

USAWC STRATEGY RESEARCH PROJECT

**PRIVATE SECURITY CONTRACTORS ON THE BATTLEFIELD**

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## **ABSTRACT**

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Today's military forces are more reliant on contractors for a greater range of services than ever before. In Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF), one of the fastest evolving and most contentious services provided by contractors is that of security. Private security contractors (PSC) have become an indispensable component of the U.S. efforts in Iraq and Afghanistan. This paper reviews existing policy concerning the control of PSCs in Iraq. It further analyzes the theater entry requirements for PSCs, legal issues arising from PSC use, and the operational control of PSCs in the area in which a joint force commander conducts military operations. This paper concludes with policy recommendations to better control PSCs in future U.S. or Coalition military operations.



## PRIVATE SECURITY CONTRACTORS ON THE BATTLEFIELD

Contractors on the battlefield are a reality the United States military has embraced, to varying degrees, since the formation of our armed forces. The advent of private contractors authorized to apply deadly violence as part of their contracted responsibilities is a phenomenon that has grown exponentially throughout the current conflicts in Iraq and Afghanistan. This use of private security contractors (PSC)<sup>1</sup> in a theater of conflict is necessary with the present force structure and nature of the mission, but policies governing their use have been lacking. The purpose of this paper is to focus on the policy considerations of the theater entry requirements for PSCs, the legal quandaries that arise as a result of using PSCs, and the operational control of PSCs in the joint operating area (JOA). Acknowledging the unique circumstances in various theaters of conflict, the policy recommendations in this paper are meant as a starting point to plan the incorporation of PSCs as part of future US or Coalition military operations.

Since the Revolutionary War, the United States has relied on contractors and civilians to provide services and capabilities in order to complete its various missions.<sup>2</sup> Following the end of the first Gulf War, the privatization of many military services took on a new urgency as the US followed through in reaping the “peace dividend” started by the collapse of the Berlin Wall. The US military eventually decreased its forces by 700,000 personnel. This decrease, combined with an international trend in privatization, led to a rise in the use of contractors, principally for logistical support. By hiring contractors to provide routine logistic and maintenance functions, the military could better focus its remaining force structure on its core competency of applying violence. In short, contractors were a way to both reduce military expenditures and to increase the ratio of “trigger-pulling” soldiers to support soldiers – also known as the “tooth-to-tail” ratio.<sup>3</sup>

The US military’s reliance on contractors for primarily logistic services changed dramatically with Operation Enduring Freedom (OEF) in Afghanistan and Operation Iraqi Freedom (OIF) in Iraq. The large presence of civilian contractor personnel in these conflicts, combined with tremendous demand on deployed military forces and the gravely dangerous security environment, created a growing demand for PSC services to ensure the safety of the large non-military entities in theater. As insurgents and terrorists began attacking softer civilian targets in addition to military targets, PSCs became necessary enablers for non-military organizations to successfully accomplish their intended purposes on the battlefield. PSCs contribute to the safety and security of a vast array of organizations and individuals: from other contractors, to US government agencies. Examples of PSC clients include the US Department of State, the US Army Corps of Engineers, and some top members of the military and civilian leadership in Iraq.<sup>4</sup>

I do not address the debate of whether the application of violence should be contracted from a state to a private company. My starting point is the understanding that PSCs are currently a necessity and will be necessary in future conflicts. Furthermore, I do not discuss whether the application of violence is the sole domain of a state nor do I address whether these functions are “core” competencies of a state’s military forces and therefore not subject to become contracted services.<sup>5</sup> At present, PSCs are a critical enabler for the US to effectively and efficiently complete its reconstruction and stability operations.<sup>6</sup> I do not foresee significant changes in the need for PSCs for future operations similar to OIF and OEF.

For the purpose of this policy discussion, I will define PSCs as private companies recognized by the US or a Coalition government who gain commercial benefits and financial profit by providing security services to individuals, businesses, and organizations – governmental or otherwise.<sup>7</sup> This definition includes security contractors directly hired by Coalition governments, as well as PSCs hired by the governments’ recognized contractors.

Despite the plethora of existing policy, guidance, and regulation concerning US military contractors, there was a dearth of US policy regarding PSCs until recently.<sup>8</sup> The Coalition Provisional Authority’s (CPA) “Memorandum Number 17” (Memo 17) titled, “Registration Requirements for Private Security Companies (PSC)” dated 26 June 2004, was the first attempt to write policy concerning the control of the thousands of PSC personnel operating in Iraq. Although the document focuses exclusively on Iraq, it is instructive as a measure to balance future PSC policy. On 3 October 2005, the Department of Defense (DoD) published Instruction 3020.41 (referred to herein as DODI), Subject: Contractor Personnel Authorized to Accompany the U.S. Armed Forces. Subsequently, US Central Command (CENTCOM) published guidance in its 23 Dec 05, message, subject: : USCENTCOM Policy and Delegation of Authority for Personal Protection and Contract Security Service Arming of DOD Civilian Person (referred to herein as CENTCOM Policy), further refining the guidance set forth in DODI specifically for Iraq and Afghanistan.<sup>9</sup> The DODI and the CENTCOM Policy together are the most detailed and instructive publications to date regarding many of the policy challenges regarding PSCs, but there remains a need for further policy refinement.

