Office (Fleet) (090) Senior Office (Fleet) (100) Senior Office (Fleet) (110)	2 – 6 Mar 09 (Pensacola) 23 – 27 Mar 09 (Pensacola) 27 Apr – 1 May 09 (Pensacola) 27 Apr – 1 May 09 (Naples, Italy) 8 – 12 Jun 09 (Pensacola) 15 – 19 Jun 09 (Quantico) 22 – 26 Jun 09 (Camp Lejeune) 27 – 31 Jul 09 (Pensacola) 21 – 25 Sep 09 (Pensacola)
BOLT	BOLT (010) BOLT (010) BOLT (020) BOLT (020) BOLT (030) BOLT (030) BOLT (040) BOLT (040)	6 – 9 Oct 08(USN) 6 – 9 Oct 08 (USMC) 15 – 19 Dec 08(USN) 15 – 19 Dec 08 (USMC) 30 Mar – 3 Apr 09 (USMC) 30 Mar – 3 Apr 09 (USN) 27 – 31 Jul 09 (USMC) 27 – 31 Jul 09 (USN)
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020)	14 – 15 Feb 09 (Yokosuka) 27 – 28 Apr 09 (Naples, Italy)
961F	Coast Guard Judge Advocate Course (010)	6 – 10 Oct 08
900B	Reserve Lawyer Course (020) Reserve Lawyer Course (010) Reserve Lawyer Course (020)	22 – 26 Sep 08 22 – 26 Jun 09 21 – 25 Sep 09
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	11 – 22 May 09 20 – 31 Jul 09
4044	Joint Operational Law Training (010)	27 – 30 Jul 09
4046	SJA Legalman (010) SJA Legalman (020)	23 Feb – 6 Mar 09 (San Diego) 11 – 22 May 09 (Norfolk)
4048	Estate Planning (010)	31 Aug – 4 Sep 09
627S	Senior Enlisted Leadership Course (Fleet) (010) Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090 Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160)	12 – 14 Nov 08 (Norfolk) 12 – 14 Nov 08 (San Diego) 12 – 14 Jan 09 (Mayport) 2 – 4 Feb 09 (Okinawa) 9 – 11 Feb 09 (Yokosuka) 17 – 19 Feb 09 (Norfolk) 17 – 19 Mar 09 (San Diego) 23 – 25 Mar 09 (Norfolk) 13 – 15 Apr 09 (Bremerton) 27 – 29 Apr 09 (Naples) 26 – 28 May 09 (Norfolk) 26 – 28 May 09 (San Diego) 30 Jun – 2 Jul 09 (San Diego) 10 – 12 Aug 09 (Millington) 9 – 11 Sep 09 (Norfolk) 14 – 16 Sep 09 (Pendleton)
748A	Law of Naval Operations (020) Law of Naval Operations (010)	15 – 19 Sep 08 14 – 18 Sep 09

748B	Naval Legal Service Command Senior Officer Leadership (010)	6 – 19 Jul 09
748K	USMC Trial Advocacy Training (040) USMC Trial Advocacy Training (010) USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	15 – 19 Sep 08 (San Diego) 20 – 24 Oct 08 (Camp Lejeune) 11 – 15 May (Okinawa, Japan) 18 – 22 May 09 (Pearl Harbor) 14 – 18 Sep 09 (San Diego)
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	23 – 27 Mar 09 20 – 24 Apr 09
846L	Senior Legalman Leadership Course (010)	20 – 24 Jul 09
846M	Reserve Legalman Course (Ph III) (010)	4 – 15 May 09
850V	Law of Military Operations (010)	1 – 12 Jun 09
932V	Coast Guard Legal Technician Course (010)	3 – 14 Aug 09
961D	Military Law Update Workshop (010) (Officer) Military Law Update Workshop (020) (Officer)	TBD TBD
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted) (020)	TBD TBD
961J	Defending Complex Cases (010)	11 – 15 May 09
961M	Effective Courtroom Communications (010) Effective Courtroom Communications (020)	20 – 24 Oct 08 (Mayport) 6 – 10 Apr 09 (San Diego)
525N	Prosecuting Complex Cases (010)	18 – 22 May 09
03RF	Legalman Accession Course (010) Legalman Accession Course (020) Legalman Accession Course (030)	29 Sep – 12 Dec 08 12 Jan – 27 Mar 09 11 May – 24 Jul 09
03TP	Prosecution Trial Enhancement Training (010)	TBD
049N	Reserve Legalman Course (Ph I) (010)	6 – 17 Apr 09
056L	Reserve Legalman Course (Ph II) (010)	20 Apr – 1 May 09
2205	Defense Trial Enhancement (010)	TBD
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	15 – 26 Jun 09 (Norfolk) 13 – 24 Jul 09 (San Diego)

