LEGAL ABSURDITIES AND WARTIME ATROCITIES: LAWFARE, EXCEPTION, AND THE NISOUR SQUARE MASSACRE

by

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ABSTRACT

According to the United States Department of Defense (DOD), as of 2013 there were over 12,000 DOD contractors supporting the U.S. mission in Iraq (DASD, 2013). This thesis explores the laws and legal systems that operate to keep contractors, and the companies that employ them, resistant to legal oversight. I ground my analysis in the 2007 Nisour Square massacre, exploring how every attempt to prosecute those responsible was doomed due to Blackwater’s legal position of being American-headquartered, hired by the State Department, privately owned, and operating in Iraq. I conclude that the legal indeterminacy of the US deployed security contractor normalizes violence towards Iraqi civilians while simultaneously downloading the risk and responsibility associated with the US war efforts onto the shoulders of individual contractors. Moreover, I suggest that this legal indeterminacy is of particular interest to geographers as it arises, in part, out of overlapping legal systems, jurisdictions, and authorities.
I have many, many people to thank for the successful completion of my Master’s thesis.

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<th>Description</th>
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<tbody>
<tr>
<td>DOD</td>
<td>Department of Defense</td>
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<tr>
<td>DOS</td>
<td>State Department</td>
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<tr>
<td>PSMC</td>
<td>Private Security Military Contractor</td>
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<tr>
<td>PMC</td>
<td>Private Military Corporation/Company</td>
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<tr>
<td>USAID</td>
<td>United States Agency of International Development</td>
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<tr>
<td>SPOT</td>
<td>Synchronized Predeployment and Operational Tracker</td>
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<tr>
<td>BOG</td>
<td>Military Boots on the Ground</td>
</tr>
<tr>
<td>ATS</td>
<td>Alien Tort Statute</td>
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<tr>
<td>ATCA</td>
<td>Alien Tort Claims Act</td>
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<td>IHL</td>
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CHAPTER 1: INTRODUCTION

On September 16th, 2007 shortly after 12:00 p.m. local time, a heavily armed Blackwater convoy entered the busy intersection of Nisour Square in Baghdad, Iraq and made an unexpected stop. Members of Blackwater, a private security force employed by the American State Department, opened fire on Iraqi vehicles and civilians, killing at least 17 people and injuring more than 20 (Daskal, 2007). While Iraqi traffic officers on the scene are reported to have signaled to the Blackwater operatives to stop firing, what ensued instead was sustained and allegedly random gunfire for the next fifteen minutes (Hurst and Abdul-Zahra, 2007a).

According to witnesses on the scene, the Blackwater convoy continued to fire randomly even as it was withdrawing. As Sarhan Thiab, an Iraqi traffic guard on the scene recalls, “each of the four vehicles opened heavy fire in all directions, they shot and killed everyone in cars facing them and people standing on the street….when it was over we were looking around and about fifteen cars had been destroyed and the bodies of the killed were strewn on the pavement and road” (Thiab, quoted in Scahill 2009a).

Those fifteen minutes quickly brought international infamy to the security company most active in the early days of the Iraqi occupation: Blackwater USA. Established in North Carolina in 1997, Blackwater was one of the earliest private companies to be granted a security contract in the US launched invasion and occupation of Iraq (US Congress Majority Staff, 2007). In 2004 Blackwater had 482 staff operating in Iraq; by the time of the Nisour Square shootings it had over 1000 (ibid). ¹

¹ Blackwater re-named itself Xe Services shortly after the 2007 Nisour Square shooting. In 2011, after a change of ownership, the company re-branded itself again as Academi. For the sake of consistency, I refer to the company as
After the Nisour Square massacre—a widely publicized and condemned act of violence—there were calls both from inside and outside Iraq to hold the Blackwater operatives, and the company who employed them, accountable. Investigations of the massacre (including by the FBI and members of the United States military) found that Blackwater was not attacked that afternoon, that the killings were unjustifiable, and that a criminal offence had taken place (Johnston and Broder, 2007). Yet despite repeated attempts from the Iraqi government, human rights groups and the families of the victims to attain legal recourse, no member of Blackwater has ever been criminally charged for the atrocity. In fact, even though there has been consistent evidence of “criminal” activity in both Afghanistan and Iraq, as of June 2013, only 3 contractors have been found guilty in the United States (US) for crimes against an Iraqi or Afghani civilian.2

This thesis examines the legal black holes, grey holes and loopholes that made it possible for the private security personnel of Blackwater to avoid criminal persecution in the Nisour Square shootings.

1.1 PROBLEM STATEMENT

Within 3 months of US-led Operation Iraq Freedom, the Economist had dubbed the conflict “the first privatized war” (Economist Staff Reporters 2003: 56). While the statement oversimplifies the larger trajectory of growing private involvement in US military operations, it is nonetheless indicative of the unprecedented number of private contractors working alongside Blackwater throughout.

2 In March 2011, a federal jury in Norfolk, Virginia convicted former Blackwater contractors Justin Cannon and Christopher Drotleff of involuntary manslaughter for a 2009 shooting in Kabul that resulted in the death of two Iraqi civilians. A 4th Circuit Court of Appeals upheld the verdict on November 29, 2012. Cannon was sentenced to 30 months, Drotleff to 37 (US v. Cannon and US v. Drotleff). In August 2009, CIA Contractor David Passaro was convicted of assault in a 2006 beating of a detainee in Afghanistan (US v. Passaro).
the US military throughout the Iraq war. A 2011 Congressional Report on the Department of Defense’s (DOD) use of private contractors highlights the industry’s integral role in US military operations. Analyzing data from the Congressional Budget Office and from the DOD, the report’s authors calculated that the employment ratio of the three largest US military operations of the last 15 years – Iraq, Afghanistan, and the Balkans—was almost 1:1 between military personal and private contractors (Schwartz and Swain 2011: 2). By way of comparison, during the first Gulf War, the ratio of military personnel to contractors was about 100:1 (Singer 2003: 523). And while troops outnumbered contractors in the early days of the Iraq War, by March 2011, contractors made up approximately 58% of the DOD workforce in the country (Schwartz and Swain 2011: 2).

But the numbers only tell part of the story, for the occupations in Iraq and Afghanistan have also seen a transformation in how private contractors are employed. In addition to providing food, shelter, and transportation services to troops (the primary role of the private sector in previous US conflicts), the past decade has seen an unprecedented growth in the use of armed contractors involved directly in hands-on military and security operations. These private forces can be responsible for everything from surveillance and tracking, to security and interrogation (Singer 2003: 522-523).

In this thesis I examine the legal spaces of the private security industry through an in-depth case study of the Nisour Square tragedy outlined above. The Nisour Square attack provides a good starting point for asking questions about the actions and accountability of armed private forces. However, the numbers only tell part of the story, for the occupations in Iraq and Afghanistan have also seen a transformation in how private contractors are employed. In addition to providing food, shelter, and transportation services to troops (the primary role of the private sector in previous US conflicts), the past decade has seen an unprecedented growth in the use of armed contractors involved directly in hands-on military and security operations. These private forces can be responsible for everything from surveillance and tracking, to security and interrogation (Singer 2003: 522-523).

In this thesis I examine the legal spaces of the private security industry through an in-depth case study of the Nisour Square tragedy outlined above. The Nisour Square attack provides a good starting point for asking questions about the actions and accountability of armed

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3 This number refers to Department of Defense contractors only; many security companies however, operate under contract with the State Department (DOS). The omission of DOS contractors from this example is due to insufficient data on non-DOD contractors in the first years of the war. Other federal agencies, including the United States Agency for International Development (USAID) also lack full accounts of contractor numbers. The ambiguity of data will be looked at further in Chapter 3.
contractors operating in Iraq. Not only was the shooting unambiguously violent, destructive, and unprovoked, it has also been the subject of intense legal and political debate and has resulted in numerous court cases, congressional hearings and legal investigations.

