

PRINCETON PROBLEM-SOLVING WORKSHOP SERIES IN LAW AND SECURITY:  
A NEW LEGAL FRAMEWORK FOR MILITARY CONTRACTORS?

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**SESSION ONE – SETTING THE STAGE**

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*The first session of the workshop consisted of presentations by three experts on key aspects of the problem. The first presentation gave an overview of the industry. The second identified particular issues that arise in the area of intelligence-gathering. The third outlined the legal accountability framework.*

**A. Overview**

The first speaker, an industry expert, began by discussing the extent to which U.S. forces in Iraq and elsewhere include contractors, as well as government civilian employees. As the speaker explained, the military uses the term ‘hybrid’ to denote such a force.

*1. Five primary areas of contractor support*

The speaker noted that contractors perform in five primary areas. First, contractors provide training. According to the speaker, many units receive some preparation by contractors such as MPRI. Second, contractors such as KBR perform logistics functions. Third, contractors offer specific expertise such as technical support, translation, and data management. Fourth, contractors provide security. Leading firms, the speaker noted, include Blackwater, Erinys, and Dyncorp. Finally, contractors engage in reconstruction. The speaker observed that twenty years ago, the military had no idea that it would be involved in these rebuilding efforts. While it has now gained some expertise in managing these efforts, it lacks the experience that private firms can provide. Overall, the speaker said, logistics represents 70% of contracts, whereas consulting accounts for 20%, and security 10%. In many cases, the speaker emphasized, for example in conducting logistics, contractors perform much better than the military could. Contractor expertise, such as that of translators, is often higher than the military’s. Contractors’ use of force, the speaker noted, presents the most difficult questions.

*2. Origins and direction of the industry*

The speaker explained the industry’s rise as due, at least in part, to the downsizing of uniformed forces. Currently, the speaker described, the industry is consolidating, as smaller companies merge, and more product-oriented firms are buying out consulting companies. Each company is more diversified as a result. For instance, the speaker

observed, Blackwater now makes armored vehicles in addition to providing security services, and MPRI performs some logistics functions in addition to giving tactical advice and training. The Department of Defense (DOD) is the largest customer. The amount of money spent on contractors has almost doubled in recent years to over \$113 billion. Over 40% of companies were developed after 9/11.

### *3. Challenges and key questions for policymakers to consider*

The speaker identified core challenges the government faces in using contractors. The speaker emphasized that contractor support of the military is a good idea if it is the right support. Nevertheless, the speaker argued, the use of contractors presents challenges. The government, for example, is both a customer and a regulator, and this double role presents difficulties. Specifically, the speaker highlighted several core challenges the government faces and related questions for policymakers to consider.

*Determining what is inherently governmental.* First, the speaker observed that the question of which functions are inherently governmental is a muddier one than it was in the past. Because the military is now turning to contractors to perform tasks (such as aero-refueling) it never would have in an earlier era, the answers are much more difficult to reach. Yet, the speaker contended, policymakers need to have more of a discussion about which functions are inherently governmental and may not be contracted out. To determine the answer to that question, the speaker suggested that policymakers ask whether outsourcing the function in question will better accomplish the mission and whether outsourcing the function will work over the long haul. The speaker noted that, once privatized, the government rarely takes back a function.

*Oversight.* Second, the speaker suggested that contracting presents oversight challenges that are both regulatory and contractual. Specifically, the speaker maintained that the changing environment in which contracts are being acquired poses particular challenges for regulation and oversight. The speaker recommended that policymakers ask what is required of the government to adequately supervise the contractor, as well as provide clarity of mission and purpose to the contractor. Relatedly, the speaker suggested that policymakers ask what level of risk the government is willing to accept.

*Operational issues.* Third, the speaker identified several operational challenges. For example, according to the speaker, the level of education and training required for military troops is typically higher than for contractors. In many cases this is due to contractors' previous experience. At the same time, contractors tend to be more specialized; as a result, unlike uniformed troops, they cannot be called upon for jack-of-all trades functions. In addition, the speaker noted, military must provide security to the contracting firm's employees. A fourth challenge, the speaker observed, stems from the fact that contractors do not fall within the chain of command, and as a result commanders' authority has to be re-negotiated each time in each setting. Moreover, different types of contractors (logistics v. security) raise different issues.

*Co-mingling of different actors.* Fifth, the speaker pointed out, the co-mingling of contractors and uniform personnel, and the existence of different rules for each group, creates confusion and the potential for problems. For example, contractors may have greater access to drugs and alcohol, and can fraternize, which may corrupt military discipline.

*Transparency and reliability.* Finally, the speaker suggested that the use of contractors presents challenges of transparency and, in some cases, reliability (for example, when contractors quit a post or fail to follow through on a contract due to unforeseen risk).

