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Immunity in Contingency Operations: A Proposal for US Contractors

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ABSTRACT: This article introduces the nuances of bilateral security agreements and status of force agreements in Afghanistan. Many contain legal restrictions that complicate the ability of Long War contractors to provide advice and security during international missions.

Department of Defense (DoD) contract employees have become a vital part of the force. Soon after Overseas Contingency Operations began in Afghanistan (2001) and Iraq (2003), a Government Accountability Office (GAO) report observed “limits on the number of military personnel allowed in an area, called ‘force caps,’ led DoD to use contractors to provide support to its deployed forces.”¹ Many of these contractors play a “critical role in supporting US troops.”² Most third-country and even US contract employees are generally systems contractors who provide basic life and information technology support; however, many US contractors provide direct and indirect command support such as advising and security.³

According to the Congressional Research Service, 28,189 of 45,592 Defense Department contractors working for US Central Command in the fourth quarter of fiscal year 2016 were in Afghanistan and Iraq.⁴ Few know more than 3,000 contractors were killed and another 1,000 were wounded in these countries’ wars; American contractors account for approximately 32 percent of these casualties.⁵ There were even periods during these long wars in which more US contractors than US military personnel were killed. In 2014, for example, “private contractors accounted for 64 percent of all U.S. deaths in Afghanistan (56 service members and 101 contractors died).”⁶ Given that contract personnel represent approximately 72 percent, nearly two-thirds, of the DoD

1 US General Accounting Office (GAO), *Military Operations: Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DOD Plans* (Washington, DC: GAO, 2003), 8.

2 Heidi M. Peters, Moshe Schwartz, and Lawrence Kapp, *Department of Defense Contractor and Troop Levels in Iraq and Afghanistan: 2007–2017* (Washington, DC: Congressional Research Service, 2017), 1.

3 Gordon L. Campbell, “Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm’s Way and Requiring Soldiers to Depend upon Them” (conference paper, Joint Services Conference on Professional Ethics 2000, Springfield, VA, January 27–28, 2000).

4 Peters, Schwartz, and Kapp, *Contractor and Troop Levels*, 2.

5 “Office of Workers’ Compensation Programs: Defense Base Act Case Summary by Employer,” US Department of Labor, March 31, 2017, <https://www.dol.gov/owcp/dlhwc/dbaallemmployer.htm>; “Contractor Casualty Statistics,” Feral Jundi, February 9, 2017, <http://feraljundi.com/contractor-casualty-statistics/>; and Micah Zenko, “The New Unknown Soldiers of Afghanistan and Iraq,” *Foreign Policy*, May 29, 2015, <http://foreignpolicy.com/2015/05/29/the-new-unknown-soldiers-of-afghanistan-and-iraq/>.

6 Zenko, “New Unknown Soldiers.”

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manpower in Afghanistan, clear legal protections for these Americans while in theater would seem only reasonable.⁷

Under the US-Afghanistan Bilateral Security Agreement (BSA) signed in 2014, US contactors working in Afghanistan became subject to Afghan law. Since the agreement was fully implemented in January 2016, companies and individual workers must navigate complex and onerous procedures that are often arbitrarily interpreted and inconsistently enforced. This quandary often leaves many American contract personnel in untenable situations in which they may be subjected to fines, deportation, or even arrest by Afghan authorities. Contractors frequently face the dilemma of illicitly bribing Afghan officials or going without documents required by the BSA and Afghan law. To compound these problems, US government officials often view contractors with suspicion and even contempt, and are reticent to defend the contractors' cause with the Afghan government. These obstacles degrade the contractors' ability to support the mission for which they were hired fully and efficiently.

Therefore, the American position regarding its contractors in Afghanistan needs to be reevaluated. Specifically, the United States should consider renegotiating the current BSA with Afghanistan and any forthcoming status of forces agreements (SOFAs) for ongoing operations to ensure legal protections for this group of Americans.

Despite the dangers and sacrifices, contractor employees often feel marginalized and undervalued by both military and civilian government personnel, who may think of them as greedy, corrupt, and operating outside the law.⁸ This negative perception is not imaginary. Despite the prevalence of contractors with previous military service, professional competition between the military and the contractor communities is fierce.⁹ Scholars claim to be alarmed by the level of integration of contractors into military activities, and the bulk of the literature begins by assuming contractor motives are less than noble.