What the Nisour Square case study so sinisterly demonstrates is how difficult it is to hold private security contractors accountable under any existing legal framework. In October of 2007, a congressional panel on State Department security services (a panel appointed by then Secretary of State Condoleezza Rice in the aftermath of the Backwater shootings) concluded that “it was unaware of any basis for holding non-Department of Defense contractors accountable under US law” (Boswell, Joulwan, and Stapleton Roy 2007: 5). This conclusion applied to the Blackwater operatives involved in the Nisour Square shooting, who, at the time of the massacre, were employed under State Department contract. The fundamental problem, as articulated in an article on Salon.com shortly after the Nisour Square shootings, is that “the introduction of private contractors into Iraq was not accompanied by a definitive legal construct specifying potential consequences for alleged criminal acts” (Koppelman and Benjamin, 2007). This absence of “a definitive legal construct” has resulted in a substantial amount of literature on the insufficiencies of existing laws when applied to private contractors. There has been less focus, however, on the ways that the logics inherent in the US legal and political structures contributed to this legal indeterminacy. In my thesis, I aim to begin to fill this gap in the literature by moving beyond the specific characteristics of the Nisour Square legal grey zone (e.g. why existing laws were not applicable in this case) to thinking about the larger geolegal logics that created and sustained it. It is here where I think my project can make a contribution to an understanding of some of the more substantive legal issues concerning Private Military Security Contractors (PMSC) and their ongoing role in the Iraq occupation.
To do this, I turn to Joshua Barkan’s 2011 article “Law and the Geographic Analysis of Economic Globalization”. In it Barkan presents a two-pronged methodological approach to investigating law. Barkan’s approach—which he calls historical-philosophical—is a holistic approach to law that involves studying both the “law as a set of institutions that attempt to establish enforceable rules and protocols” as well as “the process by which the claims of these institutions take on the status of legal authority” (Barkan 2011: 591, emphasis in original). The second prong of this approach prods us to examine what he calls “the process of legalization itself” in that it compels us to look at the processes that cast particular areas of social life as either within or beyond the scope of legal regulations and legal protections (ibid)

It is this focus on the “process of legalization” that I try to bring to bear on the Nisour Square tragedy. This line of investigation shines attention on the legal processes that create and engender spaces and subjects as beyond or within the law, but also compels us to pay attention to the converging geographies that created these spaces of legal ambiguity. I build on a body of work that looks at the insufficiency of existing regulatory frameworks to consider why and how the contractor, and the victims of the contractor’s violence, were constructed as beyond the scope of law in the first place. Moreover, I investigate the different ways that law was invoked after the fact to secure the continuing impunity of Blackwater and the United States government.

In short, my thesis is an attempt to answer four interrelated questions:

1. How can it be that a team of privately employed contractors stormed into a public space, shot and killed unarmed civilians and walked away without anyone being held accountable? And, more generally.

2. What kinds of legal spaces (or non-spaces) do private security contractors and private security firms occupy?
3. What legal or geographical constructs contributed to these spaces of legal indeterminacy?

And,

4. How can existing legal geography frameworks help us to understand this phenomenon? How might they need to be clarified or altered?

1.2 RESEARCH CONTOURS

My research on the Nisour Square case study is focused specifically on US legal responses to the tragedy and how we might understand these responses from a critical geolegal perspective. This focus means that I ignore other important repercussions from the shootings, including for example, victim impact, local understandings of the massacre in Iraq, and the everyday experience of living alongside a massive military and private contractor presence. My particular focus—looking at the shooting vis-à-vis the US legal and military complex—is thus only one of a myriad of other analytical lenses that could be employed to investigate this very public, and very horrific, flashpoint in the US invasion of Iraq.

Victim and local experience of the massacre is of course important, even integral, for understanding the consequences of the shootings, and the proliferation of the private military industry more generally. My decision to focus on the legal contours of the Nisour Square massacre was based on a research interest in legal geography as well as more pragmatic and ethical concerns to do with time, resources, and access. And while I do have trepidations about subjecting the victims of violence to, as Derek Gregory articulates it, “the further indignity of becoming the objects of theory” (Gregory 2004: 318), my hope is that there is some value,
however small, in making the legal systems that engender these violences more explicit.

1.3 OUTLINE OF THESIS

In Chapter 2, I outline my theoretical framework and the methodology that guides the rest of my thesis. I began by providing a literature review of the ways that law has been used by geographers, before outlining the specific approach to law that I take in this thesis. My approach is based primarily on the work of Walby (2007), and Rose and Valverde (1998) who, I argue, by conceptualizing law as an ongoing process "within a de-centered economy of power and governance" (Walby 2007: 552), provide a methodically useful framework for asking questions about the geolegal space of Private Military Security Contractors. I conclude this chapter by turning specifically to five "foci of legal analysis" identified by Rose and Valverde (1998) and demonstrating how I will use each foci to guide my investigation of the legal complex surrounding the private contractors involved in the Nisour Square shooting.

In Chapter 3 I provide a short history of the private security industry in order to ground the examination of my case study. Building on the work of Catherine Gallaher (2012) and others, I argue that the private security industry is best understood in the context of political and economic neoliberalization. I also use this chapter to clarify terms and figures; I define terms such as “contractor”, “Private Military Security Contractor” or “Private Military Corporation”. I also make explicit where and how I found statistical data for the industry.

I follow this general examination of the private military contracting industry by turning to my specific case study in Chapter 4: the Nisour Square massacre. I begin by recreating the scene based on eyewitness accounts and media reports. I then draw out the political and legal ramifications that occurred in the weeks, months, and years that followed the attack. In the
process I unpack the seemingly bizarre legal positions occupied by the Blackwater operatives, and why every legal avenue pursued by the victims and their families was ultimately doomed. I also use this chapter to provide a brief overview of the existing literature on the Nisour Square massacre and the legal accountability of the contractors and company involved. I conclude that while this body of work is both enlightening and useful, insofar as it unpacks the insufficiencies of existing laws when applied to Private Military Security Contractors, there is in fact reason to take the analysis a step further by examining the ways these laws were formulated, interpreted and articulated to create a zone of legal indeterminacy.

In my last two chapters I present the overarching claim of my thesis. Namely, that the violence that occurred at Nisour Square (and the inexplicable legal processes it set in motion), is best understood not as an isolated anomaly that can be “fixed” with proper legislation, but rather as the result of processes and practices that create, engender and maintain ambiguous legal spaces. In Chapter 5, I consider the “legal spatializations” that created this legal grey zone. To do this I turn to a body of geographical work (flagged first in Chapter 2) that investigates the fraught intersections between war, geography, violence and the law. I pick up, in particular, on two key concepts—“lawfare” and “the state of exception”—two ideas that have gained traction from scholars thinking through the role of law in times of war or rupture. I argue that these two theories, while on the surface divergent, can actually be read as complementary. In bringing insights from the lawfare and state-of-exception literatures to bear on my case study, I highlight the explanatory power these theories have, and identify tensions in the literature that remain murky. To conclude Chapter 5, I maintain that what is at issue with the security contractor industry is that its legality is indeterminate and further, that this indeterminacy was constructed
and maintained by a host of institutional processes and legal maneuvering by all three branches of the American government.

In Chapter 6, I conclude my discussion of the legal space of the private military security industry by turning to the work of Jamieson and McEvoy (2005) on “juridical othering”. I suggest that both the private security contractor as well as the Iraqi civilians who were victims of their violence, are best conceived as “juridical others”, placed in a legal no man’s land by a state which used proxy actors to “other” both the perpetrators and victims of its own institutionalized violence.
CHAPTER 2: CRITICAL LEGAL GEOGRAPHY AND A POST-SOVEREIGN METHODOLOGY

In this thesis I apply an explicitly geolegal approach in my examination of my case study and of the private security industry more generally. While geography is central to my analysis—in particular the ways that ideas of citizenship, nationality, and territory help to engender and perpetuate atrocities like Nisour Square—I come at this analysis from a legal lens. In the following section I unpack the conceptual basis of the law/geography connection by investigating what geographers are actually talking about when they talk about “the law”. In the process I hope to demonstrate that, despite a heterogeneous engagement with law, multiple lines of geographic inquiry are in fact engaging in the same overarching conceptual project. I unpack this conceptual project in order to ground my own approach to law throughout this thesis.