Memo 17 appears to be the result of a letter from Congressman Ike Skelton to Secretary Donald Rumsfeld dated 2 April 2004, wherein the Congressman inquires about the status of PSCs following the killing and mutilation of four Blackwater employees in Fallujah. The brutal slaying of the Blackwater employees and the subsequent media saturation of the event thrust the issue of PSC use into the public spotlight.<sup>10</sup> Secretary Rumsfeld’s 4 May 2004 reply to Congressman Skelton outlines the CPA policy regarding PSCs that was published about seven

weeks after the Secretary's reply. CPA Memo 17 appears to be a policy resulting from that incident and the subsequent inquiries. DODI 3020.41 is a considerable enhancement of the initial policy effort in CPA Memo 17. Not only does DODI 3020.41 address PSCs in Iraq, it provides more detailed guidance for PSCs throughout the entire DoD. The CENTCOM Policy further refines PSC policy for both Iraq and Afghanistan and provides more specific guidelines concerning the hiring of PSCs and certain aspects of their functional control. The CENTCOM Policy references Memo 17 in its text, indicating that the policy is meant to compliment the earlier guidance rather than supersede it.

Memo 17 was the US's first attempt to control armed contractors operating in Iraq, but it failed to address US responsibilities regarding PSCs. This Memo was, after all, written by the CPA and focused on the Interim Iraqi Government (IIG). Placing the vast majority of responsibility on the infant Iraqi government was problematic. The Iraqis were in the process of forming their governmental structures and were operating in a difficult, violent environment. The entry and control of PSCs was one of many pressing issues the IIG could not effectively control in mid-2004. In October 2005, the DoD published much more comprehensive policy in DODI 3020.41, placing the greatest responsibility for PSC entry, tracking and control where it needs to be in such situations: on US leadership in the country of conflict. CENTCOM subsequently adopted the DODI in its 23 Dec 05 Policy message, which blended the Iraqi licensing responsibilities from Memo 17 with the new, detailed US PSC control responsibilities outlined in DODI 3020.41.

In order to understand the current evolution of existing PSC policy, we must examine the significant factors bearing on PSC control in a theater of operations: (1) the entry requirements of armed contractors into a theater of operations; (2) the legal difficulties associated with PSC policy; and (3) the operational control of PSCs in the JOA.

#### Theater Entry Requirements

The diffuse nature of hiring and subcontracting PSC services creates the first policy issue, *i.e.*, how does a presiding coalition authority decide which contractors are allowed in a theater of conflict with weapons? Entry requirements are essential to control the quality and quantity of PSC personnel who could potentially exercise deadly force in the course of their contracted duties. The PSC personnel in theater will not only have weapons, but as contractors, will not be subject to direct military command authority.<sup>11</sup> This poses both legal and control problems that any PSC policy must bridge. Stipulations concerning the quality and credentials of PSC personnel take on urgent proportions considering their responsibilities as legitimately armed

civilians. The responsibility, training, vetting, and identification requirements of PSC personnel must be the foremost considerations when contracting for PSC services. Any situation following major combat actions will likely be chaotic and perhaps even lack the basic enforcement authorities of a failing state. This lack of existing host-nation (HN) control mechanisms makes the initial entry and tracking of PSCs and their personnel critically important. Entry requirements and stipulations are the first and most important layer of PSC control.

#### Responsibility

The CPA published Memo 17 as a first attempt to apply some controls to the burgeoning PSC population in Iraq. Section 2 of the Memo addresses registration, vetting, and licensing of PSCs. This section obligates the PSC applying for licenses to provide the names of all employees, the details of the work, as well as the types and serial numbers of all weapons they will use. The Memo outlines specific obligations of the Iraqi government and states PSCs must have licenses issued by both the Iraqi Ministry of Trade (MOT) and the Ministry of the Interior (MOI). As with virtually every area of responsibility delineated in Memo 17, the entry and tracking of PSCs was placed on the shoulders of the newly formed IIG.

While the HN licensing of the PSCs is an important step in legitimizing a government (if it exists), it is probably not practical in similar future scenarios (as it was not appropriate in OIF and OEF). In comparable future circumstances, the US would most likely intervene in cases where there is either a failed state or where the military has changed the regime,<sup>12</sup> such as in Iraq and Afghanistan. A HN licensing requirement would be desirable if state mechanism exists and are viable; however, it is difficult to foresee HN licensing as a feasible entry requirement for PSCs – at least initially. Local licensing could also have the unintended consequence of leaving the Coalition forces without a critical capability if the HN exercises the authority to deny a license to a PSC. The US or Coalition authorities must exercise control over its PSCs and be responsible to the HN until the HN becomes more capable to establish viable licensing processes and legitimately control PSC activities. The point at which a HN government is able to effectively oversee PSC licensing and control is subjective and vulnerable to the vagaries of political pressure. However, US authorities, as the contracting agent, remain responsible for the conduct of all contractors, including PSCs, and consequently must retain the authority to oversee their behavior.

DODI 3020.41 delegates the planning and conduct of contractor theater reception and accountability reporting to the geographic combatant commanders. The CENTCOM Policy stipulates that the USCENTCOM Deputy Commander is the approval authority for PSC

contracting and arming requests in both Iraq and Afghanistan. The CENTCOM Policy allows for further delegation to general officers or their civilian equivalents in specific staff positions. In this regard, the CENTCOM Policy is careful not to preempt Memo 17 or to overshadow MOT and MOI authorities. The CENTCOM Policy clarifies the expectations and responsibilities of the US military authorities in Iraq and Afghanistan.