The pejoratively titled *Patriots for Profit*, by Naval Post Graduate School scholar Thomas C. Bruneau, for example, broadly challenges stereotypes regarding civilian-military relations; nonetheless, he identifies dependence on contractors as a strategic weakness.¹⁰ Another scholar holds private contractor firms operate opaquely, carrying “the stench of corruption” and eroding “trust in the motives behind [their] efforts.”¹¹ And some legal experts are even ready to cede US sovereignty

7 For more on the ratio of 28,626 contractors to 9,800 military personnel, see Micah Zenko, “Mercenaries Are the Silent Majority of Obama’s Military” *Foreign Policy*, May 18, 2016, <http://foreignpolicy.com/2016/05/18/private-contractors-are-the-silent-majority-mercenaries-iraq-afghanistan/>. For more on the estimated 750,000 private-sector contractors providing services to the Defense Department, see Robert F. Hale, *Business Reform in the Department of Defense: An Agenda for the Next Administration* (Washington, DC: Center for a New American Security, 2016), note 18.

8 For more on the common misuse of “mercenaries,” the similarities between them and private military contractors, and the legal perspective, see J. Ryan Cutchin, *Privately Contracted Military Firms in the Twenty-First Century: Reclassifying, Redefining, and Reforming the Way We Fight* (thesis, Naval Post Graduate School, June 2012), 75–76. For more perspective on contractors’ sense of being marginalized, see Zenko, “New Unknown Soldiers.”

9 Scott L. Efflandt, “Military Professionalism & Private Military Contractors,” *Parameters* 44, no. 2 (Summer 2014): 53.

10 Thomas C. Bruneau, *Patriots for Profit: Contractors and the Military in U.S. National Security* (Stanford, CA: Stanford University Press, 2011).

11 Cutchin, *Privately Contracted*, 3.

over American contractors as they look to international law for ways to “mitigate concerns,” “control private military actors,” and “encourage their compliance to [international] public norms.”¹²

While there may be empirical evidence that some contractors may not be motivated to serve solely out of a sense of patriotic duty, these American citizens nonetheless deserve legal protections and considerations afforded to other US civilians similarly serving overseas.¹³ Although contractors, specifically those performing security duties, may have had too much latitude during the height of combat operations and expeditionary capacity building in Iraq and Afghanistan (circa 2002–08), the opposite is true today.

The Need for Status of Forces Agreements

On September 30, 2014, in one of his first official acts as the newly inaugurated president of Afghanistan, Ashraf Ghani agreed to the BSA and the North Atlantic Treaty Organization (NATO) Status of Forces Agreement.¹⁴ These types of agreements are standard treaty-like mechanisms that establish the rights and privileges of US personnel present in a sovereign nation to support larger security arrangements.¹⁵ According to an International Security Advisory Board report, the United States has similar agreements with more than 100 nations.¹⁶

Among other things, SOFAs set the conditions for protecting US interests to ensure taxpayer dollars are properly managed and US personnel are not subjected to foreign taxes, customs fees, and other administrative liabilities in the course of carrying out the security arrangement. According to DoD Directive 5525.1, *Status of Forces Policy and Information*, the main goal of any SOFA is “to protect, to the maximum extent possible, the rights of United States personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.”¹⁷ In general, SOFAs are negotiated with host nations to allow the presence of US military forces and to ensure Defense Department personnel—military members, government civilians, and sometimes contractors—are given limited legal protections from host nation laws

12 Ibid., 89; and Laura A. Dickinson, “Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law,” *William & Mary Law Review* 47, no. 1 (2005): 135–237.

13 In addition to anecdotal evidence that most US contractors have previously served in the US military, 61.5 percent of respondents in a study on military versus corporate culture were former military. For more on this finding and the trend to outsource positions such as “security guards, operational planners, and participants in raids by special operation forces . . . endanger[ing] the basic tenets of the military profession itself,” see Gary Schaub Jr. and Volker Franke, “Contractors as Military Professionals?,” *Parameters* 39, no. 4 (Winter 2009–10): 93, 94, 100–101.

14 On behalf of President Ghani, Afghan National Security Advisor Mohammed Haneef Atmar cosigned the BSA with US Ambassador James B. Cunningham and the NATO SOFA with NATO’s Senior Civilian Representative Ambassador Maurits R. Jochems.