2.1 CRITICAL LEGAL GEOGRAPHY AND THE LAW/SPACE BINARY

Critical legal geography is a relatively new and growing sub-discipline in geography that has received sustained attention over the last 30 years. A number of self-described legal geographers—Nicholas Blomley, Richard T. Ford, David Delaney, and Gordon Clark, among others—have been prolific in their attempts to define a "critical legal geography", to identify its core questions and to argue for its relevance (Blomley and Clark 1990; Blomley 1994, 2003a, Delaney, Blomley and Ford 2001). These synthesizing accounts suggest that, despite a broad and diverse set of concerns, a “critical legal geography” has certain defining characteristics. Despite the heterogeneity in the literature, critical legal geographers share the core premise that, in many cases, "law" and "space" are deeply entangled concepts: that engagement with law helps us to understand space, and that engagement with space is furthered by an investigation of law.
This “entanglement” is often presented in the legal geography literature as two overarching proposals:

1) That law is already imbued with all sorts of interesting and complicated spatializations. Scholarship which takes this analytic approach is sometimes referred to as “spatializing law”, since it inserts geographical thinking into studies of existing laws and legal systems.

And,

2) That law, like geography, is a powerful ordering process, inextricable from the productions of identity and social relations. And thus, law does fundamental work in not only carving up space but also in the ways we think about, engage with, and act in certain places. Conversely, this analytic approach is often referred to as “legalizing space”, since it inserts geographical concepts into studies of existing laws and legal systems.4

Taken together, these two proposals or analytic approaches to the law/space convergence are often referred to as the law/space binary (Delaney et al. 2001: xviii). The first of these analytical approaches—“the space in law” side—looks at the kinds of spatializations always already present within the law. This literature is built on the premise that law—at the level of formal rules, interpretations, and actions—is central to defining the everyday places we inhabit (e.g. school, work, home) (Cotteral 1997; Delaney 1993). For example, in his work on race-based restrictive covenants in the United States, David Delaney notes that neighbourhood deeds (meant to exclude black Americans from particular areas) made judges active players in creating ethnic spatial separation, illustrating that legal rules, actions and interpretations often create very specific kinds of spatial arrangements and classifications (Delaney 1993, 1998). Geographers taking this particular approach have tackled everything from worker protections, to racial

4 “Spatializing law” and “Legalizing Space” are terms that Delaney et al. employ in their introduction to the Law and Geography Reader (2001).
segregation, to asylum law, and in the process have added to a body of work that investigates law’s very localized manifestations (Blomley and Barken 1992; Delaney 1998; Holder and Harrison 2003; Blomley 1994).

The second proposal—that law is entangled with geography since law is a powerful ordering process, inextricable from the productions of identity and social relations—comes out of 30 years of work in critical legal studies literature. As David Delaney argues in his paper on the influence of critical legal studies to geography, both critical legal studies and critical geography are premised on the belief that their respective disciplines are crucial to an understanding of larger social processes (Delaney, 2003). So for critical geographers, Delaney argues, it is hardly contentious to say that geography is "everywhere." And everywhere not only in the physical sense (in that every physical space is also a place and vice versa) but geography is also everywhere in the sense that spatial process and practices are inseparable from the kinds of power relations that shape our everyday lives: we can’t understand one without the other. As critical legal theorists began pointing out 30 years ago, the omnipresence of law (as a constitutive force and lived reality) is no less important for making sense of our social world. In his 1986 essay, “Law and Ideology,” R.W. Gordon argues that a critical engagement with law means recognizing its powerful presence in ordering the social spaces we inhabit:

Consider all the habitual daily invocations of law in official and unofficial life—from the rhetoric of judicial opinions through the advice lawyers give to clients, down to all the assertions and arguments about legal rights and wrongs in ordinary interactions…they are among the discourses that help us make sense of the world, that fabricate what we interpret as reality…They split the world into categories that filter our experiences (14-15).
For Gordon and others, a critical approach to law involves the recognition that law does not simply affect our daily lives; it actually does integral work in creating and shaping them (and is, in turn, shaped by them). By adding a legal analysis to our study of places, territories, and landscapes, we can thus engage more fully with a force (law) that does essential work shaping and legitimatizing our physical world (i.e. borders, property rights).

Nicholas Blomley has written extensively on how law matters to geography in his discussions of property rights (Blomley 2003b, 2003c). According to Blomley, the property rules that permeate our daily lives, and the discourses embedded in these rules, create very specific kinds of subjectivities. Inscribed in the whole notion of property, for example, is the difference between those who belong and the “threatening other” (Blomley 2003b; Blomley 2003c). Property separates those who occupy particular spaces from the ones whose presence threatens those spaces – the homeless, the panhandlers, and the squatters. Thus property rules (and the associated discourses) not only influence the way we move, where we go, and where we do not, but they also help create very particular subjectivities.

Despite having unpacked the two approaches to law that make up the law/space binary, the difference between these approaches, when applied to specific instances of scholarship is often unclear—it is often hard to discern whether it is "space in law?" or "law in space"? 5 As Blomley (2003a) argues, given that both disciplines have long existed as two separate solitudes—looking how each bears on the other is important for overcoming a long-standing analytical lacuna. Nonetheless, he allows, the binary is often misleading for, in many cases, the two concepts are entangled in inextricable ways (i.e. borders, property, the home).

5 In their introduction to “Law and Geography”, Harrison and Holden write of the papers in the collection, “that in the majority of cases it is not possible easily to attribute one or other of these labels (space in law/law in space) to a piece of work” (2003, ii).
It is important here to flag that while “critical legal geographers” share the common premise that law is contextual, that does not mean that they share a coherent theory or common understanding of law. Among the works subsumed under the critical legal geography umbrella, some give emphasis to law as an instrumentality, some look almost entirely at legal institutions, while others conceive of "the law" as being about ideology, culture, and discursive practices. What they have in common, besides an interest in law and geography, is that they reject an understanding of law as an independent social variable. As Wesley Pue (1990) argues in his own synthesis of law and geography, while legal geographers may not embrace one definition of the “law” they all, by the very nature of their project reject “legal closure”. “Legal closure”, is the process by which law is presented as closed-off, as something separate from the social, something that can be employed neutrally and objectively. Until the emergence of critical legal studies in the late 1970s, legal literature had tended to present itself as a normative and objective discipline. This privileging of law as something impartial, universal and normative worked to abstract legal studies from geography as well as all other social sciences (and social discourses). Legal geography, by its very nature, is thus a refutation of these canonical legal texts. As Audrey Kobayashi explains, the legal geographer always sees the law as “contextual”, as a social construct that always bears with it a relationship to larger social processes (1990). Despite heterogeneous engagement with law, legal geographers see the law as socially constructed, as a source for constituting and legitimating relations of power (of persons and organizations) over other persons and organizations.

2.2 Legal Geography and the “War on Terror”

As flagged above, given the often co-constitutive nature of law and geography, a wide range of geographical work can be included under the "critical legal geography" label. In this
section I unpack a relatively recent cluster of work that investigates the role of law as a political and governmental tactic in the on-going “war on terror” and in contemporary geopolitics more generally. This work—which explores the ways that law is extended, manipulated and transgressed through practices of war, colonialism, and security—provides the more specific theoretical starting point for my investigation into Nisour Square. In contrast to much of the critical legal geography summed up above, this cluster of work often takes into account a plurality of legal systems. In so doing, these geographers take the additional step of considering the relationship between the legal, illegal, and extrajudicial. They also consider the ways these seemingly distinct concepts fold into each other to create spaces of legal indeterminacy.