DODI 3020.41 does not address HN licensing, but instead designates control of contractor theater reception and accountability to the geographical combatant commander. Rather than set forth a specific licensing arrangement with the HN, the DODI states that, “contingency contractor personnel must comply with applicable HN and TCN (third-country national) laws.”<sup>13</sup> This non-specific approach is useful because it prescribes detailed responsibility for contractor reception and accountability to the US military chain of command, while allowing for relevant HN and international laws in a given situation. Negotiation with a HN government is a significant variable that is situation dependent. In most cases where the US must deploy combat forces in significant numbers, the HN government will not be in a position to control PSC usage in its country. As the HN develops its capacity, it will have to prioritize those functions it wishes to subsume from an occupying force. How well the US and its coalition partners control PSCs in the HN will govern the timing of the HN's assumption of greater control of PSC entry and activity.

#### Training

Just as the US maintains high standards for the training of its military forces, it must also insist on a high level of proficiency for PSC employees who are authorized to carry and potentially use weapons in a theater of conflict. Memo 17 does not describe specific standards for training or prior experience of PSC personnel hired into the JOA. The only training standard mentioned in Memo 17 is a one sentence sub-paragraph providing that PSC personnel should receive “operations and weapons training to the minimum standard set for the Facility Protective Service.”<sup>14</sup> The DODI specifies that all contractor personnel must “validate or complete any required training” that refers to similar types of training all deploying military personnel would receive, e.g., Geneva Conventions, operational security, and cultural awareness.<sup>15</sup> For PSCs, the DODI requires:

Documentation of individual training covering weapons familiarization, rules for the use of deadly force, limits on the use of force including whether defense of others is consistent with HN law, the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of deadly force that control the use of weapons by civilians, and the Law of Armed Conflict...<sup>16</sup>

These specific requirements for PSCs are a significant improvement in US policy, but fail to identify what “documentation” is sufficient to satisfy the listed requirements. The result is that unscrupulous contractors could falsify these requirements for unqualified personnel.

The CENTCOM Policy prescribes the same training as the DODI and further specifies that the training is only valid for a period of one year for arming requests. As in the DODI, the CENTCOM Policy does not specify who is authorized to validate these requirements. Given the tremendous variations in standards of military and police organizations throughout the world, the only viable way to screen the quality of personnel is to establish objective criteria for all PSC personnel. Individuals should have to demonstrate their proficiency in a variety of skills immediately upon their deployment into theater or prior to their deployment into theater. Specific standards such as these must come from the military commander in the JOA, based on the local security situation. Future plans must specify the training standards for various PSC employees to ensure that armed contractors have some minimum level of training proficiency that Coalition authorities validate upon entry to the JOA or before deployment of the PSC personnel into theater.

#### Vetting

Memo 17 requires the MOI to vet the officers and employees of each PSC to “ensure that any criminal or hostile elements are identified...” For non-Iraqi employees, the Memo allows “comparable certification from a foreign governmental authority...”<sup>17</sup> The DODI places the responsibility for vetting all contractor personnel directly on the Under Secretary of Defense for Intelligence, but does not detail anything further than “...shall develop and implement, as required, procedures for counterintelligence and security screenings of contingency contractor personnel...”<sup>18</sup> The CENTCOM Policy does not address vetting.

This uncovers one of the greatest difficulties in attempting to regulate or control PSC employees from another country: most PSCs hire their personnel from countries other than the HN.<sup>19</sup> It is important to request from the nation of citizenship of each employee vetting information on its citizens. Close cooperation between a wide variety of nations will be necessary.<sup>20</sup> By involving the nation of citizenship in the vetting process, it would also serve to strengthen any existing national legislation attempting to control the activity of citizenry in the international arena. A current example of the paucity of state influence on the activity of its citizens in foreign countries is the case of South Africa. In July 1998, South Africa passed legislation prohibiting its citizens from engaging in “mercenary” activity. In that legislation, South Africa’s definition of mercenary activity refers to the kind of work PSCs perform in both OEF and

OIF. The legislation attempted to differentiate between mercenary activity and “foreign military assistance” which allows PSC work in third countries under specific circumstances.<sup>21</sup> Some South African lawmakers used this legislative confusion to declare that PSC employment outside of South Africa was illegal. However, South Africans make up a significant percentage of the PSC forces in both Iraq and Afghanistan.<sup>22</sup>

The obvious difficulty in vetting citizens of a third country is the willingness of the nations of citizenship to cooperate in providing information about its citizens who desire PSC employment. The best possible solution in this case would be to require the contractor to obtain specific necessary vetting information on its prospective employees for entry into the theater. In this way, the PSC would be required to exercise caution in who it hires and from what countries it attempts to draw its workforce. It is then incumbent on the US authorities through the contracting officers to clearly specify vetting information requirements in the terms of the contract.

#### Identification Cards

To be effective in enforcing the gateway requirements for PSC hires, the procedures and processes for issuing identification badges must be in place when contracting for services. Senior coalition officials must also coordinate common criteria for badges amongst all coalition nationalities and forces to avoid confusion and loss of control. To properly control the entry of PSC personnel, enforce the training requirements, and uphold the personnel quality standards, entry procedures must culminate with the carefully controlled issue of a common identification badge. Such a badge would be necessary to move about theater and gain access to essential locations and services.