## **B. Intelligence-Gathering**

A speaker with expertise in military intelligence began by suggesting that there is a consensus in the military that (1) the contracting process needs to be improved; (2) contractors should engage in more self-regulation; (3) command and control in the field needs to be clarified; and (4) the legal status of contractors needs to be made explicit. The speaker argued that with regard to intelligence, however, it is not clear that a bright-line definition of certain functions as inherently governmental is useful. The speaker noted that we have contracted for intelligence-gathering services for a long time, that paying non-governmental actors for intelligence is a commonplace practice, and that such intelligence has always been gathered without regard to human rights standards. Thus, the speaker contended that we should not per se preclude contractors from performing particular functions, so long as the contractors can perform the function better. On this view, even pulling a trigger does not have to be an inherently military function. Likewise, the speaker suggested that if we can control interrogators through proper contracting, there would be no problem with contracting that function (or hiring contractors to train military interrogators). Thus, we might reform the contracting process to make contracting more flexible so that the collector can identify a need or a source; give the collector the option to be the payer of the contract or not; and perhaps even relieve intelligence contracts from the requirement to vet the contractor's human rights background, or at least allow for exceptions. The speaker emphasized that this last suggestion follows from the observation that, in most cases, the people we want to talk to do not have clean backgrounds.

## **C. Legal Framework**

A final speaker with expertise on the legal framework governing contractors argued that, contrary to what some commentators have suggested, there is actually an extensive accountability framework for contractors. The speaker noted that there are some gaps and important open questions – questions the speaker suggested might be addressed during the course of the workshop.

### *1. Criminal law*

First, with respect to international law, war crimes prohibitions generally do not require state action, and so contractors might be prosecuted under this theory. Torture committed during armed conflict would constitute a war crime and probably does not

include a state action requirement even though the Convention Against Torture defines the offense as linked to official misconduct. Whether military commanders might be subjected to prosecution for the actions of contractors, under a theory of command responsibility, is an open question.

Second, with respect to domestic law, there are three statutory accountability regimes. The Military Extraterritorial Jurisdiction Act (MEJA), which extends federal criminal jurisdiction to actions of contractors taken overseas, initially applied only to DOD contractors; recently Congress expanded the provision to include contractors “supporting the mission of the DOD; pending legislation would expand the provision further to include all contractors acting in a contingency operation. Another statutory framework is the special maritime and territorial jurisdiction (SMTJ), which, after the USA Patriot Act, extends federal criminal jurisdiction to nationals of the U.S. on the premises of U.S. diplomatic, consular, or other U.S. missions or entities, or in residences or appurtenant land used for the purposes of these missions or entities. Another statutory framework might be the War Crimes Act or the torture statute, which allow U.S. courts to prosecute U.S. nationals who have committed torture or war crimes overseas.

Yet for both the international and domestic criminal law, enforcement is rare. There is no international tribunal with jurisdiction, and enforcement in a third-party state under a theory of universal jurisdiction is only a remote possibility. Courts in the host nation state are most likely not up to the task. And in U.S. courts, we’ve seen only one prosecution, the case of David Passaro, who abused a detainee in Afghanistan. He was successfully prosecuted under the SMTJ. Obstacles include graymail (when those accused threaten to reveal classified information unless charges are dropped), evidence-gathering difficulties, inter-agency coordination problems, and political will.

Perhaps due to these difficulties, Congress recently enacted legislation amending the Uniform Code of Military Justice (UCMJ) to allow contractors to be prosecuted in military courts not only during declared wars but also in contingency operations. Military prosecutions of contractors may not pose as serious a constitutional problem as it may at first seem, but it will surely be litigated and ultimately likely will require a new Supreme Court decision. In addition, there are significant operational challenges: Who will investigate? Which contractors should be subject to prosecution? Contractors from agencies other than DOD? Non-citizens? On the other hand, might the possibility of UCMJ jurisdiction increase commanders’ authority over contractors in the field?

## *2. Civil law*

The speaker also suggested that several categories of tort suits have emerged as potential vehicles of accountability: suits by injured third parties claiming intentional wrongdoing by contractors (under the Alien Tort Statute or domestic tort law); suits by injured third parties claiming reckless or negligent conduct by contractors; and suits by employees of contracting firms. These suits have faced political question challenges, and the issue of contractor immunity remains an open one. A participant emphasized that enforcement of contract terms by the government or the contractor is an important option.

The participant also noted that civil false claims suits may be brought, and civil recovery for cost disallowances (war profiteering cases) are available.