Geographers Derek Gregory, John Morrissey, and Matthew Hannah, for example, have examined how uneven and overlapping geographies of legal authority have been used to facilitate practices such as indefinite detention, and have constituted seemingly “lawless” places such as Guantánamo Bay and Abu Ghraib (Gregory 2006, 2007; Hannah 2006; Morrissey 2011). Gregory (2006, 2007), for instance, has written a number of papers on the legal and geographical processes that sustain the extraterritorial war prisons. He contends that by unpacking the “interlocking spatialities” at work in places like Guantánamo Bay or Abu Ghraib, we can move beyond static analysis that frames these seemingly “exceptional” places as outside or beyond the law to an analysis that sees them as the result of ongoing processes. Tracing the colonial and legal history of Guantánamo Bay, Gregory argues that the prison depends upon the ongoing mobilization of two contradictory legal geographies, one that places the prison outside the United States to allow the indefinite detention of its captives, and another that places the prison within the United States in order to permit their ‘coercive interrogation’ (Gregory, 2007).
Hannah’s (2006) work on the relationship between terrorism and torture—albeit less explicitly focused on the law/space connection than Gregory’s—is demonstrative of the ways in which the geographies and legalities of the US-launched “war on terror” are often deeply intermixed. Among other things, Hannah links the “discursively inflat[ed]” threat of terrorism to the re-working of the legal norms on the acceptability of torture (622). Hannah pays particular attention to the ways in which the threat of terrorism was inflated through a twofold process of territorialization—one that cast the whole of the US as imminently threatened, and the other that cast Iraq and Afghanistan as imminently threatening. It was through this twofold discursive process, Hannah argues, that the US Executive and Judiciary branches were able to upset long-held assumptions about the definition of torture. By creating a zone of legal indeterminacy—where the definition of torture and its legality was thrown into flux—the US was able to justify torture, so long as it was extraterritorial and used only on the threatening foreign terrorist. Like Gregory, Hannah shows how understandings of territory, war, and colonialism work in concert to create ambiguous legal spaces where the legal, extralegal, and illegal fold into each other.

The critical work on the connections between law, space and war by Gregory, Hannah, and others has influenced much of my analysis on the legal space of the Private Military Security Contractor. Building particularly on Gregory’s work, I have explored both the congruencies and differences between the geolegal space of Nisour Square and other seemingly lawless sites of violence in the “war on terror”. In the following section, I outline my research strategy and specific methodological framework.

2.3 **Building a Legal Methodology**

The law and geography scholarship unpacked above is helpful in demonstrating the overarching conceptual projects of geographers working explicitly with the law; namely that
geographers who engage with the law see it as a social construct, as a source for legitimizing power, and as an important variable in social analysis. This work, however, proved less helpful when I tried to build on it to create a specific methodology for my thesis project. The difficulty in devising a methodology was in part due to the omission of an explicit understanding of law and the way this thing called “law” differs from other normalizing projects. In order to develop a legally-informed methodology I turned instead to the work of several sociolegal scholars—including Walby (2007), Rose and Valverde (1998) and Hunt (1993)—who conceptualize the law as a “mode of regulation within a de-centered economy of power and governance” (Walby 2007: 552). In the following sections I look at what it means to view law “as a mode of regulation” and how this conceptualization of law guided my research strategy.

2.3.1 Law as Post-Sovereign Process

As mentioned above, Joshua Barkan suggests that a holistic approach to law involves studying the ‘law’ as both “a set of institutions that attempts to establish enforceable rules and protocols” and as “the process by which the claims of these institutions take on the status of legal authority” (Barkan 2011: 591). The second prong of this approach prompts us to examine what he calls “the process of legalization itself”, those processes that cast particular areas of social life as either within or beyond judicial oversight (ibid).

While Barkan does gesture towards a methodological approach for undertaking the “historical-philosophical approach” to law and geography, he does not provide a lot of detail on what such an approach might entail. To develop my methodology, I turned instead to the work of legal theorists, primarily to the “post-sovereignist” framework developed by Kevin Walby, and to the work of Mariana Valverde and Alan Hunt, two scholars on whom much of Walby’s own
work is built. I use the following sections to unpack Walby’s framework, to lay bare its theoretical foundations, and to outline the explicit ways it guided my own research.

As Barkan emphasizes, any study of law is hindered both by a seemingly endless list of legal theories and understandings of law, and the way that “law” is used as a blanket term for all sorts of distinct social practices and social processes. One way out of this confusion, according to Barkan, Walby, and others, is to conceptualize law as an ongoing process, as something that we are constantly creating and negotiating, not as something static that can be pinned down and categorized. It means moving away from ultimately self-defeating ontological questions about the nature of law, to questions about “what a certain set of legal knowledges and legal powers actually do, how they work” (Valverde 2003: 11).

In his 2007 paper, “Contributions to a Post-Sovereigntist Understanding of Law: Foucault, Law as Governance, and Legal Pluralism”, Kevin Walby develops a process-focused legal framework by bringing together the work of law-as-governance scholars and legal pluralists. Walby’s “post-sovereigntist” framework is so-called because, while he still recognizes the state as an important site of legal analysis, he argues that we need to pluralize the state from within; he contends that while any analyses of law needs to focus “on the state as a site for the unification of regulatory projects”, researchers need to position their analysis of law “within a de-centered economy of power and governance” (Walby 2007: 552). Walby’s approach is post-sovereigntist not because it jettisons the state as a site of legal analysis (in fact, Walby’s insists on its continued importance) but because it acknowledges that there is not one unitary sovereign and that law is not “a unitary phenomenon”. Law, as Walby argues, can

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6 Walby uses the term “law-as-governance scholar” to refer to theorists who understand law vis-à-vis Foucault’s understanding of government and power; he refers in particular to the work of Rose and Valverde (1998), Hunt (1993), and Hunt and Wickham (1994). Walby brings law-as-governance scholars into conversation with legal pluralists, arguing that the two theories, while similar, “do not share a common academic language” (Walby, 564).
emanate, and be contested, from multiple sites of authority. At the same time Walby reminds us that normative and legal orderings are iterative, not irreducible processes. Walby’s project is not to define law once-and-for-all, but rather to develop a framework to analyze law that allows us to begin to ask questions about the process of legalization itself.

Walby, building on the work of law-as-governance scholars, argues that the clearest way to understand the “law as process” idea is to see this process itself as part of the “technologies and techniques of governance” (Walby 2007: 568). Or, as Hunt articulates it, we need to see law as a “constitutive mode of regulation” because legal discourses are both constitutive of and constituted by, the social political field (Hunt 1993: 307). Understanding law as an ongoing process serves a number of purposes. It allows us to move away from problematic conceptualizations of law that present it as a monolithic entity apart from the social world. In addition, an understanding of law as both process and practice compels us to constantly interrogate legal “habitus”’’ (Barkan 2011: 599). It compels us to think about the assumptions inherent in laws and legal systems as well as the ways legal discourses work to legitimize some bodies and some practices while working to problematize others. And, most importantly, it provides a methodological approach that actually matches up to the empirical reality: that “law”, however understood, is constantly in flux, being made, remade, and contested simultaneously (Walby 2007: 568).

2.3.2 Putting Walby to Work: Research Design and Methods

Based on Walby’s framework, I set out to both examine the legal what of Nisour Square (i.e. which laws were used to try contractors, the technicalities on which they failed, etc.) as well
as the discourses (both legal and non-legal) that framed those outcomes (i.e. whose legal claims were seen as legitimate? Whose were not? And why?).