DODI 3020.41 is explicit in the required identification for contractors accompanying US Armed Forces. In an unusual break between the CENTCOM Policy and the DODI, the CENTCOM guidelines do not address contractor identification requirements. In fact, neither Memo 17 nor the CENTCOM Policy addresses common identification badge requirements across all Coalition forces. Among the thousands of contractors in Iraq and Afghanistan, there currently is not a viable standard for identification badges that crosses various unit and provincial boundaries in either country.<sup>23</sup> The US standard credential in Iraq is the Common Access Card (CAC). Without it, individuals may experience difficulty entering secure Coalition bases or receiving services such as lodging, food, fuel, or water. Due to the difficulty of replacing contractors' CAC cards in Iraq during 2005, Coalition Authorities decided to no longer recognize the CAC card as a viable contractor identification badge as of 1 January 2006.

However, trouble in establishing a new badge for the thousands of contractors in Iraq forced two additional extensions of CAC card use: once to mid-February 2006 and later to May 2006. As a result of no strong entry and identification procedures at the beginning of OEF and OIF, there is presently not a recognized badging standard for contractors in Iraq.<sup>24</sup> Trying to fix the procedures after-the-fact is extraordinarily complex, highlighting the importance of clear, up-front guidelines and procedures for future conflicts.

The DoD recognized the importance of identification badges when it published DODI 3020.41, dictating that "(c)ontingency contractor personnel shall be issued a standard Geneva Convention Card..."<sup>25</sup> The issuance of this standard identification card must be the culmination of any deployment or entry requirements. In enforcing the issuance and use of a commonly recognized identification card, PSC and other contractor personnel would be forced to submit to all entry procedures and processes. The identification card can only function as an effective control mechanism if it is realistically tied to daily requirements for support (fuel, food, lodging), recognition, and movement in the JOA.

#### Legal Quandaries

The fact that PSC personnel are civilians, yet carry weapons as combatants, puts them in a murky legal status. Their legal status is further muddled by the fact that PSC personnel are citizens of third-country nations and work for multi-national corporations. The vast body of existing state and international law addresses either military combatants of a particular nation or its civilians. The only other category addressed by most existing law is that of the mercenary.<sup>26</sup> PSCs do not fall into any of these legal categories. Until state and international laws catch up to the advent of PSCs, US or Coalition authorities must define PSC legal status in each case. The United Nations (UN) is beginning to realize this fact and in its most recent guidance and they have begun addressing "other security actors" in recent UN guidelines.<sup>27</sup> The ambiguous legal status of PSCs makes policy development particularly difficult. One of the principal problems resulting from this legal confusion is the matter of jurisdiction. Another legal consideration for PSC control is that of PSC financial liability.

#### Jurisdiction

Legal jurisdiction over PSC employees is frequently complicated by the fact that a multi-national PSC corporation working for the US in a HN hires its employees from different third country nations. What body of law applies to the misdeeds of such PSC employees? If it is not international law (which does not exist with regard to PSCs), the question of which national legal standards and venue are appropriate. Fred Schreier and Maria Caparini effectively

encapsulated this legal dilemma in their paper on the law of privatizing security when they wrote:

The failure to establish the exact legal status of PMCs (private military companies) and PSCs (private security *companies*) under international law effectively defers the problems to the national level. However, few states offer clear-cut legislation or effective enforcement mechanisms.<sup>28</sup>

Both international law and most national law instruments are insufficient to hold PSC employees criminally liable for misdeeds while working in a foreign country. In reality, the misdeeds of PSC employees are punishable by dismissal from the theater of operation and termination of employment, but individuals suffer little further legal accountability.<sup>29</sup> Perhaps the most prominent recent case of contractor accountability in criminal cases is the implication of CACI and Titan contract interrogators in abuses at Abu Ghraib prison.<sup>30</sup> While the US Army determined contractors were involved in over one-third of the proven incidents at the prison, the only individuals prosecuted to date have been US Soldiers.<sup>31</sup>

Rather than bemoan the fact that there exists a significant gap in international and national laws concerning non-state actors in general and PSCs in particular, the US must strive to articulate the legal status of PSC employees and their liability for criminal behavior in both contractual documents and policy. In Memo 17, the CPA broadly indicated that PSC personnel were subject to Iraqi law for their actions and did not enjoy any special protected status. In an attempt to clarify the legal status of US contractors, Paul Bremer (the former head of the CPA in Iraq) later issued an order clarifying that contractors were subject to their own nation's laws rather than HN law for any activities specified in their contracts.<sup>32</sup> Both the DODI and the CENTCOM Policy require armed contractors to acknowledge that "potential civil and criminal liability exists under US and HN law for the use of weapons."<sup>33</sup> This statement appears purposely vague; it is unclear what legal jurisdiction US officials could exercise over non-US contractor personnel.

The CENTCOM Policy, and DODI 3020.41 to a greater degree, go into extensive detail specifying acceptable activities for PSCs and their personnel. It clearly states that contractors in general, but specifically contract security/PSC personnel, are not combatants and expressly prohibits their involvement in hostilities against enemy forces.<sup>34</sup> This careful articulation of PSC combatant legal status is an attempt to resolve legal questions regarding PSC status for the purposes of prisoner of war status and eligibility for other treatment under the Geneva Convention – declaring that PSC personnel enjoy the same status as other contractors. The DODI and the CENTCOM Policy directly address the question of whether PSCs violate a law of war or other DoD policy. The DoD Office of the General Counsel states that the present

circumstances in Iraq and Afghanistan clearly do not violate laws of war or other DoD policy since the present conflicts in both countries have progressed to phases that are not considered “major combat operations of an international armed conflict.” While it is clear US forces are indeed engaged in significant combat operations on a daily basis in both Iraq and Afghanistan, the important distinction is “there is no longer a high risk of direct contact with or confrontation with *lawful* hostile forces.”<sup>35</sup>