15 For more on the distinctions between various international agreements, which are led by the Department of State, see Barry E. Carter et al., *International Law* (New York: Aspen Publishing, 2003), 203; and Frederic L. Kirgis, “International Agreements and U.S. Law,” *ASIL Insights* 2, no. 5. Notably, “the NATO SOFA is the only SOFA that was concluded as part of a treaty.” R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?* (Washington, DC: Congressional Research Service, 2011), 2.

16 International Security Advisory Board (ISAB), *Report on Status of Forces Agreements* (Washington, DC: US Department of State, 2015), 1.

17 US DoD, *Status of Forces Policy and Information*, Directive (DoDD) 5525.1 (Washington, DC: DoD, 2003); emphasis added.

and international tribunals. In other words, the SOFA establishes how jurisdiction over US personnel is exercised in the host nation.¹⁸

Under US law, the Department of State is the lead agency for all international agreements, even when an agreement, such as the BSA, is focused on Department of Defense activities.¹⁹ These agreements, when executed by the United States, usually contain a clause that each party has an inherent right to self-defense, which allows either party to cancel the agreement at any time. After September 11, 2001, the United States encountered new and complex expeditionary and civil-society development missions imbued with varying United Nations Security Council authority, which created a new era of SOFA-craft, requiring experts focused on writing and negotiating such agreements.²⁰

The Afghanistan Agreements

After the initial NATO invasion of Afghanistan, the Military Technical Agreement of January 2002 (MTA) was established under United Nations Security Council Resolution (UNSCR) 1386 (2001). The agreement covered all forces under the NATO-led International Security Assistance Force (ISAF) mission, including support personnel working with the interim Afghan administration.²¹ The agreement did not, however, apply to the non-NATO US forces covered under the commonly referenced Diplomatic Note No. 202.²² While the MTA specifically reserved jurisdiction for support personnel under the NATO mission to an individual's home country, the note covered support personnel operating exclusively under the US mission, Operation Enduring Freedom (OEF) (2001–14). Although the note did mention support personnel, it left the level of protection for contractors and their employees open to interpretation.

After 13 years, the ISAF and OEF missions in Afghanistan formally ended. On January 1, 2015, coalition and US forces simultaneously began a new phase of involvement in Afghanistan: the NATO-led mission, Resolute Support, to train, advise, and assist and the US Forces-Afghanistan (USFOR-A) mission; Operation Freedom's Sentinel, to contribute to the Resolute Support mission; and to US counterterrorism missions. The new missions required new agreements, thus the NATO SOFA and US-Afghanistan BSA were drafted and signed. Formal implementation of these agreements, however, was not scheduled until the following year, giving contractors until January 2016 to prepare for compliance.

18 Mason, *Status of Forces Agreement*, 3.

19 See Case-Zablocki Act, 1 U.S.C. § 112b (1972) issued pursuant thereto by the Department of State and codified at 22 C.F.R. 181 (2010) reflecting *Department of State Circular 175* (1955), as amended, codified at Volume 11, Chapter 700 of the *Foreign Affairs Manual* (Circular 175).

20 ISAB, *Status of Forces Agreements*, 15.

21 See ISAF Commander-Afghan Transitional Authority, Military Technical Agreement of January 2002, <http://webarchive.nationalarchives.gov.uk/+http://www.operations.mod.uk/isafmta.pdf> (accessed February 25, 2017); and Jeremy Greenstock to President of the United Nations Security Council, S/2002/117, January 25, 2002, which references UN Security Council Resolution (UNSCR) 1386 (2001), which reaffirms UNSCR 1378 (2001) and UNSCR 1383 (2001).

22 Karen DeYoung, "Only a Two-Page 'Note' Governs U.S. Military in Afghanistan," *Washington Post*, August 28, 2008; and Diplomatic Note No. 202, *Agreement Regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in Afghanistan in Connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises, and Other Activities*, State Department Number 03-67, 2003 WL 21754316 (Treaty), May 28, 2003.

The development of specific implementation criteria is standard for such agreements; for example, the 1966 agreement with South Korea, amended in 2001, established a joint committee for consultation, and the 2002 Japan-United States Status of Forces Command Order established a joint committee for “any matter regarding [the SOFA’s] implementation.” Likewise, an essential component of both the BSA and the SOFA for Afghanistan was the requirement for implementation bodies to resolve “any divergence in views or dispute regarding the interpretation or application.” The BSA Joint Commission and the Afghanistan-NATO Implementation Commission were established “to oversee implementation” of the agreements and the auxiliary groups, which held their first combined meeting on February 4, 2016.²³ No further guidance was provided; therefore, an additional document was required to lay out the procedures for convening and conducting the business of the commissions as well as establishing an Executive Steering Committee, working groups, and a secretariat for each.