Initially my data collection was both haphazard and overzealous. After framing a relatively vague research question I collected everything and anything I could find relating to the Nisour Square shootings and the cases that followed. The result was a personal archive of hundreds of newspaper articles from sources such as *The New York Times*, *The Nation*, *The Guardian* and *Aljazeera English*; academic articles by geographers, legal scholars, historians and others; legal cases; and US governmental reports. This led to an overwhelming stack of unorganized notes.

However, in working through my notes, I realized that, at least initially, reading through a diverse set of work from a multiple disciplines proved to be a productive starting point. Through a wide reading of the literature(s) I began to develop a picture of some of the dominant Western narratives around the Nisour Square tragedy. Specifically I noticed that the Nisour Square shooting, and the lack of legal accountability which followed, was framed primarily as a *problem of regulation*, in so far as commentators were focused on *why* or *how* particular laws failed to hold the contractors accountable. And yet, despite all the attention the case had garnered, there seemed to be little focus on the larger question: what circumstances had to be in place, and what understanding of law had to be mobilized, to keep the perpetrators outside of legal regulation, and to deny victims the protection we usually understand as being integral to any legal project. A lot of the critical analysis I engaged with, as helpful as it was, tended to, as Barkan would describe it, “presume, without interrogating, the law” (Barkan 2011: 593).

After coming to this realization, my second phase of data collection was more strategic. I divided my research into two overarching categories—the Nisour Square Case and the Private
Security Industry—each with 4 sub-categories—primary documents (including court cases, congressional hearings, and indictments), media reports, governmental reports (specifically reports from the US government) and academic literature. I used this wide body of work to try to construct a coherent legal account of the Nisour Square Massacre. I began by building a detailed account of the Nisour Square shooting and all the cases, legislation, and legal arguments that emerged as a result. This entailed a close reading not only of academic literature and popular press about the case, but also a close reading of legal indictments, congressional hearings and relevant pieces of legislation (including in particular the US Uniform Code of Military Justice and the US Military Extraterritorial Jurisdiction Act of 2000). Simultaneously, I collected and read material—including other court cases and reports from the US House of Representatives and Department of Defense—that helped me to situate the Nisour Square case within a larger legal and political context. While building this account of my case study, I used theorists from both inside and outside geography to attempt to unpack “the legal habitus” at work in the documents I was working through (Barkan 2011: 599).

2.3.3. **Deciding Which Questions to Ask**

In their 1998 article “Governed by Law?” Rose and Valverde identify a number of explicit themes or “foci” helpful for pursuing “an investigation of the legal complex from the perspective of government” (547). I used these methodological foci as a starting point to begin asking questions about the legal habitus at work in the piles of documents I had collected. Below I give an overview of the six themes: problematizations, subjectifications, normalizations, authorizations and spatializations. While I focus particularly on spatializations in this thesis, I employed the other foci to build my larger analysis (which I will draw out in Chapters 5 and Chapter 6).
Problematizations

Drawing on the work of Castel (1994), Rose and Valverde argue that the fundamental question in legal analysis—if we want to think about law from the point of view of government—is to think about how an experience “is offered to thought in the form of a problem requiring attention” (1998: 545). It involves thinking through how a problem gets formed in the first place and how this problem becomes the target for government.

It might seem initially counterintuitive to ask questions about “problematizations” in reference to the Nisour Square case study given that the case seems to reveal an absence of law and regulation. However, while the contractors were not held legally accountable, the “problem” of the contractor has been the subject of significant legal debate and analysis. Moreover, the “problem” of the Nisour Square case and the way that problem was framed is, I think, enlightening for helping think through why there is still no binding regulatory framework governing the behavior of private security contractors/companies.

Subjectifications

Rose and Valverde draw our attention to ways that the intertwining of legal and normative ordering strategies shape very specific kinds of legal subjects. Attention to subjectifications thus means paying attention to the variety of ways that subjects are constituted “in legal contexts and forums” and to the “strategies that are offered to individuals to self-identify within a legal system” (1998: 547). This lens of subjectification helped guide my research by making me cognizant of the forms of identity open to, or imposed upon, the
contractors who fired at Nisour Square, as well as the victims of that violence.

**Normalizations**

Attention to normalization, according to Rose and Valverde, means attention to the “technologies of the legal procedure, and to ways in which non-legal knowledges can be introduced into legal forums” (1998: 548). The point is that laws and norms are always iterative; law is often justified with reference to the norm while law is itself “deployed to support or authorize the power of the norm” (1998: 548). According to Rose and Valverde, the law, like any rule, “is external to that which is governed: it is imposed upon its subject in relation to an extrinsic standard of authority, morality, virtue, order, duty or obedience” (Rose and Valverde 1998: 544). But a norm “appears—or claims—to emerge out of the very nature of that which is governed” (ibid).

In a study of the legal complex surrounding Nisour Square, attention to normalizations means, among other things, asking about the appeals to the norm and to non-legal knowledge raised in the various legal cases. And while a fuller engagement with this lens would require a more comprehensive discourse analysis than I did for this project, attention to normalizations also demands attention to the implicit legitimizations that result from law’s absence. Given the significant discursive power of law, it is important to interrogate the way the US legal system’s routine failure to bring contractors into the legal fold contributes to normalizing and legitimizing what is any other circumstance would be considered legally and normatively inappropriate behavior.
**Authorizations**

A fourth “foci” of analysis is “authorizations”. Rose and Valverde suggest that legal mechanisms—especially when combined with “expertise”—are often a key mechanism whereby some individuals or institutions “are deemed capable of exercising authority” over other individuals and institutions (Rose and Valverde 1998: 550). To apply this lens methodologically means trying “to identify the authorities who define and delimit the problem to be investigated” and the ways in which those authorities are granted legal legitimacy (Rose and Valverde 1998: 546). Applying this analytical focus to my case study meant that I paid particular attention to the multiple authorities that both defined the legal playing field of the Iraq War (for example the interim American government in the country as defined by a Status of Forces Agreement), as well the authorities within the United States (e.g. Congress, the Judiciary and the Executive Branch) who tried, often unsuccessfully, to draw legal parameters around the private contractor industry. In addition to identifying the authorities who worked to both define the contractor “problem” as well to contain it, I investigated the ways the legal mechanisms granted them this authority.

**Spatializations**

Rose and Valverde argue that investigations of laws and legal systems often involves looking not only at how legal practices govern individuals but also at how these legal practices govern spaces. Drawing on the work of Garland (1997), Rose and Valverde highlight that in many situations, it is not the individual, but rather the “crimogenic situation” that is governed. They thus argue that attention to spatializations involves thinking about how particular places get constituted as either governable or ungovernable spaces. While this conception of spatializations is no doubt useful, I consider a different kind of legal spatialization in this paper. Using insight
from critical legal geography, I look to the role of geographies—specifically discourses and enactments of territory, citizenship, and sovereignty—in shaping the nebulous accountability of private contractors.
CHAPTER 3: THE PRIVATE MILITARY SECURITY CONTRACTOR

On April 24, 2010, shortly after the release of more than 300,000 classified military documents by the self-described “not-for-profit media organization” Wikileaks, the front page of *The New York Times* reported on a slew of previously unreported confrontations involving private security contractors in Iraq and Afghanistan. By combing through a series of incident reports in the Wikileaks archive, *Times* correspondents James Glanz and Andrew W. Lehren discovered not only that the violence committed by these contractors was much more substantial than had previously been thought, but also that the United States military knew about the violence and further, that almost nothing had been done about it (Glanz and Lehren, 2010). Glanz and Lehren sum up the revelations revealed by the documents this way:

The documents sketch, in vivid detail, a critical change in the way America wages war: the early days of the Iraq war, with all its Wild West chaos, ushered in the era of the private contractor, wearing no uniform but fighting and dying in battle, gathering and disseminating intelligence and killing presumed insurgents.

