

If they walk like lawful combatants, and talk like a lawful combatants, they are lawful combatants: Defining the Status of DOD Private Security Contractors under the Geneva Conventions

EWS Contemporary Issue Paper
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to
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19 February 2008

Report Documentation Page

Form Approved
OMB No. 0704-0188

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1. REPORT DATE 19 FEB 2008		2. REPORT TYPE		3. DATES COVERED 00-00-2008 to 00-00-2008	
4. TITLE AND SUBTITLE If they walk like lawful combatants, and talk like a lawful combatants, they are lawful combatants: Defining the Status of DOD Private Security Contractors under the Geneva Conventions				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) United States Marine Corps, Command and Staff College, Marine Corps Combat Dev, Marine Corps University, 2076 South Street, Quantico, VA, 22134-5068				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release; distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Same as Report (SAR)	18. NUMBER OF PAGES 14	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

The current operating environment has seen an unprecedented number of private security contractors such as Black Water and Dynacorp engaging in combat with enemy forces in Iraq and Afghanistan. One of the many issues raised is whether such contractors are protected under the Geneva Conventions. The answer to this question is crucial for commanders as the United States prosecutes current and future combat operations along side of civilian security contractors. Private security contractors conducting combat operations on behalf of the United States are civilians and should be afforded all of the protections granted to lawful combatants. They satisfy the definition of a combatant protected by Article 44 of the Geneva Conventions, Additional Protocol of 8 June 1997 and they are defacto members of the United States armed forces.

Background

Since the beginning of the Global War on Terror, the United States has relied heavily on the service of private security contractors. Never before has the line between civilian and combatant been less clearly defined. The nation became acutely aware of this complicated relationship when four DOD security contractors were killed in Fallujah on March 31, 2004.¹ The contractors, all former U.S. service members, were conducting a security escort mission for another contractor supplying food to U.S. military bases in Iraq when they were ambushed.² Few could

forget the news clips of their mutilated bodies being dragged through the streets and strung up over a bridge.³ DOD security contractors made headlines again only four days later in Najaf, Iraq after engaging in a lengthy firefight with insurgents that attacked a local U.S. government headquarters.⁴

Such incidents have prompted congressional inquiry into the part played by DOD security contractors in combat operations and their legal status.⁵ Among the relevant issues that should be addressed is whether DOD security contractors are protected by the Geneva Conventions while engaged in U.S. combat operations.

Combatants protected by Art 44 of the Geneva Conventions

DOD security contractors should be considered lawful combatants because they satisfy the definition of a combatant protected by Article 44 of the Geneva Conventions, Additional Protocol of 8 June 1997. The Geneva Conventions provides the framework for determining the status of civilians and combatants on the battlefield.⁶ Applying that framework to the role of private security contractors and their relationship with the DOD, it is clear that such contractors should be considered lawful combatants for several compelling reasons.

Private security contractors are entitled to protected status as lawful combatants because they satisfy the definition of a "combatant" as defined, and protected by, Article 44 of the Geneva Conventions, Additional Protocol of 8 June 1997. The

Geneva Conventions, along with the Additional Protocols I and II, represent the majority of what is otherwise commonly referred to as international humanitarian law (IHL): "a whole system of legal safeguards that cover the way wars may be fought and the protection of individuals."⁷ IHL specifically protects those who abstain from combat such as medical personnel and the clergy as well as combatants that are unable to continue fighting due to injuries or being captured by the enemy.⁸

Additionally, under the Geneva Conventions and their Protocols, IHL endeavors to thwart "grave breaches" and bring to justice those who are responsible for such offenses.⁹ Acceded by the majority of the world's nations, including the United States, the Geneva Conventions is internationally recognized as customary international law.¹⁰

While IHL generally applies to the conduct of the United States and its citizens, "prisoner of war" status and the protections under the Geneva Conventions and their Additional Protocols are triggered only under certain conditions. Specifically, Geneva Convention III provides that the full protections of "prisoner of war" status are afforded only to privileged combatants in armed conflicts of an international character.¹¹

In the case at hand, the United States is currently engaged in international armed conflicts in the countries of Iraq and

Afghanistan. Therefore, due to the international nature of those conflicts under the Conventions, the protections of "prisoner of war status" are triggered and afforded to all **combatants** operating on behalf of the U.S. Government in both Iraq and Afghanistan.

Under the Geneva Conventions, the key term that must be considered and defined is "combatant." A singular word that has been the source of much debate, "combatant" is specifically defined under IHL and does not simply mean anyone who fights.¹² In fact there are four distinct types of persons in any armed conflict that qualify as combatants. Of the four types, there are two that are particularly relevant with respect to the role of DOD security contractors:

- members of the armed forces of a state party to an armed conflict or members of militias or volunteer corps forming part of such forces;
- members of other militias and of other volunteer corps, including those of organized resistance movements, belonging to a state party to an armed conflict, provided that such militias or corps fulfill the following conditions: they are commanded by a person responsible for his/her subordinates; they have a fixed distinctive sign recognizable at a distance; they carry arms openly; and they conduct their operations in accordance with the laws and customs of war.¹³

Applying this framework to DOD security contractors in Iraq and Afghanistan, it is reasonable to characterize those private companies and the services they provide in support of combat

operations in Iraq and Afghanistan as "militias... belonging to a state party to an armed conflict."