To date, the missions in Afghanistan have two separate agreements and two distinct implementation bodies with identical leadership and nearly identical members. The US contingent is, in fact, dual-hatted. As the US member of the secretariat for the BSA, the author participated in Joint Commission meetings at the same time and in the same room as the NATO commission meetings; people addressed the same agenda items and issues as members of both groups. The similarities and concurrent meetings resulted in nearly identical minutes reflecting only minor changes to indicate the two different bodies.

Melding these two implementation commissions may have been expedient, but the arrangement inhibits addressing important issues affecting only US contractors. The NATO SOFA focuses on nonkinetic train, advise, and assist activities. The BSA is between the United States and Afghanistan only and includes the counterterrorism mission which may include more kinetic activities “when the U.S. deems it necessary.”²⁴ This fundamental difference in mission alone warrants separation as the more kinetic training usually requires contractors to be armed. Moreover, issues regarding the proper and legal use of deadly force by contract employees authorized to carry weapons while assisting US military forces in dangerous missions will not be of interest to our NATO partners.

The Immunity Question

A primary objective of the US and NATO missions is to assist the Afghan government in becoming administratively functional and able to properly exercise the powers of a sovereign nation, which includes consular and immigration functions, taxing, business licenses, and

23 The similar bodies comply with Article 25 of the BSA and Article 23 of the “Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-Led Activities in Afghanistan” (NATO SOFA) signed by the RS Commander and the Afghan Minister of Defense on November 6, 2015.

24 Note that BSA articles 4, 5, and 6 refer to an earlier agreement, The Strategic Partnership Agreement, which went into effect on July 4, 2012, and defers concerns regarding security and defense to the Defense and Security Cooperation Working Group, which did not meet for the first time until April 2016, leaving the BSA for more mundane, operational issues, such as contractor compliance.

determining who is permitted to carry firearms. Therefore, as the new Afghan government began to gain more autonomy, it seemed natural for the United States and NATO to shift jurisdiction over contractors to the Afghan government. This decision, however, exposed contract employees, many of whom are US citizens, to a system rife with corruption and bureaucratic ineptitude coupled with limited avenues for redress.²⁵

The US policy identifies techniques for crafting agreements to ensure the maximum protection for all US citizens. Some SOFAs include language that, according to the International Security Advisory Board report, “will most always include special agreements and arrangements for both civilian DoD employees and contractors” within the scope of their official duty.²⁶ The SOFAs for Japan and Korea, for instance, cover US citizens who are contractor personnel,” especially when they “qualify as technical experts” and are involved in assistance of “key activities” that are “closely linked to a military mission.”²⁷ Despite these examples and the Defense Department’s stated policy of extending protections to all US personnel, “less than 10 percent of SOFAs directly address government contractors.”²⁸ Unfortunately, the US-Afghanistan BSA falls within the 90 percent that does not offer such protections in a country of continued armed conflict. The BSA specifically states: “Afghanistan maintains the right to exercise jurisdiction over United States contractors and United States contractor employees.”²⁹ Such an arrangement may be feasible in nations and regions which have a culture of rule of law and transparency, but the reality in Afghanistan demands revisiting this provision of the BSA.

While most contractors and contract employees finish tours of duty without incident, many personnel find BSA compliance difficult and understand the inherently dangerous consequences established therein—for example, the BSA allows military personnel and Defense Department civilians to enter and exit without passports, but contractors are required to obtain passports and visas.³⁰ Although most contractors purchase multiple entry visas, the Afghan government insists contractors also acquire an entry or exit stamp every time they enter or leave Afghanistan.

Stamping is a traditional practice at most borders. But, the Afghan government did not have the capacity to provide such services on a regular basis from 2015 to 2016. This deficiency affected contractors who had been permitted in the country previously with no stamp in their passport; they now had no way to exit Afghanistan. While they waited for the Afghan government to obtain the capability to stamp visas,

25 For the US government’s most recent assessment on the issues of ministerial capacity building and endemic governmental corruption see, Lead Inspector General for Overseas Contingency Operations, *Operation Freedom’s Sentinel Report to the United States Congress*, October 1, 2016–December 31, 2016 (Washington, DC: US Office of the Inspector General, 2017), 4–5, 39–41, 48, 64–67.