The incident reports revealed a culture among contractors of indiscriminate shooting, ad hoc operating procedures, and a hostile attitude towards members of the US military, as well as towards contractors from other companies. Moreover, during the six years covered by the reports, it was revealed that at least 175 private security contractors were killed in Iraq alone (Glanz and Lehren, 2010).

These reports appeared to confirm what many saw as a shift in US military strategy: not only had private contractors and in particular private security contractors become integral to US warfare efforts, the industry and the actions of the contractors
were largely unregulated. In this chapter I investigate The New York Times’ bold claim that the United States has “entered the era of the private contractor” by looking to the literature on the private security military industry, and tracing its recent history in US contingency operations. In so doing, I will outline the ways that these private contractors are different from national standing armies, and how this is important for understanding the different relationship that they hold vis-à-vis the state and the law. At the same time, the diversity of private contractors will be detailed to underline the wide range of actors on the ground.

3.1 Methodological Cautions: What are we talking about when we talk about Private Military Security Contractors?

The New York Times correspondents referenced above are among a chorus of journalists, politicians, and academics who have pointed to the privatization of military services as either ushering in, or as the result of, a changing American military paradigm. But though they all agree about the rapid growth of the industry, there is no consensus about what defines it. Among those who write about military or security “contractors”, it is often unclear which services or types of industry fit under that umbrella term. Not only is there no agreed upon definition of the industry, but its piecemeal and rapid growth into a multitude of different service areas from computer technology to transit service on military bases, make any attempts to categorize service providers quickly out-of-date. Moreover, even if we could create solid borders around the industry, analysis would be further thwarted by the fact that there is simply no consistent way to track the growth of the industry: number collection is haphazard at best and, until recently, was often a wild guess.
3.1.2 Terms and Typologies

One of the noted difficulties when discussing Private Military Corporations is the confusing and inconsistent terminology used to describe the companies, the services they provide and the people whom they employ. For example, while the focus of my case study is on armed security contractors, the companies providing international security services are often categorized under the umbrella term Private Military Corporations (which includes, for example, firms that build and manage infrastructure or firms that provide intelligence services). Private security firms are but one segment within this larger industry and their growth has occurred simultaneously with the growth of other kinds of military service providers. This obfuscation of terminology is further compounded by the media's tendency to use the term "contractor" as a catchall term to refer to a diverse set of actors who perform a diverse set of tasks.

As a result of this confusion, and in an effort to remedy it, a number of scholars have come up with different typologies to help us categorize the various functions and roles of private military/private security companies. Some of the earlier attempts to distinguish between types of armed contractors focused on the distinction between firms that provided "defensive" and "offensive" services. But, as I will expand on below, companies selling purely offensive services are all but extinct. That said, while companies like Blackwater advertise their services as defensive, they are permitted and expected to take almost any means necessary to protect the people, places or cargo they are defending. This means that in hostile situations, distinctions between defensive and offensive action are often blurred.
P.W. Singer (2008), one of the first scholars to provide an in-depth look at the contracting industry in Iraq and Afghanistan, has devised a much-used typology that categorizes these companies based on proximity to the battlefield (91-100). Singer's first category, the companies closest to the battlefield, is the Military Provider (exemplified by offensive companies like the now-defunct Sandline International as well as security companies like Blackwater). Next is the Military Consultant, firms that provide intelligence and translation services. Lastly is Military Support, firms like KBR, responsible for everything from the building of military bases to providing other 'nonmilitarized' services like laundry and food provision.7

More recently however, scholars writing on the private military service industry have begun moving away from such static categories, in part, because, as Caroline Holmqvist (2005) highlights, multinational corporations are moving into the security industry, and most of these firms take on multiple roles and functions. Instead of straightforward “security” or “support” firms, the new face of the private military industry is the corporate conglomerate; alongside security, these companies provide services ranging from risk analysis, to computer system management, to arms production (Holmqvist 2005: 6). DynCorp Intentional, for example, the private security firm responsible for, among other things, protecting Afghan president Hamid Karzai and managing the entire Air Force fleet, was acquired in 2003 by CSC, a major communications and computer technology multinational (Philip and Luke 2003: 159). CSC, which had been a primarily IT-focused company, was then able to leverage

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7 KBR (formerly Kellogg Brown & Root)—a firm which specializes in building military bases—is one of the biggest beneficiaries of the corporatization of military services. Until 2007, KBR was a division of Halliburton (the company former Vice President Dick Cheney was once CEO of) (see Baum, 2003).
Dyncorp’s government contracts to become what Avant refers to as a “large defense systems conglomerate” (Avant 2004: 154). Thus the divisions proposed by Singer, though helpful their categorization of private military services, are less helpful in categorizing (the increasingly uncategorizable) private military company.

In order to sidestep some of these typological confusions, when talking about the contractor industry throughout this paper, I make an effort to avoid generalizations, to focus on the activity in which the contractors are engaged, and to provide examples wherever possible. Where I am making more general claims, I use the term PMSC (Private Military Security Contactor) to refer to a contractor (e.g. the Blackwater operatives) that provides security services. I use the term PMC (Private Military Company/Corporation) as an umbrella term to refer to any to company that, to quote McCoy "hire[s] individuals to provide an array of military specific tasks that, throughout much of the last 200 years, had been defined as the purview of soldiers in war zones” (2013: 323).

3.1.3. Notes on Numbers

The difficulty of accurately categorizing contractors is further compounded by the lack of accurate numerical information. The United States Congress did not even begin pushing federal departments to track and disclose numbers relating to their contracts in Iraq and Afghanistan until the summer of 2008. Moreover, a number of follow-ups by the Government Accountability Office found that the three major federal employers of private contractors—the DOS, the DOD, and the United States Agency of International Development (USAID)—routinely failed to keep accurate numbers (GAO, 2009 and 2010). The numbers, even when available, rarely map on neatly to the categories used in
the literature. For example, the same GAO report mentioned above identified that the joint database—the Synchronized Predeployment and Operational Tracker or SPOT—where the DOD, the DOS and USAID are required to enter contractor information—has no category exclusively for armed security contractors. While SPOT tracks contractors who are “authorized to carry weapons”, that category does not include all contractors performing security functions. Contractors performing security functions who are not authorized to carry weapons are often not included in this count; but personnel who are not performing security functions but have been authorized to carry weapons for personal protection often are (GAO 2010: 12). The result is that (at least using SPOT) it is impossible to pinpoint the number of armed security contractors operating in Iraq or Afghanistan at any one time. In order to provide some clarity around the numbers I use in my thesis, I outline in Figure 1 below the main databases used by US federal agencies to track contractors numbers.

When citing numbers on contractors in this thesis I rely primarily on data from GAO reports as well as data from Congressional Research Service reports (what I call “one-time headcounts”), as they tend to use the data from the continuously updated sources as their starting points and then supplement that data with additional information (i.e. through interviews with agency representatives or with information released through freedom of information requests). Frustratingly, for non-DOD contractors, the only reliable source for headcount numbers appears to be the GAO reports from 2010 and 2011; the result is that for many years of the Iraq War it is difficult to get a firm grasp on numbers of contractors on the ground.
**Figure 1: Sources of Data**

### Continuously Updated Headcount Sources for DOD Contractors Only

**Military Boots on the Ground (BOG)**
- BOG was established by “Congressional Research Service Request for Boots-on-the-Ground (BOG) for Iraq/Operation New Dawn (OND) and Afghanistan/Operation Enduring Freedom (OEF)” and is prepared by the Office of the Chairman, Joint Chiefs of Staff (H.Rept. 110-279, Department of Defense Appropriations Bill, 2008, July 30, 2007: 27)
- BOG depicts the number of defense contractor personnel and the number of U.S. Military personal on a quarterly fiscal year basis. Tracking began in the first quarter of FY 2008.