In future cases where Coalition forces must use the services of PSCs, it is impractical to assume the HN could properly oversee or enforce the activity of a PSC. One could argue there would probably not be a need for PSCs in an area if the HN police and security forces were capable of effectively enforcing its laws. In fact, there may not be any legitimate or widely recognized law for the HN to enforce in a post war scenario. Future policy must include the responsibility of the contracting nation to enforce standards of behavior on their contractors. This is extraordinarily difficult given the varied citizenship of most PSC personnel. Individual enforcement requires coordination with the country of origin for the offending parties and requires multilateral agreements among nations to provide for the consistent treatment and accountability of all PSC personnel. The US should work with other interested countries to draft international guidelines for UN consideration regarding PSC employees or “other security actors.” Until some form of internationally recognized standard for PSCs exists, the US and Coalition authorities will have to seek multilateral agreements with nations whose citizens request employment with in-theater PSCs. Without some form of multilateral or international agreement, it will remain exceedingly difficult to hold individuals responsible for their actions outside of their nation of citizenship.<sup>36</sup>

#### Financial Liability

While holding TCNs criminally liable for any misdeeds requires a more extensive legal framework and new legal instruments, assessing financial liability is much easier under the standard terms of a written contract. Given that contractors are in the business to make money, fines or financial restitution can be the easiest and most effective enforcement mechanism compelling PSCs to better choose and subsequently monitor their employees' behavior.

Memo 17 is the only current policy document that directly addresses financial liability of PSCs. In the Memo under Section 3, “Bonds and Insurance”, the CPA policy requires a bond of \$25,000 to cover any unpaid damages or breaches of Iraqi law. The policy also requires that the PSC have “sufficient” public liability insurance to cover possible claims. However, in the same paragraph it also provides for exemption from the liability insurance requirement if

securing such insurance is not practical. The DODI and the CENTCOM Policy do not specifically address financial liability. Future policy guidelines should require a sufficiently large bond (with respect to the value of the PSC contract) to inspire compliance from the contracted company. The \$25,000 bond invoked by Memo 17 is not large enough to provide a practical incentive considering most of the PSC contracts are worth millions of dollars.<sup>37</sup> To have the desired enforcement effect, the bond, and required liability insurance, should be determined as a percentage of the contract value. Private contractors are in business to make a profit and plainly understand monetary incentives to police their employees' behavior.

#### Control in the JOA

The control of contractors in an area of operation is the ultimate aim of any PSC policy. Coalition authorities are responsible to the HN and their domestic governments/constituencies for the conduct of their contractors. This degree of control is difficult in the violent and often chaotic post-hostilities phases such as we have in both OIF and OEF. Effective control in the JOA requires formal oversight, designated deployment processing center(s), and operational control mechanisms. Due to the demand for qualified PSC personnel in a theater, future policy must also address the problem of in-theater recruitment of security forces. Ultimately, the control of PSCs will be the responsibility of a contracting officer. However, the current paucity of in-theater contracting assets make effective control of PSCs difficult.

#### Oversight

Current PSC policy in Iraq, as defined in Memo 17, addresses the control of PSC actions through the licensing procedure with MOI and via an "Oversight Committee" to be established at some point in the future. This committee is composed of the Inspector General of MOI, a member of the Judiciary, and a representative of the MOT. Memo 17 specifies that this committee is to report annually to the Minister. Although the Memo 17 licensing procedures are still in effect for Iraq, most HN governments will not be able to form an oversight committee that is properly empowered to appropriately enforce standards immediately following a major conflict or regime change. The US or Coalition authorities must form an oversight committee as a multi-agency body to oversee PSC activity in theater. In this way, it could audit the personnel, weapons, and the operations of PSCs. To be effective, the committee must be empowered with the ability to fine, remove PSCs from country, or detain them for proper legal action – so its actions must be closely coordinated with the contracting office.

The DODI and CENTCOM Policy do not specifically call for a separate oversight committee, but do place many more control mechanisms in the hands of US authorities. The

DODI details several mechanisms for the Geographic Combatant Commanders (GCC) to control contractor deployment into the JOA. The first mechanism is the GCC must formally designate the location of a deployment center through which PSCs must process before they enter theater. The GCC also issues letters of authorization, designates the entry joint reception center (JRC), oversees the development and use of a web-based joint database for all contractors, and must approve all individual arming requests before contractors are authorized to carry armaments in the JOA.

#### Deployment Processing Center

In order to standardize the training and requirements for all contractors entering the JOA, the GCC must provide specific deployment and admission requirements in a written contract to include which deployment center to conduct all deployment and redeployment processing. In the DODI, there is a provision to allow contractors to perform their own theater admission processing with a contracting officer waiver based on exigent circumstances. In this case, the DODI specifies that "(c)ontracting officers shall coordinate with and obtain approval for the appropriate Military Department or agency and ensure all requirements of the DoD deployment centers are met."<sup>38</sup> This would place an extraordinary burden on contracting officers that are already overwrought. The approval authority to authorize contractor-performed theater admission should rest with the GCC who would then also be responsible for the oversight of pre-deployment requirements. This would provide for consistency amongst all contractors and place the responsibility for contractor qualification in the staff section of the commander's choosing.