26 ISAB, *Report on Status of Forces Agreements*, 20.

27 Donald P. Oulton and Alan F. Lehman, “Deployment of U.S. Military, Civilian and Contractor Personnel to Potentially War Hazardous Areas from a Legal Perspective,” *DISAM Journal of International Security Assistance Management* 23, no. 4 (Summer 2011): 15–21, 16; and ISAB, *Report on Status of Forces Agreements*, 52.

28 G. Christine Ballard and Wray E. Bradley, “Beyond Tax Treaties: Status of Forces and USAID Agreements,” *Journal of International Taxation* 17, no. 4 (April 2006).

29 BSA, art. 13, para. 6.

30 BSA, art. 15, paras. 1, 2.

contractors had to choose between traveling back to the United States or mailing their passports for processing. Moreover, if an Afghan official found a contractor's passport had no stamp in it when the contractor attempted to leave the country, there would be dire consequences—unless the official was paid to ignore the lack of a stamp.³¹

In one incident, contractors spent months diligently pursuing entry stamps in order to comply with the Afghan law, only to be told that the stamps were not readily available. Without a separate US-focused implementation committee, there was nowhere to voice concerns formally or to seek official assistance. When the Afghan Border Police finally did start stamping visas, some contractors traveled days to and from the designated ports of entry within Afghanistan to join others who were literally lining up for the only opportunity to get their passports stamped. There was little official information to enable efficient compliance. In fact, despite the willingness of the US contractors to comply, at least one group was issued a blunt statement through official US channels: report for a stamp within 48 hours or face arrest, fines, or deportation.

As the January 1, 2016, deadline for contractor compliance with the BSA approached, a significant number of contract employees were unable to attain the required paperwork and permits, including those for weapons, which put their safety at risk. In some cases, individual employees had no one to blame but their own lack of urgency. But, many cases of noncompliance were caused by external forces, including political and legal pressures such as the well-documented bribery and corruption endemic in Afghanistan.³² When contractors sought redress with US officials, there was little institutional support for them due to the lack of protections in the BSA.

Full Immunity Option

In the National Defense Authorization Act for Fiscal Year 2007, Congress amended the Uniform Code of Military Justice to provide jurisdiction over civilians accompanying the armed forces during war or contingency operations.³³ Today, American contractors in Afghanistan are subject to US federal and military jurisdiction as well as Afghan law. While the International Security Advisory Board report recommends protections for contractors be written into agreements on a case-by-case basis, it acknowledges there “will be instances where the United States has a strong interest in protection for contractors.”³⁴ Specifically, the report mentions missions with “large scale deployments that entail a very substantial and continuing U.S. presence,” environments where “contractors are deeply integrated into core military operations and mission tasks,” and tasks in which contractor involvement has a high

31 A number of contractors in Afghanistan expressed they had no choice but to pay Afghan officials who demanded bribes even though the practice violated Afghan and US law, specifically the Foreign Corrupt Practices Act of 1977.

32 For more on Afghanistan's ranking of 166 out of 168 countries ranked for corruption, see Transparency International, <http://www.transparency.org/country#AFG> Afghanistan.

33 John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552; and Uniform Code of Military Justice, 10 U.S.C. § 802, para. a(10). See US Secretary of Defense, “UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations” (memorandum, March 10, 2008).

34 ISAB, *Report on Status of Forces Agreements*, 51–52.

“risk of incidents.”³⁵ When negotiating such agreements, the report suggests “contractor protection is worth insisting on.”³⁶

One solution to the dilemma with contractors is renegotiating the BSA to include full immunity for contractors supporting US military and diplomatic missions. American and Afghan officials have reasons to avoid this option, not the least of which is that it amounts to an admission of the Afghan government’s failure to oversee contractors competently. Nonetheless, the short-term pain of the United States reasserting full jurisdiction over contractors may pay dividends in the long-run for both countries, as the mission would be better equipped to train, advise, and assist the Afghan government even with reductions in military and diplomatic personnel.