## **Other Issues**

*The Scope of MEJA and the UCMJ.* One participant explained that Congress expanded MEJA in order to cover all Iraq contractors, and used the “in support of DOD missions” language because at the time DOD was in charge of everything through the CPA. As this participant noted, when the CPA left, the contracting authority got much murkier, and the majority of security contractors are in fact not contracted by DOD but by State and USAID. Thus, this participant observed, MEJA could be further amended to remove the DOD limitation completely, as is contemplated in pending legislation. As to the UCMJ amendment, there was disagreement as to whether, as drafted, it applies to contractors hired by agencies other than DOD, but in any event, several participants argued that statutory language too could be clarified.

*Oversight of contractors by contractors.* Several participants noted the growing practice of contracting out the oversight of contracts themselves. For example, one participant observed that Acquisition Solutions Inc., on the web offers the services of senior contractor officials who provide acquisition support to the government. This monitoring function has historically been deemed inherently governmental, but it is now contracted aggressively.

*Training military personnel to work with contractors.* There was some discussion of the training soldiers receive to engage with contractors. Some participants felt that pre-deployment training along these lines is more effective now than four years ago, but commanders on the ground still have to figure out the appropriate relationship in each individual situation. Yet one participant noted that before his 2005-06 deployment to Iraq, he received zero training in working with contractors, even though he led a hybrid team of contractors and military personnel. Another participant noted that his one formal class on contracting was conducted *post* deployment. Another asserted that, to be effective, such training should not be confined to the classroom; it should come primarily by routinely giving military commanders experience overseeing contractor support when they are not deployed. Indeed, the same participant who led a hybrid team in Iraq emphasized that, officers spend their entire career learning how to manage and lead soldiers, but only receive a few hours (at most) on how to manage contractors, a difficult situation when contractors provide as much of the force’s capability as they do today.

*Security protection for contractors.* Finally, several participants pointed out that although the military’s provision of security to contractors may not create added tensions (because for soldiers such a security assignment is just another mission), these sorts of missions take time and manpower away from other missions, thereby creating opportunity costs. Another participant emphasized that while the military may provide security for logistics contractors, security contractors do not receive such protection.

*Access to alcohol and drugs.* One participant emphasized that troops as well as contractors may have access to alcohol and drugs, and that contractors working for the government on contracts with DOD and DOS are forbidden from using alcohol and drugs under General Order 1.

## **SESSION TWO – PROBLEM-SOLVING SCENARIO #1**

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***In this session, participants used a hypothetical scenario as a starting point for a moderator-led discussion. The scenario involves an exchange of fire between Iraqi demonstrators, on the one hand, and a collection of troops and security contractors at a U.S. military base in Iraq, on the other. It is loosely based on an incident that took place in Najaf, and is available on the website. The session addressed key management and coordination issues that arise in conflict zones when contractors have the capacity to use force. Discussion included the role of command structures, contract monitors, and military-civilian relations. A commentator made a few remarks at the beginning of the session***

*Moderator's remarks.* The moderator identified a few key issues from the scenario for the group to keep in mind: (1) the presence of many different kinds of troops, including coalition troops; (2) the involvement of multiple agencies; (3) the lack of an available military chain of command on the ground; (4) the question of whether the UCMJ system ought to apply to such incidents; and (5) the possibility that security contractors could be subcontractors.

*Commentator's remarks.* The commentator observed that the scenario is a familiar one, and raised several questions for the group to consider. First, the commentator asked who was in charge of Cpl. White, a marine who apparently sought guidance from security contractors before firing on a crowd outside the base. Is it worrisome, the commentator questioned, that he looks around for a commanding officer, but that person is not there? Second, the commentator asked whether the same is true for the security contractors on the scene. It seems, the commentator observed, that they are in charge of themselves. Who gives them orders? Third, the commentator pointed out, why is a signals marine, White, all of a sudden in the business of fighting? Why are there not more soldiers there protecting the gate? Fourth, the commentator queried why White, the marine at the base, asks for and takes orders from the security contractors. The commentator suggested that the contractor is most likely an ex-military person, and it looks like he knows what he is doing. The contractor is used to giving orders, while White is looking for orders. Thus, it may be natural that White turned to him, but, the commentator asked, is it problematic. Finally, the commentator raised the question of where we would fix responsibility for the deaths?

*Investigation.* Several participants noted that such an incident would ordinarily result in an investigation because an investigation is mandatory as a matter of DOD or DOS policy whenever contractor action results in a loss of life, and escalation of force in any event always triggers an investigation. Yet one participant observed that because there were two chains of command here, there likely would be two investigations, which could pose problems – the two might never get reconciled. Another participant argued that there

should be one investigation only, and that even if there are multiple reporting requirements, the one investigation can be passed up different lines.