Per the DODI, upon completion of all deployment processing, the contractor receives a Letter of Authorization so its personnel may then proceed to the Joint Reception Center (JRC) in the JOA. The JRC is a final control mechanism to ensure contractors have completed all specified requirements and are entered into the joint database before being permitted to receive an identification card and move into the JOA. For TCNs, it does not make sense to require a stop through a deployment center outside of the JOA and then another stop in the JRC in the theater of operations. For all non-US contractors, the JRC should function as the single deployment processing center. Otherwise, TCNs will conceivably run into difficulty with visa requirements, unnecessary travel expenses, and other administrative delays. Combining the deployment center with the JRC would streamline the entire entry validation process and enhance control of TCNs.

### Operational Control

There is no specific provision in Memo 17 or the CENTCOM Policy for the operational coordination of PSC activities with HN or other security forces. DODI 3020.41 requires basic operational coordination plans as part of a request for permission to arm contractor personnel. These requirements include information on PSC personnel such as where they will operate, perceived threat in these areas, and the scope of their protective services. The DODI also requires a movement plan for PSC personnel, how they can rapidly identify themselves to coalition forces, and a communication plan to share information with US military forces.<sup>39</sup> The control details of PSCs and other contractor personnel is best left to the commanders in the JOA, but future policy guidelines should include US interagency and HN coordination requirements.

### In-Theater Recruiting

Neither Memo 17, DODI 3020.41, nor the CENTCOM Policy addresses the possible recruiting (“poaching”) of state security forces. This has the potential to be a serious concern with the tremendous disparity in remuneration between private and public security forces.<sup>40</sup> Typically, the state pays for the training of public security personnel. PSCs can attempt to recruit public security forces with the promise of higher pay, fewer hours, and better work conditions. This phenomenon can further damage the working relationship between public and private security forces.<sup>41</sup> Future policy must address the active recruitment of military and police forces by including a check for such recent service in the hiring and screening criterion. This means setting a minimum acceptable time from the release of a public military or police employee until he or she can work for a PSC and be permitted to work in theater.

### Contracting Personnel

Ultimately, the control of PSCs or any other contractor depends on the skillful writing and subsequent enforcement of a contract document. For military commanders, this is particularly vexing since the commander does not enjoy his or her traditional mechanism of the Uniform Code of Military Justice (UCMJ) to enforce norms of behavior on contractors. Joint Publication 4-0, *Doctrine for Logistic Support of Joint Operations*, specifically states: “Commanders have no penal authority to compel contractor personnel to perform their duties or to punish any acts of misconduct.”<sup>42</sup> For PSCs, as with all contractors, behavior is primarily driven by present and future profit. PSCs necessarily perform their responsibilities in a multifarious atmosphere where armed violence forces exigencies not normally anticipated or included in contract terms.<sup>43</sup> These distinctive contractor control challenges create unique difficulties for the contracting

office. Due to the uniqueness of PSC services, contracting offices must strive to develop and maintain experienced contract officers and specialists in the area of security services.

As with all contractors, PSCs are controlled through the terms of a written agreement. The terms of a PSC contract are particularly important given the unique planning and enforcement challenges that US authorities must address in contracting security services in the dynamic and dangerous atmosphere of war or other protracted violence. Here even more so than in normal contracts, the usual tension between performance and profit take on increased importance. For example, to control costs or expedite delivery of services, the US government may decide to provide armored vehicles to a PSC for transport government clients. In this case, the burden to maintain those vehicles – regardless of how the PSCs drive or treat the vehicles – may reside with the government. If vehicles fail and are not available to the contractors, the PSC is under no obligation to transport clients until sufficient vehicles are again available. Contracting PSC services requires careful and thoughtful application of unique control exigencies. This requires clear guidance in the way of policy or regulations beyond what exists in DODI 3020.41.

The US government simply does not have sufficient contract specialists to surge during major operations to the extent required by the vast contracting requirements that we see today in Iraq and Afghanistan. At one point in OIF, planners specifically limited the number of contracting personnel in the JOA due to the poor security environment there. To make up for the shortfall of contracting personnel in theater, authorities in Iraq had to reach back to acquisition forces located in other countries.<sup>44</sup> Without a specific plan to address the shortfall of contractor personnel, we will certainly see the same phenomenon recur in the next conflict. The DoD must invest in training and organizing a reserve contracting corps for foreign deployments.<sup>45</sup> All US agencies must rewrite the terms of employment for their contracting personnel to ensure these crucial individuals can be compelled to serve overseas as needed.

### Conclusion

The policy embodied in DODI 3020.41 is a significant improvement in US guidance for the control of PSCs in future conflicts. While Memo 17 and the 23 Dec 05 CENTCOM Policy have many useful provisions for Iraq and Afghanistan as appropriate, those policies try to catch-up procedures that are now two years behind in implementation. Future policy must strengthen guidelines in the areas of theater entry requirements, legal quandaries, and operational control in the JOA to serve as a sufficient starting point for planners if we are to effectively control PSCs and the other contractors that are sure to be a part of any future contingency deployment.

Memo 17 places a large burden on the HN ministries to control the entry of PSCs effectively – this is not a realistic option in an occupied country. As outlined more completely in the DODI and to a lesser extent the CENTCOM Policy, future coalition authorities will have to establish more complete control of PSCs and do so with internal resources that may not be part of currently planned deployment forces. It is not realistic to expect a newly forming or previously failed state to effectively control coalition contracted security agents. In this sense, planners must anticipate and strive for the greatest extent of US control possible over PSCs throughout future operations. The US should be responsible for its contractors and must staff to effectively exercise that control.