**Defense Contractor Employees – Contractor Support of U.S Operations in the USCENTCOM area of Responsibility**
- Quarterly report prepared by the Deputy Assistant Secretary of Defense (Program Support) February 2009 to present. Prepared by the Under Secretary of Defense for Acquisition, Technology and Logistics (AT&L) prior to February 2009.

### Continuously Updated Headcount Sources for USAID, State & DOD Contractors

**Synchronized Predeployment and Operational Tracker (SPOT)**
- SPOT was established by Congress through the National Defense Authorization Act of the Fiscal Year 2008 (FY2008) The Act directed the DOD, DOS, and USAID to sign a memorandum of understanding (MOU) to create a common database of Information on contractors in Iraq and Afghanistan.
- Not only is access to SPOT limited, the numbers in the database are considered by the GAO to be largely inaccurate. In a 2010 report on spot the GAO concluded that the program “still cannot reliably track information on contracts, assistance instruments, and associated personnel in Iraq and Afghanistan”. ***

*** The reason for the omission of data from SPOT varies. According to the GAO, USAID and the State Department officials cited security concerns about identifying local nationals who work for the U.S. government by name as that could place those individuals in danger should the system be compromised. Moreover, according to the GAO report “practical limitations [also] hindered the agencies’ ability to track local national personnel” (GAO 11-1 2010:9). For example, while employers of armed contractors are required to enter data about their employees into SPOT USAID officials in Iraq explained that security personnel working under the agency’s contracts receive authorization to carry firearms from the Iraqi government, not the DOD, and are not identified in SPOT as having weapons authorization.

### One-Time Updated Headcount Sources for USAID, State and DOD Contractors

**Contractor Support of Multi-National Force-Iraq (MNF-I) Operations**

- Report brings together data and interviews from all three Departments to come up with most accurate numbers.
- Tracks outsourcing of contracting services to local and third country nationals (albeit with huge caveats about reliability of data)

### One-Time Updated Headcount Sources for DOD Contractors Only

**Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis**
3.2 A (BRIEF) HISTORY OF MILITARY CONTRACTING

My emphasis in this chapter is not on the private security industry writ large, but instead on the history of private contractors vis-à-vis US military strategy in Iraq and on the “war on terror” more generally. This focus is meant to provide context for the discussion of Nisour Square in the following chapter. That said, it is important to note that the United States is not alone in employing private military service providers, nor are Iraq or Afghanistan the only countries in which they are active; these types of service providers are in fact present in as many as 50 countries, performing tasks from intelligence gathering, to military consulting, to protecting government buildings and embassies (Singer, 2008). Moreover, as scholars of the phenomenon have noted, military services for hire is actually a very old idea.

In his 2008 book, Corporate Warriors: The Rise of the Privatized Military Industry, Peter Singer provides a detailed history of private military service from the Greek and Roman Empires, to the Thirty Years War (1618-48), to Victorian Britain (Singer 2004: 19-40; also, Shearer 1998, Holmqvist, 2004). In the process, Singer illustrates that private soldiers for hire were once necessary, and indeed intrinsic, to the waging of war. To quote Singer, “the foreign soldier hired for pay, the mercenary, is an almost ubiquitous type in the entire social and political history of organized warfare” (Singer 2008: 20).

But even by Singer’s own admission comparisons between this historic model of outsourcing and the current private military industry are not particularly helpful. The latter did not emerge from the former, and the earlier forms of mercenaries are underpinned by very different geopolitical logics. Historians of mercenary warfare (Singer 2008, also Shearer 1998, and Holmqvist, 2004) note that the mercenary system began to first to wane, and then decline rapidly, in post-Westphalian 18th century Europe. The replacement of mercenary armies in
favour of all volunteer armies is attributed in large part to a rise of nationalism and consolidation of state power across Western Europe. The result of this consolidation was the creation of standing armies made up of citizens loyal to the nation-state (though many countries did still supplement national standing armies with hired support).

By the end of the 19th century, anti-mercenary legislation existed at both the state and the international level. Not only had all-volunteer national armies become the norm, mercenary activity itself was deemed incompatible with international laws of war (Major, 1992). While warfare was never free of private actors, scholars of PMSCs tend to agree that the use of mercenary soldiers by western countries has been delegitimized for many years (Holmqvist, 2004). Where there is less agreement is whether the armed security contractors of today have anything in common with this historic industry (e.g. there has been a lot of work trying to answer the “are they mercenaries” questions). Moreover, while there tends to be agreement that the rapid growth of PMSCs represents a shift in the way the West (or at the very least the US and UK) wage war, many different ideas are given for the extent of this shift, and the logics underpinning it.

Commentators tracing the history of the contemporary Private Military Company tend to locate the industry’s emergence in the late 1980s and early 1990s. It was during this period, as Katherine McCoy (2012) notes, that the PMC moved from the shadows into the mainstream and quickly began to multiply (also Avant 2005: 122-123).

Throughout the late 1990s and into the early 2000s, much of the scholarship on Private Military Companies focused in particular on two controversial companies: Executive Outcomes and Sandline International. Though helpful, the scholarship on these two companies is not particularly applicable to the kinds of companies operating in Iraq, at least in terms of how they
branded and marketed their services. EO, a South African company, and Sandline International, an international company with offices in London and Washington, were both active in the conflicts in Sierra Leone in the mid- to late-1990s (during the same period EO was also active in providing military assistance throughout the conflicts in Angola) (Musah, 2000). Advertised as replacements and supplements to national armies, both companies provided direct military assistance to national governments to help quell rebel forces.

These companies garnered outrage; their presence was seen by commentators as representing the return of mercenary armies. But these concerns—that companies like EO and Sandline would be the future of warfare—were, notes Caroline Holmqvist (2004), generally "misplaced" (2004: 3). Not only are both companies now defunct, but this type of company—one that provides direct, military, and offensive services—is largely absent from the global market today. As Holmqvist emphasizes, “In reality, there have been few instances of national governments hiring private companies to wage war” (Holmqvist 2004: 3); and none are currently operating in Iraq or Afghanistan. Instead, we are left with the Private Military Corporation: companies that provide logistical services, security services or both—but advertise themselves as merely support for military activity rather than a replacement. Nonetheless, many of these contractors are armed, are providing interrogation and intelligence services, and can and do use deadly force against civilians.

As Singer (2003) and Shearer (1998) point out, EO and Sandline were not the only predecessors to the PMCs that emerged in early 1990s. Companies like Watchguard (UK) and Vinnell (US), which provided training services for US and UK allies, or Dyncorp (US) which provided “technology and logistics support for the American army in Korea, Vietnam, Grenada, and the Gulf War” (Davis 2002: 157), had, in fact emerged decades earlier. Singer (2003) refers
to these companies as “proto-PMCs”, because while these companies were the precursors to the industry that has burgeoned in the last 3 decades, only a handful existed, and they operated very discretely. Moreover, their roles, as Singer and Shearer point out, were limited to training and tech support.

What has been distinct about the last two decades of the 20th century has been the emergence, at least in the UK and the United States, of companies that provide military services that have distinct corporate structures and openly advocate for public legitimacy. As Holmqvist (2004) emphasizes, this new wave of PMCs exist as legal entities and have a distinct public mission (often complete with a corporate website) to offer support—in the form of logistics or security—to national governments during military operations. But as we will see, this relationship to the government is slippery: private contractors are often kept at arms-length from the governments they work on behalf of, and (as I will show), their legal position vis-à-vis these governments are often unclear.

Particularly interesting about these companies, especially those which offered security services, is the emphasis on branding, and, in particular, lending themselves legitimacy by distancing themselves from the "mercenary label". As McCoy (2013) points out, PMCs and their PR firms have made a point of differentiating themselves from companies like Executive Outcomes and Sandline International to which the mercenary label was more accurately applied. The new Private Military Corporation sees itself as "supporting" and "enhancing" the military, freeing active duty soldiers from tedious and unnecessary duties: “PMC advocates made a point of contrasting their work with that of previous generations of mercenaries…they did this primarily by pointing to their corporate credentials and likening their role to that of other
corporate ‘public support professionals’” (McCoy 2013: 324).