*Chain of command.* A number of participants expressed concern about the lack of a clear chain of command and the chaotic, one-the-ground situation posed in the scenario. One participant emphasized that the enemy might have decided to attack this target precisely for this reason. Several participants were troubled by the fact that the marine in the scenario took orders from the contractors. Citing Abu Ghraib, where troops took orders from contractors, one participant observed that the chain of command confusion presented in the scenario was not unique. Another participant noted that, because the marine asks a question and receives a response, this does not make the response an order. That participant also emphasized that, the facility in the scenario was a Coalition Provisional Authority (CPA) outpost, and such outposts were like embassies which have their own chain of command.

*Rules of Engagement.* There was discussion about the differing rules of engagement for contractors, as compared to uniformed troops. Military forces have a right to self-defense, can use force when they see a hostile act or intent, and are supposed to follow an escalation of force model (for instance a green flashlight, firing in the air, etc). Contractors, by contrast, are subject to rules that are fixed in their contract, and most are not authorized to carry weapons at all. According to one participant, Central Command (“CENTCOM”) has reserved to individual commanders the authority to arm contractors to the CENTCOM commander. Those contractors that are armed are subject to more limited rules of engagement than troops: some may use weapons only in individual self-defense, and others may use their weapons only to defend persons or places specified in their contracts. Contractors carry a paper that states that they have received training in the rules of engagement, and one participant suggested that contractors often know their rules of force better than most soldiers. Another participant emphasized that the contractors receive theater-specific rules on the use of force—even if it is contained in the contract, it mirrors theater regulations for troops on the rules of engagement. On the other hand, some participants asserted that neither contractors nor troops receive adequate training in the multiple different rules that apply to different categories of people with whom they interact. And one participant said that contractors rarely receive training specifically in the law of armed conflict, even if they receive training in their particular rules of engagement.

*Legal status of contractors under the international law of armed conflict.* Several participants noted that contractors fall into a gray area in the law of armed conflict. In response to the question whether contractors are POWs protected under the Third Geneva Convention or individuals protected under the Fourth Geneva Convention, one participant with expertise in international law noted that in theory contractors can fall under several categories: they can be members of the armed forces if incorporated into the armed forces, civilians accompanying the force entitled to POW status under the third Geneva Convention, or simply civilians under the fourth Geneva Convention. Most of them will fall under the latter category. Another participant noted that the question of POW status is not in practice a significant issue because it only applies in international armed conflicts, which are rare. (And in fact, one participant questioned whether security contractors are

taking actions related to armed conflict at all, as they are protecting people from bandits as much as from warlords). But the question of whether contractors are entitled to use force (other than in self-defense) and may be targeted by others remains an important question. As another participant noted, the law of armed conflict does not draw distinctions between offensive and defensive operations, even though this distinction seems to be the line that the U.S. military has attempted to draw between impermissible and permissible security contractor conduct. (A number of participants noted that this line is difficult to draw in practice in any event.) Rather, the law of armed conflict uses the term “direct participation in hostilities.” Under this definition, contractors defending a military compound would likely be directly participating in hostilities and therefore legitimate targets. Another participant suggested that contractors sitting behind troops pushing buttons on weapons systems and telling them where to shoot were as much direct participants as the troops. And yet another participant observed that the DOD regulations say that contractors may not take part in hostilities but then proceeds to authorize activities that are likely to constitute taking part in hostilities as a matter of international law.

*Subcontracting.* Several participants noted that extensive subcontracting has created added confusion, because many subcontractors are inexperienced in dealing with government contracts. Additional difficulties arise, some participants emphasized, from the differing legal regimes that apply to sub-contractors of different nationalities, as many subcontractors are not U.S. citizens but rather are locals or third-party nationals. Better contract drafting might possibly address these problems.

*Contract pricing structure and terms.* Participants disagreed whether contractors prefer fixed price contracts, in which the price of the service is negotiated in advance, or cost plus contracts, in which contractors receive a negotiated percentage of profit above cost. One participant emphasized that security contractors have preferred offer firm-fixed price contracts, while logistics and reconstruction contractors have used cost-plus/time-materials contracting vehicles. In response to the question whether contractor employees know the terms of their contracts, one participant responded that the contractors know them quite well. Moreover, he noted that the contract drafting process has improved, for example, to specify more training requirements, but that we need to do a better job of ensuring that contractors adhere to the terms and fulfill those requirements.

*The hiring of non-citizen contractors.* Participants noted that the majority of security contractors are not U.S. citizens, and in Iraq are Iraqis. One participant suggested that the use of non-citizen security contractors to fight wars undermines the democratic basis for war because the electorate of the warring government is not itself engaged to fight, and that it is immoral for a state to wage war without putting its own citizens at risk. Another participant objected to the use of the “to fight wars” as a term of emotion. This participant noted that contractors were not accompanying troops before the fall of Baghdad but rather were brought in afterwards. Another participant raised the question of whether the Iraqi and other non-citizen contractors were receiving the same training as the U.S. contractors.