The US can best control PSCs by clearly stating the theater entry requirements for their personnel to enter and remain in the theater of operations. Planners must establish the criterion and prescribe the processes necessary to allow armed contractors into theater – a *de facto* licensing process. This process must consist of vetting through the nation of citizenship for PSC employees, attendance at theater training validation (to demonstrate basic proficiency in those tasks prescribed by the in-theater authorities), and followed by the issuance of a commonly recognized identification badge for personnel control. To the greatest extent possible, planners must specify the appropriate documentation requirements for PSCs so contracting officers can quickly include those provisions in all contracts for services in the JOA. The greater specificity in standards and required documentation, the less turmoil there will be as coalition authorities plan for the entrance and accountability of contractors. Furthermore, the vetting of all personnel should be the burden of the employing PSC. This vetting must be explicitly outlined in contractual standards with a requirement to include certification from the employees' nation of citizenship.

The legal status and jurisdiction of PSC employees is the most difficult issue to resolve because it involves the citizens of several countries working in a third nation. To address this problem in the long term, the US must draft international guidelines for UN consideration and adoption. Until there is a viable international standard for the legal status and criminal jurisdiction of PSC employees, the US may have to negotiate multilateral agreements with the countries of PSC employ if the US reasonably expects to hold these individuals accountable for their actions in theater. Until that time, the best recourse to enforce standards of behavior on third-country national PSC employees is to include punitive fines and monetary incentives to properly police PSC actions in the JOA. To ensure PSCs remain fiscally accountable for misdeeds, the contract must stipulate bonds and insurance hold-backs as a percentage of the value of the entire contract.

For operational control of PSCs in the JOA, the in-theater authorities must establish an independent oversight committee empowered to fine, remove, or detain PSC employees. The committee should also be responsible for prescribing interagency and HN notifications and operational coordination processes, as well as communications and spectrum requirements. TCNs should deploy directly to the JRC to receive all necessary training and certification at a single location rather than create the additional administrative burden of traveling to a separate deployment center outside the JOA. To prevent PSCs from recruiting state security forces, no PSC employees should be allowed to enter theater until one year after they have separated from state military or police forces.

The best control of policy provisions for contractors are enforced through a well-written and well-administered contract by skilled contract officers. These individuals are presently in strong demand and while the number and value of contracts continues to increase in the US government, the number of contracting officers and specialists is not increasing in a corresponding fashion. With the growing importance of contractors on the battlefield, DoD should train and organize a reserve contracting corps to answer the growing requirement to properly administer PSCs on the future battlefield. The terms of establishing the reserve contracting corps must include a legal requirement to serve in a theater of conflict as needed.

Implementing these policy recommendations for the entry, legal status, and control of PSCs in conjunction with DODI 3020.41 is important for planners as they consider the proper incorporation and accountability of PSC personnel on future battlefields. The US will have to use security contractors in future conflicts and must begin to address the inherent difficulties now if it is to be prepared for the next conflict.

#### Endnotes

<sup>1</sup> The acronym of "PSC" can be confusing since different documents use "PSC" for various meanings. Some use PSC to refer to private security *companies*, while others use it to describe private security *corporations*. I refer to PSCs as those contractors authorized to use violence in the execution of their responsibilities, but some authors (e.g., Deborah Avant in *The Market for Force*) use the acronym to describe all military contractors whether they supply logistics, operational, or training support.

<sup>2</sup> James E. Manker, Jr. and Kent D. Williams, "Contractors In Contingency Operations: Panacea or Pain?," *Air Force Journal of Logistics* 28 (Fall 2004): 12.

<sup>3</sup> Lloyd J. Matthews, eds., *The Future of the Army Profession*, 2d ed. (Madison, WI: McGraw Hill), 273.

<sup>4</sup> AME Info, "Who's Winning Work in Iraq and Afghanistan?," available from <http://www.ameinfo.com/35609.html>; Internet; accessed 22 Oct 2005.

<sup>5</sup> Opposing ends of this discussion are represented by Ken Silverstein's *Private Warriors* and David Shearer's *Private Armies and Military Intervention*. Mr. Silverstein argues that lucrative security business interests drive state policy and Mr. Shearer makes the case that PSCs offer services essential to today's messy security environment at bargain prices.

<sup>6</sup> U.S. Congress, House of Representatives, Committee on Armed Services, Readiness Subcommittee, *Contractor Support in the Department of Defense*, 108<sup>th</sup> Congress, 2d sess., 24 June 2004, 7.

<sup>7</sup> In developing this definition, I modified the definition of a "private security company" as printed in Coalition Provisional Authority Memorandum Number 17, "Registration Requirements for Private Security Companies (PSC)," 26 June 2004 on page 1.

<sup>8</sup> Many noted PSC scholars collectively agree the international community needed to address the peculiar circumstances of PSCs. However, they generally gave their policy recommendations in platitudes, e.g., in his Executive Memorandum #958, James Carafano recommended that the Army should "Rewrite Doctrine" and PSCs should "Gain the Confidence of Congress".

<sup>9</sup> The Deputy General Counsel provided further clarification in his 10 January 2006 Office of the General Counsel memorandum, subject: Request to Contract for Private Security Companies in Iraq. The CENTCOM Staff Judge Advocate subsequently issued the General Counsel's additional legal guidance in a 12 January 2006 memo. For the purposes of this paper, I have included this additional legal guidance when I refer to the "CENTCOM Policy."

<sup>10</sup> Deborah D. Avant, *The Market for Force: The Consequences of Privatizing Security* (New York: Cambridge University Press, 2005), 2.