5764	LN/Legal Specialist Mid-Career Course (010) LN/Legal Specialist Mid-Career Course (020)	14 – 24 Oct 08 4 – 15 May 09
627S	Senior Enlisted Leadership Course (Fleet) (170)	2 – 4 Sep 08 (Norfolk)
7485	Classified Info Litigtion Course (010)	5 – 7 May 09 (Andrews AFB)
7487	Family Law/Consumer Law (010)	6 – 10 Apr 09

7878	Legal Assistance Paralegal Course (010)	6 – 11 Apr 09
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Oct 09 5 – 8 Jan 09 6 – 9 Apr 09 6 – 9 Jul 09
NA	Legal Specialist Course (010) Legal Specialist Course (020) Legal Specialist Course (030) Legal Specialist Course (040)	12 Sep – 14 Nov08 5 Jan – 5 Mar 09 30 Mar – 29 May 09 26 Jun – 21 Aug 09
NA	Speech Recognition Court Reporter (010) Speech Recognition Court Reporter (020) Speech Recognition Court Reporter (030)	27 Aug – 6 Nov 08 5 Jan – 3 Apr 09 25 Aug – 31 Oct 09
NA	Leadership Training Symposium (010)	27 – 31 Oct 08 (Washington, DC)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (080) Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	8 – 26 Sep 08 20 Oct – 7 Nov 08 1 – 19 Dec 08 26 Jan –13 Feb 09 2 – 20 Mar 09 30 Mar – 17 Apr 09 27 Apr – 15 May 09 1 – 19 Jun 09 13 – 31 Jul 09 17 Aug – 4 Sep 09
0379	Legal Clerk Course (070) Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050 Legal Clerk Course (060) Legal Clerk Course (070))	8 – 19 Sep 08 20 – 31 Oct 08 1 – 12 Dec 08 26 Jan – 6 Feb 09 2 – 13 Mar 09 20 Apr – 1 May 09 13 – 24 Jul 09 17 – 28 Aug 09
3760	Senior Officer Course (070) Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	25 – 29 Aug 08 17 – 21 Nov 08 12 – 16 Jan 09 23 – 27 Feb 09 23 – 27 Mar 09 18 – 22 May 09 10 – 14 Aug 09 14 – 18 Sep 09
4046	Military Justice Course for Staff Judge Advocate/ Convening Authority/Shipboard Legalmen	TBD

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (080) Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	8 – 26 Sep 08 20 Oct – 7 Nov 08 1 – 19 Dec 08 5 – 23 Jan 09 23 Feb – 13 Mar 09 4 – 22 May 09 8 – 26 Jun 09 20 Jul – 7 Aug 09 17 Aug – 4 Sep 09
947J	Legal Clerk Course (080) Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	8 – 18 Sep 08 14 – 24 Oct 08 1 – 12 Dec 08 5 – 16 Jan 09 30 Mar – 10 Apr 09 4 – 15 May 09 8 – 19 Jun 09 27 Jul – 7 Aug 09 17 Aug – 4 Sep 08
3759	Senior Officer Course (080) Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	25 – 29 Aug 08 (Pendleton) 6 – 10 Oct 08 (San Diego) 2 – 6 Feb 09 (Okinawa) 9 – 13 Feb 09 (Yokosuka) 30 Mar – 3 Apr 09 (San Diego) 13 – 17 Apr 09 (Bremerton) 27 Apr – 1 May 09 (San Diego) 1 – 5 Jun 09 (San Diego) 14 – 18 Sep 09 (Pendleton)
NA	Military Justice Course for Staff Judge Advocate/ Convening Authority Shipboard Legalmen	TBD

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 08
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 08
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 08
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 08
Area Defense Counsel Orientation Course, Class 09-A	6 – 10 Oct 08