*Lack of policy debate about outsourcing security.* A number of participants lamented the fact that outsourcing has largely taken place without a policy debate. This is particularly

problematic in the case of security functions, where needs on the ground are driving the decision to outsource, but there's been no real policy debate about the costs and benefits, and where to draw the line.

*Whether the U.S. government should outsource security.* Participants divided over the question of whether the government should use security contractors. Several participants suggested that security functions are inherently governmental, and drew the analogy to lawyers: while lawyers have outsourced will drafting they haven't outsourced courtroom arguments, which lie at the core of the profession. Similarly, these participants argued that the monopoly on the use of force is at the core of the uniformed military's responsibilities. Moreover, just as government lawyers have taken an oath to defend the Constitution, uniformed troops similarly have only one master, whereas contractors are both serving the country and seeking private gain. Another participant argued that outsourcing security inevitably produces chaos that undermines the efficacy of commanders on the battlefield. Yet another suggested that outsourcing security undermines the American ideal of the citizen soldier. In contrast, other participants argued that the use of security contractors is both inevitable (because we need them to run our complex weapons systems) and legitimate. For example, one participant noted that the U.S. and other countries such as Japan routinely outsource policing and other functions, and so the idea of a state monopoly on violence is not inviolate. And others pointed out that, regardless of what the U.S. does, other countries will inevitably use security contractors.

### **SESSION THREE – PROBLEM-SOLVING SCENARIO #2**

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***In this session, after brief remarks from the commentator, participants engaged in a moderator-led discussion about recent legislation that would make private contractors eligible for discipline within the military justice system. A hypothetical scenario provided a springboard for debate. The scenario (available on the website) is loosely based on the case of David Passaro, a contractor who was tried and convicted in U.S. courts for abusing a detainee in Afghanistan. Participants considered the feasibility of implementing such an accountability mechanism, its interaction with existing federal law, and its impact on military-civilian relations in the field.***

*Moderator's remarks.* The moderator began by laying out the core questions raised by the scenario: How do different accountability regimes affect actions on the ground, and what are the effects of different and overlapping regimes?

*Commentator's remarks.* The commentator began by highlighting that the current war in Iraq is very different from previous wars, and the proportion of contractors (estimated at between 125,000-180,000, alongside 160,000 troops) is high. Contractors, the commentator observed, pose challenges to the important principle of the unity of command. At the same time, the commentator emphasized there are accountability gaps, and closing these gaps is important. On the ground, the commentator speculated, Afghan and Iraqi civilians don't distinguish our troops from civilian contractors.

The commentator noted that Congress has tried to close some legal loopholes, and the extension of UCMJ to contractors in contingency operations raises important questions. First, there are constitutional concerns due to *Reid v. Covert*'s strong language critical of military justice for civilians. Yet the civilians in that case, the commentator emphasized, were military family members. Perhaps contractors are sufficiently different that the case should not apply, the commentator suggested. And, the commentator pointed out, military law has changed since then. Second, the commentator raised the question, should contractors be subject to disciplinary offenses, such as the failure to report, the use of alcohol, dereliction of duty, etc? Third, with respect to implementation, the commentator asked, who would investigate and prosecute, and in which venue? And who would serve on the panel of judges? Finally, the commentator queried, under Article 2, who would fit within the jurisdiction? For example, would journalists or foreign nationals be subject to the UCMJ regime?

*Arguments in favor of subjecting contractors to UCMJ jurisdiction.* Several participants argued that subjecting contractors to the UCMJ could have the positive effect of bringing everyone within the same system, bridging the culture gap between contractors and military personnel, and clarifying the applicable legal standards. Indeed, one participant pointed out, if teamwork and leadership are a large part of what makes a cohesive and effective force, unifying the justice system is crucial, particularly given the reality that the roles of contractors and troops are often similar. Without the possibility of sanction under the UCMJ system, contractors are subject only to the terms of the contract, which only bureaucratic contracting personnel can modify. The best argument for the UCMJ, this participant observed, is that it gives commanders the authority to say 'shoot' and to sanction the contractor if they do not. Applying the UCMJ effectively concentrates authority in one person and is therefore the best way to give commanders a coherent fighting unit.