<sup>11</sup> Manker and Williams, 17.

<sup>12</sup> Peter W. Singer, "Peacekeepers, Inc.," *Policy Review* 119 (June/July 2003): 60 and Matthews, 108.

<sup>13</sup> U.S. Department of Defense, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, Department of Defense Instruction 3020.41 (Washington, D.C.: U.S. Department of Defense, 3 October 2005), 7.

<sup>14</sup> The Facility Protective Service is one of the divisions of the MOI charged with protecting Iraq's oil and electrical infrastructure.

<sup>15</sup> Department of Defense Instruction 3020.41, 12.

<sup>16</sup> *Ibid.*, 18.

<sup>17</sup> CPA Memorandum 17, 3.

<sup>18</sup> Department of Defense Instruction 3020.41, 5.

<sup>19</sup> "The Baghdad Boom," 25 March 2004; available from [www.sandline.com/hotlinks/Economist-Baghdad.html](http://www.sandline.com/hotlinks/Economist-Baghdad.html); Internet; accessed 21 Nov 2005.

<sup>20</sup> PSCs recruit their employees from all over the world: South Africa, the UK, Nepal, the US, Fiji, the Philippines, Denmark, and other nations.

<sup>21</sup> Greg Mills and John Strelau, eds., *The Privatisation of Security in Africa* (Johannesburg, South Africa: The South African Institute of International Affairs, 1999), 102.

<sup>22</sup> Raenette Taljaard, "Controls Needed to Rein in Private Military Firms," *The Straits Times*, 5 Jan 2004 [newspaper on-line]; available from [www.sandline.com/hotlinks/Straits-Times\\_Controls.html](http://www.sandline.com/hotlinks/Straits-Times_Controls.html); Internet; accessed 21 Nov 2005.

<sup>23</sup> Interviews with various MNC-I Officers in Iraq from Dec 2005-February 2006.

<sup>24</sup> LTC Wallace "Matt" Dillon, Deputy Director, National Reconstruction Operations Center, Gulf Region Division, Iraq, telephone interview by author, 24 Jan 2006.

<sup>25</sup> Department of Defense Instruction 3020.41, 12.

<sup>26</sup> Clive Walker and Dave Whyte, "Contracting Out War? Private Military Companies, Law, and Regulation in the United Kingdom," *International and Comparative Law Quarterly* 54 (July 2005): 674.

<sup>27</sup> Office of the UN Humanitarian/Resident Coordinator and DSRSG of UNAMI, *Guidelines for Humanitarian Organizations on Interacting with Military and Other Security Actors in Iraq, 20 October 2004* (New York: UN Printing Office), 1.

<sup>28</sup> Fred Schreier and Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper No. 6, March 2005, available from [http://www.dcaf.ch/\\_docs/occasional\\_6.pdf](http://www.dcaf.ch/_docs/occasional_6.pdf); Internet. Accessed 2 December 2005, ii. Parenthetical explanations added by author.

<sup>29</sup> Laura Dickinson, "Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law," University of Connecticut School of Law Working Paper Series, Year 2005, Paper 53, available from <http://lsr.nellco.org/uconn/ucwps/papers/53>; Internet; accessed 2 December 2005, 142.

<sup>30</sup> Avant, 2 and 235.

<sup>31</sup> Peter W. Singer, "Outsourcing War," *Foreign Affairs*, March 01, 2005; available from [www.brookings.edu/views/articles/fellows/singer20050301.htm](http://www.brookings.edu/views/articles/fellows/singer20050301.htm); Internet; accessed 26 Oct 2005.

<sup>32</sup> Avant, 235.

<sup>33</sup> Department of Defense Instruction 3020.41, 18, and similar language in Department of Defense, Central Command, "USCENTCOM Policy and Delegation of Authority for Personal Protection and Contract Security Service Arming of DOD Civilian Persons," 23 December 2005 (DOD Message 231606Z DEC 05), 3.

<sup>34</sup> Ibid., 2.

<sup>35</sup> U.S. Department of Defense Deputy General Counsel for International Affairs Charles A. Allen, "Request to Contract for Private Security Companies in Iraq," memorandum for the Staff Judge Advocate, U.S. Central Command, Washington, D.C., 10 January 2006. Emphasis added by author.

<sup>36</sup> Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, NY: Cornell University Press, 2003), 234.

<sup>37</sup> Avant, 8.

<sup>38</sup> Department of Defense Instruction 3020.41, 18.

<sup>39</sup> Department of Defense Instruction 3020.41, 17.

<sup>40</sup> "The Baghdad Boom".

<sup>41</sup> Singer, "Outsourcing War".

<sup>42</sup> U.S. Department of Defense, *Doctrine for Logistic Support of Joint Operations*, Joint Publication 4-0 (Washington, D.C.: U.S. Department of Defense, 6 April, 2000), V-8.

<sup>43</sup> Peter W. Singer, *Corporate Warriors*, 152.

<sup>44</sup> U.S. Congress, House of Representatives, Committee on Armed Services, Readiness Subcommittee, *Contractor Support in the Department of Defense*, 108<sup>th</sup> Congress, 2d sess., 24 June 2004, 16.

<sup>45</sup> James J. Carafano, "The Pentagon and Postwar Contractor Support: Rethinking the Future," 1 Feb 2005; available from <http://www.heritage.org/Research/NationalSecurity/em958.cfm>; Internet; accessed 3 Nov 2005.