Defense Paralegal Orientation Course, Class 09-A	6 – 10 Oct 08
Judge Advocate Staff Officer Course, Class 09-A	6 – 12 Oct 08
Paralegal Apprentice Course, Class 09-01	7 Oct – 20 Nov 08
Paralegal Craftsman Course, Class 09-01	14 Oct – 20 Nov 08
Reserve Forces Judge Advocate Course, Class 09-A	25 – 26 Oct 08
Advanced Environmental Law Course, Class 09-A (Off-Site, Wash DC)	27 – 29 Oct 08
Federal Employee Labor Law Course, Class 09-A	8 – 12 Dec 08
Deployed Fiscal Law & Contingency Contracting Course, Class 09-A	15 – 18 Dec 08
Trial & Defense Advocacy Course, Class 09-A	5 – 16 Jan 09
Paralegal Apprentice Course, Class 09-02	6 Jan – 19 Feb 09
Air National Guard Annual Survey of the Law, Class 09-A (Off-Site)	23 – 24 Jan 09
Air Force Reserve Annual Survey of the Law, Class 09-A (Off-Site)	23 – 24 Jan 09
Advanced Trial Advocacy Course, Class 09-A	26 – 30 Jan 09
Interservice Military Judges Seminar, Class 09-A	27 – 30 Jan 09
Pacific Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	2 – 5 Feb 09
Homeland Defense/Homeland Security Course, Class 09-A	2 – 6 Feb 09
Legal & Administrative Investigations Course, Class 09-A	9 – 13 Feb 09
European Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	17 – 20 Feb 09
Judge Advocate Staff Officer Course, Class 09-B	17 Feb – 17 Apr 09
Paralegal Craftsman Course, Class 09-02	24 Feb – 1 Apr 09
Paralegal Apprentice Course, Class 09-03	3 Mar – 14 Apr 09
Area Defense Counsel Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Defense Paralegal Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Environmental Law Course, Class 09-A	20 – 24 Apr 09
Military Justice Administration Course, Class 09-A	27 Apr – 1 May 09
Paralegal Apprentice Course, Class 09-04	28 Apr – 10 Jun 09
Reserve Forces Judge Advocate Course, Class 09-B	2 – 3 May 09
Advanced Labor & Employment Law Course, Class 09-A	4 – 8 May 09
CONUS Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	11 – 15 May 09

Operations Law Course, Class 09-A	11 – 21 May 09
Negotiation and Appropriate Dispute Resolution Course, Class 09-A	18 – 22 May 09
Environmental Law Update Course (DL), Class 09-A	27 – 29 May 09
Reserve Forces Paralegal Course, Class 09-A	1 – 12 Jun 09
Staff Judge Advocate Course, Class 09-A	15 – 26 Jun 09
Law Office Management Course, Class 09-A	15 – 26 Jun 09
Paralegal Apprentice Course, Class 09-05	23 Jun – 5 Aug 09
Judge Advocate Staff Officer Course, Class 09-C	13 Jul – 11 Sep 09
Paralegal Craftsman Course, Class 09-03	20 Jul – 27 Aug 09
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

APRI American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22313
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CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272

IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
NCDA:	National College of District Attorneys University of South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095
NDAA	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 ((703) 549-9222
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637

PLI: Practicing Law Institute
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New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
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Nashville, TN 37205
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TLS: Tulane Law School
Tulane University CLE
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UMLC: University of Miami Law Center
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UT: The University of Texas School of Law
Office of Continuing Legal Education
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Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2009

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University, the online home of TJAGLCS located at https://jag.learn.army.mil. The new course is expected to be open for registration on 1 April 2008.

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University. The new course is expected to be open for registration on 1 April 2008. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2009, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

A Judge Advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to complete Phase I Non-Resident courses and writing exercises by 1 November 2008 will not

be cleared to attend the 2009 JAOAC resident phase. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

1. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.
AD A301095	Government Contract Law Desk book, vol. 2, JA-501-2-95.
AD A265777	Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333	Servicemembers Civil Relief Act Guide, JA-260 (2006).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A326002	Wills Guide, JA-262 (1997).
AD A346757	Family Law Guide, JA 263 (1998).
AD A384376	Consumer Law Deskbook, JA 265 (2004).
AD A372624	Legal Assistance Worldwide Directory, JA-267 (1999).
AD A360700	Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

2. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other

personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. t is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

5. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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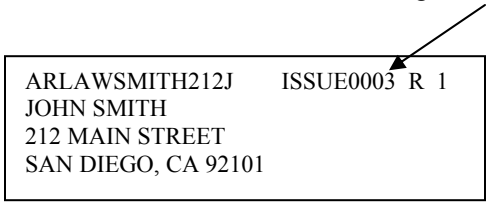

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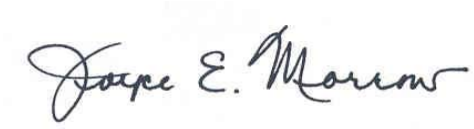

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