Some skeptics claim immunity for contractors and their employees will never again be politically viable as the result of Blackwater contractors’ actions at Nisour Square in Baghdad (2007). The shootings left 17 Iraqi civilians dead and 20 others injured.³⁷ While the Coalition Provisional Authority established immunity for all coalition personnel, including contractors, the American government chose to prosecute several members of Blackwater through the US court system.³⁸ After this incident, the United States felt compelled to reconsider the large aperture of legal and political protection created for contract employees. In 2008, the US government agreed to lift immunity for contractors in Iraq.³⁹

Others argue the contractors’ case in Afghanistan not only suffers from the bitter legacy of the Blackwater contractor’s actions but also from President Hamid Karzai’s residual distrust from America’s first attempt at an agreement.⁴⁰ This personal animosity combined with the shifting US policy against contractor immunity shaped the current BSA so that it lacks much needed administrative and legal protections for contract companies and employees. These insufficient protections affect contractors’ daily lives, especially those who are required to carry weapons in order to do their jobs. Such contractors must apply for an endorsement from US Forces-Afghanistan to be armed and must acquire weapons permits issued by the Afghan government.

35 Ibid.

36 Ibid.

37 The question of the legitimacy of the actions of the Blackwater employees, despite the eventual sentencing of several members of the security team, remains a subject for debate.

38 Coalition Provisional Authority, *Status of the Coalition, Foreign Liason Missions, Their Personnel and Contractors*, Order Number 17, June 26, 2003. The UN Security Council-recognized legal receivership was in authoritative control of Iraq at the time of the Nisour Square incident. Some pundits called for the US government to waive the immunity clause granted in Order No. 17 and allow the contractors who committed serious crimes to be prosecuted in Iraqi courts. See Scott Horton, “Getting Closer to the Truth about the Blackwater Incident,” *Bronzings* (blog), *Harpers*, November 14, 2007.

39 During negotiations for the 2008–11 SOFA, some Iraqi politicians also wanted to remove immunity for US service personnel, which the military opposed.

40 For more on the background and history of presidential directives from the Karzai administration concerning private security companies, see Moshe Schwartz, *The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress* (Washington, DC: Congressional Research Service, September 29, 2009); Renata Giannini and Rens de Graaff, “The Private Security Companies (PSCs) Dilemma in Afghanistan,” *Afghanistan Security* 4, no. 10 (December 20, 2010); and Presidential Directive (PD) 62, which mandated that all private security companies be disbanded by December 2014 and directed the development of a committee to facilitate the actions necessary to “scrap” all such contractors. Under President Ashraf Ghani, Presidential Directive 66 rescinded some of the prohibitions of PD 62 to relieve some of the pressures on security contractors, but the new status of contractors is still under debate.

Moreover, while the BSA states members of the military and US civilians can wear uniforms, bear arms without acquiring Afghan weapons permits, and have unlimited entry and exit rights without requiring visas, US contract employees cannot. Under Afghan jurisdiction, if contractors do not have a valid visa, they can be detained or deported; if they do not have proper weapons permits, they can be arrested.⁴¹ These obstacles create moral and legal dilemmas for a number of contractors and their employees. Some contractors can obtain relief through administrative exceptions, but many cannot.

An additional concern for contractors involves accusations of owing taxes to the Afghan government, which can create an administrative logjam.⁴² For example, when a contracting company is on the Afghan blacklist for failing to pay taxes—rightly or wrongly—their employees can incur great personal risk. Without the proper tax documents, American corporate contractors cannot acquire or renew their licenses to operate their businesses in Afghanistan. Without those licenses, their employees cannot obtain other documents needed to carry weapons legally for self-protection.

Although most contractors worked in Afghanistan without the need to carry a weapon, those who had weapons were left in precarious positions.⁴³ Either they could not participate in missions because they would have left the secure military bases while carrying their weapons illegally—without the proper Afghan permit—or worse, they would go on missions with no weapon at all. This left US citizens who were performing critical services for the military without proper force protection in what was often a very dangerous environment. These administrative catch-22s frustrated contractors and prevented them from providing services. The situation also created headaches for the US military and diplomatic personnel responsible for ensuring compliance and strained the US mission.⁴⁴

The Limited Immunity Option

Providing contractors full immunity from Afghan law, which is currently granted to military personnel and federal civilians, would alleviate such problems and allow missions to be conducted more efficiently. But, amending the BSA for such privilege may be a bridge

41 By 2015–2016, there was little reason to think arrests would actually occur despite numerous anecdotal cases and one reported detention. See Sayed Jawad, “Afghanistan Frees US Contractor Illegally Detained in a Dispute,” Khaama Press, April 6, 2013.