Another participant argued that commanders have responsibility not only for soldiers but civilians who are on their installations. As a result, commanders must have the authority to enforce responsibility and the law, and the UCMJ is necessary for that. Yet another participant emphasized that even for small infractions, such as drunkenness or disorderliness, UCMJ authority over contractors would be helpful. A few participants noted that troops can be disciplined easily within the UCMJ system, but the civilian justice system is too cumbersome to invoke to discipline contractors both because flying civilian lawyers overseas is very expensive and because civilian investigation and prosecution overseas is simply not feasible. Moreover, these participants emphasized that having overlapping jurisdiction under the UCMJ and MEJA is not a problem, as such overlapping regimes are common. They also emphasized that, to the extent the UCMJ system clashes with the contracting system, the UCMJ would simply trump the contracting system just as the criminal justice system ordinarily does. And contracts could also be drafted to acknowledge the UCMJ jurisdiction, in order to provide full disclosure to individual contractors and allow for their informed consent. As one participant noted, such consent would be particularly important, as enlisted soldiers must be given an explanation of the punitive articles of the UCMJ within 14 days after entering on active duty, while civilians subject to Art. 2(a)(1) (as amended) have no such protection.

*Cons of subjecting contractors to UCMJ jurisdiction.* Several participants argued that the UCMJ would clash with the existing contracting regime, which gives contracting authorities the power over contractors, who are incentivized by profits and award fees. The UCMJ regime, by contrast incentivizes patriotism, recognition, and medals (though another participant, while not supporting UCMJ jurisdiction in most cases, objected to the implication that contractors lack patriotism). These participants argued that the two regimes are totally incompatible, in part because the underlying actors' roles are so different, and that we ought not to combine them, lest we conflate those who conduct warfare with those who serve lunches. According to this view, U.S. attorneys would and should make different decisions about a civilian who can be fired and a military person who has a career on the line, even if the two were involved in the same incident. Indeed, for minor infractions contractors can easily be fired, rendering the UCMJ system unnecessary. As one participant noted, the contract regime requires the commander to report any contractor abuses to the contractor and the governmental contracting oversight officials and carry out all discipline through that mechanism. A regime that would regularly subject contractors to the UCMJ would be overly burdensome on commanders in the field to enforce.

Another participant emphasized that, beyond cultural issues, two separate formal chains of command exist because the U.S. government does not want a local commander to have the authority to order a contractor or a contract employee to do anything outside the scope of an existing contract. This participant noted that one might certainly argue that, in combat, the niceties of a contract become secondary—and suggested that in extreme circumstances exceptions might be justified. But the participant noted that most circumstances are not that extreme. The participant emphasized that increasing commanders' authority by subjecting contractors to the UCMJ could therefore fundamentally upset the existing regulatory framework, including rules about how the government selects a particular source to conduct an activity or permits a change in an existing contract, without being warranted. Put another way, this participant noted that most commanders get contract support without paying for it and effectively don't have a checkbook they can use to buy additional services that are not provided for them for free. Implementation of the UCMJ would have to be implemented in a way that resulted in an appropriate allocation of authority within the government. It is likely that, when these issues are sorted out, the government would determine that it would be unwise to allow the UCMJ to trump all the interests within the U.S. government that account for the current allocation of authority. In any event, this participant emphasized that extending UCMJ to contractors would address shortfalls relevant to crime and tort, and not contract performance.

*Third-country nationals.* Participants disputed whether the existing statutory language extending UCMJ jurisdiction to contractors in contingency operations would apply to third-country nationals employed by companies contracting with the U.S. government. Thus, the statutory language should probably be amended to clarify this point one way or the other.

*Contractors employed under contracts with agencies other than DOD.* Participants also disputed the question of whether non-DOD contractors would or should fall within UCMJ

jurisdiction under the existing legislation. One participant argued against including contract employees of other agencies, such as the CIA, in the statute because such application might distort the UCMJ system.

*Constitutionality.* It is unclear whether the Supreme Court would strike down recently enacted legislation allowing civilian contractors to be tried in military courts. The cases from the 1950s and 60s invalidating the application of military justice to civilians involved cases of civilian wives accused of murdering GIs. Not until late in the Vietnam War did a case arise involving a government contractor, but the Court never reached the issue because it determined that the relevant statute only conferred military jurisdiction over contractors during declared wars, which Vietnam was not. Another way of resolving the constitutional question would be to make everyone who works as a contractor a reservist, potentially subject to being called up in uniform, and therefore within the reach of the military justice system. One participant noted that making everyone a reservist, however, could create more problems than it would solve. It will increase the amount that contractors must pay their employees; it may also limit a contractor's ability to provide precisely the innovative products that the government wanted to access when it sought a source outside the government. Another participant observed that making contractors into reservists would be difficult, and not worth the effort. This participant noted that not all reservists are subject to the UCMJ in any event—only when they are performing reserve drills or active duty.