The argument could be made that DOD security contractors such as Blackwater and DynCorp do not qualify as combatants under the Conventions because they do not satisfy the basic uniform requirement of "a fixed distinctive sign recognizable at a distance." However, Article 44 of the Additional Protocol I waters down the basic uniform requirement and simply provides any combatant that merely "carries his arms openly... during each military engagement" is a protected combatant eligible for POW status.¹⁴

Although the United States has not ratified Additional Protocol I, it is considered customary international law. The Geneva Conventions specifically prohibits member nations such as the United States from any actions that would otherwise interfere with its provisions.¹⁵ Therefore, under Additional Protocol I, the minimum requirement for a DOD security contractor to qualify as a "combatant" would be to carry arms openly in the attack.¹⁶ DOD security contractors who carry their arms openly while engaging the enemy in support of combat operations should be considered "combatants" as defined by the Geneva Conventions and therefore are entitled to protected status.

Defacto Members of U.S. Armed Forces

Private security contractors are lawful combatants because they are defacto members of the armed forces of the United States. Due to the nature of the relationship shared by the DOD and security contractors, private security contractors should be considered members of the armed forces of the United States. DOD security contractors are essentially employees of the department of defense. At the present time, "the United States uses private companies to provide a range of military and functions during overseas operations, including feeding troops, maintaining weapons systems, conducting interrogations, and providing security for diplomatic personnel."¹⁷ There are currently over 130,000 DOD contractors (nearly equal to the number of deployed service members) employed by the United States in Iraq alone.¹⁸ Of those contractors, about 30,000 are DOD security personnel who are authorized to use force in self-defense.¹⁹

The nexus between the employer and employee grew even stronger when the United States Congress passed legislation that made DOD contractors subject to military discipline and justice.²⁰ Under the new laws, "contract personnel may be subject to military prosecution under the Uniform Code of Military Justice (UCMJ) for conduct that takes place during hostilities in Iraq in some circumstances, although any trial of

a civilian contractor by court-martial is likely to be challenged on constitutional grounds."²¹

Additionally, "Article 2(a)(10), UCMJ,91 as amended by § 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (P.L. 109-364)("FY07 NDAA"), extends military jurisdiction in 'time of declared war or a contingency operation' to 'persons serving with or accompanying an armed force in the field.'"²² If security contractors commit law of war violations, "the UCMJ may extend jurisdiction to try suspects by court-martial or by military commission."²³

Counter Argument

Arguments that security contractors should not be considered lawful combatants include the contention that such contractors are simply service providers hired to provide security to a state's armed forces. Detractors have suggested that a service contract between the DOD and private security contractors is not a sufficient nexus to provide the protections afforded by lawful combatant status under the Geneva Conventions.²⁴ The simple "fact that a [private security contractor] has been hired to provide assistance to a state's armed forces is not conclusive; a more formal affiliation than a mere contract is required."²⁵

This argument is not convincing given the overwhelming nexus between private security firms and the DOD. More

meaningful indicators of whether private security contractors are defacto members of an armed force have been offered and include the following indicators:

- Whether they are employees of the department of defense...;
- Whether they are subject to military discipline and justice;
- Whether they form part of the military chain of command and control;
- Whether they form part of the military hierarchy²⁶

The existence of any of these factors does not necessarily prove that such contractors are members of an armed force.²⁷ However, the existence of factors does lend significant weight to the proposition that such contractors are defacto members of an armed force.

This is especially true in consideration of the law recently passed by Congress that specifically granted the commanders on-the-ground with jurisdiction over DOD contractors, under the Uniform Code of Military Justice.²⁸ Under that law, such contractors are explicitly subject to the military chain of command and control. The fact that security contractors are paid by the DOD, subject to military justice and subject to the military chain of command overwhelmingly supports the assertion that there is a much more formal affiliation than a mere service contract. Taking all relevant facts into consideration, the synergistic relationship between the DOD and security contractors convincingly leads to the conclusion that they are

defacto members of the armed forces of the United States and are protected as lawful combatants under the Geneva Conventions.

CONCLUSION

Although DOD security contractors are civilians, they should be considered lawful combatants under the Geneva Conventions for two main reasons. First, DOD security contractors should be considered lawful combatants because they satisfy the definition of a combatant protected by Article 44 of the Geneva Conventions, Additional Protocol of 8 June 1997. Second, due to the nature of the close relationship shared by the DOD and private security contractors engaging in direct combat, such contractors should be considered defacto members of the armed forces of the United States.

WORD COUNT: 1798

Notes

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 2. Elsea and Serafino, "Private Security Contractors in Iraq: Background, Legal Status, and Other Issues," 20.
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