42 For more on the thorny taxation issues in Afghanistan arising from “a lack of clarity” in the MTA, see US Department of Defense Deputy General Counsel (International Affairs) Charles A. Allen, “Contractors in Afghanistan and Iraq—Assistance in Responding to Questions Regarding Taxation under the Respective Status of Forces Agreements” (memorandum, March 29, 2011). See also Paul Pompeo, *Afghanistan Initiates Plans to Tax US Government Contractors* (Washington, DC: Arnold and Porter LLP, 2011); Ballard and Bradley, “Beyond Tax Treaties”; and Adam G. Province, “Aggressive Foreign Tax Authorities and Military Agreements: Maintaining Tax Exemption in SOFAs to Protect Civilian Contractors from Local-Country Tax,” *Journal of International Taxation* 27, no. 3 (March 2016).

43 Note that under international law, contractors are noncombatants who are generally not valid military targets depending on their specific function. See Campbell, “Contractors on the Battlefield.”

44 *Hearing on U.S. Strategy in Afghanistan Before the House Committee on Armed Services*, 114th Cong. (October 8, 2015) (statement of General John F. Campbell, Commander, Operation Resolute Support and US Forces-Afghanistan); and *Hearing on U.S. Policy, Strategy, and Posture in Afghanistan: Post-2014 Transition, Risks, and Lessons Learned*, 114th Cong. (March 4, 2015) (statement of General John F. Campbell, Commander, Operation Resolute Support and US Forces-Afghanistan).

too far. Thus, limited immunity might be a more realistic option to ease the burden on contractors and better provide for their safety. Under such a scheme, the US government would play a greater role in facilitating contractor compliance—for instance, the multiple-entry visa requirement for contractor employees would remain, but the visas would be renewed through a US government contracting officer.

Additionally, weapons permits would once again be handled through the commander of US Forces-Afghanistan or the US Embassy, who would provide a current list of permits to the Afghans for accountability. In the unlikely event of a crime against an Afghan national, the United States would have detention authority with an established diplomatic process for handling requests to transfer US citizens to Afghan jurisdiction. Although other conditions-based details would be required, any limited immunity option would provide the Afghan government with ultimate authority over contractors while providing administrative mechanisms consistent with protections of other US citizens accompanying military forces.

Conclusion

Even if one insists on viewing contractors as “mercenaries” such actors have had a very long history, “much longer, in fact, than the almost-exclusive deployment of national militaries to wage wars.”⁴⁵ The wars in Afghanistan and Iraq may have “triggered an explosion of contracting, measured both in amounts of money and numbers of personnel.”⁴⁶ But, the reduction of contractor protections increases risks to contractors and adversely affects the US mission. The following three actions will remedy this problem:

1. Separate the BSA Joint Commission meetings from the NATO SOFA Implementation Commission meetings. This independence will allow US personnel to address contractor issues relevant to the US mission that are not a priority interest for NATO and are currently neglected in the Joint Commission. Additionally, recognition should be given to the duty of US government personnel to protect and invest in the welfare of US-citizen contractors.

2. American contractors and their US employees should be granted greater immunity, especially when supporting dangerous activities. If full immunity is not possible, then a system of limited immunity should be negotiated as part of an amended BSA. In the meantime, the United States should consider creating an official government position in theater with the primary duties of assisting contractors with BSA compliance.

3. As the United States moves away from long-term contingency operations and towards more frequent midterm expeditionary operations, it is important to consider similar protections for contractors in all combat theaters.

The United States military incorporates extensive contractor support into both its routine and special operations at home and abroad.

45 Kathy Gilsinan, “The Return of the Mercenary: How Private Armies, and the Technology They Use, Are Changing Warfare,” *Atlantic*, March 25, 2015.

46 Thomas C. Bruneau, “Contracting Out Security,” *Journal of Strategic Studies* 36, no. 5 (2013): 650, doi:10.1080/01402390.2016.1139485.

At present, at least one commander has had to “substitute contractors for soldiers” to “meet force manning levels” in Afghanistan.⁴⁷ Ensuring US contractors have the necessary administrative support and legal protections ultimately benefits our nation and contributes to achieving our strategic goals.

⁴⁷ *Hearing to Receive Testimony on the Situation in Afghanistan, Before the Senate Committee on Armed Services, 115th Cong.* (February 9, 2017) (statement of General John Nicholson, commander Resolute Support and US Forces-Afghanistan).