*Deterrence.* One participant argued that, at least based on the Abu Ghraib incident, the UCMJ would not likely deter abuse, as the contract interrogators there believed they were subject to the UCMJ. In contrast, another participant suggested that if there had been UCMJ trials of contractors after Abu Ghraib, the UCMJ system might well have had a deterrent effect.

*Consolidated authority to implement UCMJ as applied to civilians.* To address the concern that application of UCMJ to contractors could burden commanders, one participant suggested that the military designate a consolidated disposition authority. Thus, in Iraq, one entity would have the authority to administer military justice over civilians.

*Need for public participation, notice, and comment.* One participant argued that it is essential for DOD to allow the public to comment on its implementation of the recently enacted amendment to the UCMJ that would extend the UCMJ's reach to contractors in contingency operations.

*Relationship between UCMJ and MEJA/SMTJ.* One participant suggested that the UCMJ might function most effectively primarily as a catalyst or spur for MEJA/SMTJ prosecution. With regard to MEJA/SMTJ, several participants argued that the system might be more effective if authority to investigate and prosecute were concentrated within the DOJ rather than fragmented in U.S. attorneys' offices around the country. In addition, one participant suggested that if the MEJA/SMTJ system fails, Congress could confer jurisdiction on state courts to enforce federal law, as was done with rent control during World War II.

*Protection of contractors.* Finally, one participant observed that the protection of contractors from abuses often gets lost in the debate. Yet subcontractor workers often do not have access to the contract under which they were hired. They have little ability to address grievances with their contractors. Sometimes they do not have control over their own passports. For instance, their passports might be held in Kuwait while they are in Iraq. Indeed some countries require their nationals' passports to be held by their employers. Commanders often do not know what to do with these people. Another participant noted that DOD has addressed this issue to some degree with its new human trafficking clause, and has made it a breach for employers to hold the passports of employees.

## **FINAL SESSION: SUMMARY, FEEDBACK, AND NEXT STEPS**

In the last session, participants continued the discussion in small teams, and focused on the following questions: (1) what is the core problem that emerged from the day's discussion? (2) what is the reason for the problem as identified? (3) what is/are the solution(s)? The teams then reported their findings to the full group.

### **Group One Report**

Group one attempted to bracket the problem they described as due to the lack of public discussion about what constitutes an inherently governmental function, and described the core problem as the lack of standardization and coordinated oversight. The group identified the genesis of the problem as deriving from force limits, combined with the need for surge capacity and the unintended consequences of aggregating a wide range of outsourced functions. Moreover, multiple governmental actors are engaging in the practice of outsourcing with different goals.

The group then offered several proposed solutions:

(1) Officials within agencies such as State and DOD that are managing large numbers of contractors should coordinate their activities better. For example, an inter-agency working-group, with representation from high-level officials at each relevant agency, should be established to set policies and coordinate activities.

(2) Agency officials from multiple agencies should strive to promulgate uniform standards and better communicate those standards across different groups (troops, contractors, and multiple civilian agency personnel).

(3) Congress should close the remaining jurisdictional gaps in the civilian criminal justice regime that applies to contractors.

(4) The government and contracting firms should provide greater resources for oversight and management of contracts and better training of contractors.

(5) The government should devote more resources to prosecution efforts.

In the end, the group could not escape the bracketed problem, and there was consensus that more public discussion about the purposes, advantages, and disadvantages of military and security contracting is needed.

## Group Two Report

This group focused on the inadequate systems and mechanisms of accountability for war crimes and other serious criminal acts that can be committed by contractors. The group identified five reasons for this inadequacy: (1) confusion over the applicable legal regime governing contractors, (2) the lack of resources for prosecution and investigation, (3) the lack of political will, (4) a lack of knowledge about the contracts themselves and what they oblige contractors to do, and (5) a breakdown of oversight and deterrence.

The group then offered several proposed solutions:

(1) The DOJ and the military should delineate the circumstances under which each will exercise jurisdiction over contractors.

(2) The government should negotiate Status of Forces Agreements to protect contractors.

(3) The home countries of third-country nationals employed by firms that are contracting with the U.S. government should exercise jurisdiction over their nationals (e.g., contractors that are UK nationals should be tried in the UK).

(4) Congress should expand MEJA to fill jurisdictional gaps.

(5) Congress should leave intact the legislation extending UCMJ jurisdiction over contractors, but the military should reserve its use for high-level crimes.

(6) The military should review the use of the UCMJ over time to see if it is useful.

(7) The DOJ should establish a unit dedicated to investigating and prosecuting any crimes committed by contractors in violation of MEJA. (The DOJ unit that has hunted down Nazis might provide a useful model. Australia has established such a dedicated office for contractors, providing another potentially useful model.)

(8) The military should conduct a top-down review of the efficacy of outsourcing.

(9) Congress, the agencies, and civil society actors should initiate a public discussion about the wisdom and efficacy of using contractors.

(10) The government should impose a tax on military contracts (perhaps 1%) to pay for increased monitoring (such as the 4% surcharge on Army Corps of Engineers contracts that pays for quality control and inspection).

## Group Three Report

This group identified as the core problem the lack of a well-thought out, overarching policy. The group agreed that military outsourcing implicates issues sufficiently close to the core competencies of the military is necessary, and traced the lack of such a policy to several factors. The reduced size of the military due to troop limits and budgetary constraints in the face of a sustained counter-insurgency, combined with the growing use of complex weapons systems that need to be maintained by civilians, prompted a large increase in the number of contractors. This large-scale privatization took place without public dialogue and discussion. At the same time, the domestic legal system has not kept up with contracting changes.

The group then offered several proposed solutions:

(1) Congress, relevant agencies, and civil society actors should engage in a national debate on the use or employment of contractors.

(2) The executive branch should establish an inter-agency contracting policy.

(3) The Department of Justice should develop effective MEJA implementation, including a dedicated unit within the DOJ to investigate and prosecute contractor crimes. DOJ should set incentives for civilian investigators to deploy to conflict zones with military units in the field.

(4) The military should develop an Article 2 UCMJ implementation regime as a complementary system to MEJA to function as a backup to be used in extraordinary cases.

### Summary and Conclusions

In response to a participant question about centers of ongoing research and debate about these issues, participants noted continuing efforts at Princeton, National Defense University, George Washington University Law School, New York University Law School, and Georgetown Law School. Participants also noted work by the Group on the Regulation of International Private Security (GRIPS), a new group of academics, the American Bar Association public contract law group, and the RAND Corporation.

Workshop moderators closed by noting areas of consensus about both the problems identified with contracting and its causes, including reduced troop size, budget constraints, disparate reporting structures, a lack of policy discussion or comprehensive understanding of what contractors are (or should be) doing, and a failure of political will to address the problem. Moderators also noted areas of consensus about solutions:

1. Numerous participants identified the need for standardization, coordination, and communication, suggesting that *formal* means of dealing with these issues may be more appropriate than informal approaches.
2. Participants seemed to agree that overlapping accountability mechanisms can be a good thing, and a menu of options for ensuring accountability may be ideal. All three working groups agreed that MEJA could be improved (although they left open the specific improvements for future discussion). Participants also seemed to agree that the UCMJ, if applied to contractors, should be used primarily as a backup. There was consensus or near consensus UCMJ jurisdiction over contractors should not be resisted entirely, at least to address shortfalls in existing criminal and tort law, but that it should be reserved for serious crimes when MEJA does not work. Moreover, a number of participants emphasized that any application of the UCMJ should not override the relationship of the U.S. government and its contractors in the normal delivery of goods and services under contract.
3. Participants tended to agree on the need to standardize security-related contracting requirements, particularly through the implementation of a government-wide vision of what issues contracts need to address.

4. Participants broadly agreed on the need for more public debate and policy analysis, leading toward a definition of inherent governmental functions, and an answer to the question whether such functions should ever be outsourced.

Moderators then identified some remaining questions:

*Practical, evidentiary, procedural hurdles associated with mechanisms for accountability.* One participant observed that we spent little time discussing these issues, which will be important to address at some point.

*Command structure problems.* One participant noted that a close reading of the UCMJ would be necessary to make clear (through public regulations or otherwise) which articles could apply to contractors and which could not (because of differing command/reporting structures for contractors and similar issues). Several participants noted that more work was necessary to determine whether a consensus exists about how an improved command authority over contractors should work. Another participant emphasized that the relevant policy issue is more about (1) the substantive question of how the U.S. government wants to allocate the authority within the government to make decisions about the choice and use of contractors than about (2) the procedural question of “differing command/reporting structures.”

*Coordination between the UCMJ and MEJA systems.* One participant noted that a key question is how to determine which contractors/functions should fall within each system (although a close reading of the UCMJ might make clear which articles could apply to contractors and which could not). Another participant emphasized the micro-challenges in creating a MEJA office (a suggested solution at the workshop), including the training requirements for an investigatory team, the need for contractors to provide logistical support to such a team, the difficulty of recruiting volunteers, and the need to provide incentives for civilian employees to serve in war zones.

*Inherent government functions.* In addition to recognized disagreements on what, if any, category of operations fits this definition, one participant suggested that it might be useful to identify specifically how a greater policy debate might be accomplished, and what the process ought to be for deciding to outsource particular functions. Another participant suggested that a model for thinking about how to draw the line between core and non-core governmental functions is the U.S. inter-agency led command in Africa (Africom), which incorporates many contractors.