3.3. PRIVATE CONTACTORS LAND IN IRAQ

On March 20th 2003, when the United States and its partners in the “Coalition of the Willing” (primarily the UK and Australia) officially began combat operations in Iraq, they were accompanied by the largest contingent of private contractors in US military history. While the Pentagon did not have a good handle on the exact numbers of contractors in the early days of the Iraq war (for reasons noted above), the Brookings Institute estimated that in the first month of operations there was one contractor for every ten soldiers, a tenfold increase since the 1991 Gulf War (Economist Staff Reporters 2003).

These corporations--the most prominent of which were Aegis, Erynis, Armourgroup, Haliburton, Dyncorp, Triple Canopy, CACI International, and Titan Corp—were responsible for everything from building military bases, to running combined Air Operations Centers, to operating precision guided missiles (Isenberg, 2004). Moreover, as major combat activities died down, contractors were needed more and more to protect diplomats, civilian officials, reconstruction workers, as well as infrastructure and convoys. Blackwater, for example, was hired under a State Department contract in 2004, to provide "protection of US and/or certain foreign government high-level officials whenever the need arises" (U.S. Congress Majority Staff 2007: 2). By March 2011, contractors made up approximately 58% of the DOD workforce in the country (Schwartz and Swain, 2011).

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8 It is unclear from if this number refers to the just DOD contractors or whether it includes contractors from other federal agencies.
3.4 A CASE OF NORM CHANGE?

While the literature on PMCs is generally consistent in its categorization of these companies as both relatively new and increasingly complex, there is no clean narrative on either the causes, or the consequences, of this now booming industry.

Commentators contributing to the ever-increasing body of work on the outsourcing of US state and military functions have identified a number of catalysts and causes to account for the industry’s growth. Despite the lack of overarching consensus, there is consistency, and the different explanatory propositions presented by authors are, I think, ultimately about differences in scale rather than differences in substance. Some authors, for example, have attributed the growth of private contractors primarily to pragmatic considerations of states in contemporary warfare, pointing to, for example, the increasing prevalence of urban conflict, the increasing sensitivity to official military causalities, and/or a surplus of military labour resulting from the end of the Cold War (Singer 2003; CBO 2008: 12; Schwartz 2008:1). However, another body of work, provides a more substantive view of contemporary PMCs by considering these pragmatic considerations alongside larger shifts in state, security and military paradigms.

Sam Perlo-Freeman and Elisabeth Skons (2008), for example, argue that the growth of contractors in US Areas of Responsibility (AORs) is simply the continuation of the larger trend in advanced market economics to outsource military and governmental functions. Though this is a fairly non-contentious point, the analysis of Perlo-Freeman and Skons (2008) provides some insight by linking this outsourcing trend to larger paradigm shifts in military policy and practices. They argue that PMCs were precipitated by the ‘Revolution in Military Affairs’ (RMA), a technologically- and private industry- driven warfare strategy that began in the early 1990s. According to Andrew Marshall, director of the Office of Net Assessments in the Office of
the Secretary of Defense, RMA "is a major change in the nature of warfare brought about by the innovative application of new technologies which, combined with dramatic changes in military doctrine and operational and organizational concepts, fundamentally alters the character and conduct of military operations" (Marshall quoted in Ramsay 1996: 10).

The so-called Revolution began with the privatization of production of military equipment and the move from state managed arms production to private arms production in the latter part of the 20th century. The privatization of logistical and defensive services, argue Perlo-Freeman and Skons (2008), is but one part (albeit a large one) of this larger "revolution".

Moreover, as Klein (2007) points out, there was certainly an explicit policy of military privatization in the Bush Jr. White House. By tracing the trajectory of Secretary of Defense Donald Rumsfeld's public work and policies, Klein demonstrates that Rumsfeld’s explicit goal was the creation of a “lighter fighting force” and the reduction of full-time army employees “in favor of a small core of staffers propped by cheaper temporary soldiers from the Reserve and National Guard, and the escalated use of security companies like Blackwater and Haliburton to perform defensive duties in conflict areas” (Klein 2007: 285).

Interestingly, this Rumsfeldian downsizing occurred simultaneously with an intensification of the United States’ military presence abroad. While the US has long had a substantial international reach, commentators have pointed to the September 11th terrorist attacks and the subsequent “war on terror” as precipitating the escalation in the military doctrine known as Full Spectrum Dominance (FSD) (Hughes 2007; Coates 2002). ⁹ FSD calls for an escalation of

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⁹ Full Spectrum Dominance was first articulated as a military strategy in the DOD Joint Vision Report 2020 published in June 2000. The report announced that future goals of the department "will be achieved through full spectrum dominance - the ability of US forces, operating unilaterally or in combination with multinational and interagency partners, to defeat any adversary and control any situation across the full range of military operations" (Quoted in Coates 2002).
a US control and influence in “Areas of Operation” through the establishment of a permanent US presence (Hughes 2007; Coates 2002). As Godferry et al. (2012) notes, the Bush Jr. White House worked both to increase US power presences abroad, while subsequently delegating the work of maintaining that presence to the private sector (Godferry et al. 2012: 7).

Hughes (2007) refers to this two-fold process—the growth in US military presence abroad and the outsourcing of military functions to the private sectors, as the new "security-industrial complex,” since the escalation of FSD and the marketization of military infrastructure and services work in tandem: each props up and depends upon the other. This, as we see below, has significant implications for how private contractors are positioned vis-à-vis the law.

3.4.1 The Geo-Economic Battlefield

Taking the analysis of Perlo-Freeman and Skons (2008) a step further, scholars have also placed the re-emergence of PMCs within the broader context of political and economic neo-liberalization (Godfrey et al. 2012; Gallaher 2012). Gallaher (2012), for example, argues that, without attention to the neoliberal context in which they operate, all critical literature on PMCs remains within a state-centered framework, “largely focused on what [the phenomenon] means for states seeking to maintain, regain, or establish security” (173).

Gallaher is one of the few scholars to have looked at armed contractors through an explicitly geographical lens. Her argument is itself built on a body of work—specifically, that of Cowen (2008) and Cowen and Smith (2009)—who focus on the relationship between militarization and the rise of a new geo-economic order (Sparke, 2007; also, Flint and Radil, 2009; Roberts, Secor and Sparke, 2007). Their conclusion, as Gallaher describes, "situates
military privatization in the shift from a world system dominated by interstate rivalry to one framed by economic competition" (784).

Geographers and others have noted that a shift, however partial, from geopolitics to geo-economics has undermined the importance of territory in war (Cowen and Smith, 2009; Sparke, 2007). They argue that the capturing of market share is replacing the capturing of territory as the ongoing goal of state-launched warfare. Thus, while territory remains important insofar as states continue to acquire and maintain territory, this territorial acquisition is often “a tactical option rather than a strategic necessity” (Cowen and Smith 2009:42). This change is itself attributed to a shifting logic in the world system; that is, specifically a shift from "territorial wars" to "imperial wars" in which economic accumulation (by states and private entities) is the goal. As Roberts, Secor and Sparke (2003) note, “gangster capitalist intervention at the previous fin-de-siècle” has been replaced by a much more open, systemic, globally ambitious and quasi economic style” (888).

We need only to look to the massive security effort that is the "war on terror" to see these logics at work. The “war on terror” has resulted in the large and permanent US presence in the Persian Gulf region and has resulted in “a network of bases in the Middle East and Central Asia that… extends from Egypt across the Arabian Gulf to Iraq, Iran and Afghanistan" (Morrissey 2011: 285-286). But the control of territory, as many commentators have pointed out, was never the primarily goal of these conflicts (Roberts, Secor and Sparke 2003; also Gallaher 2011). As the military strategy in Iraq has demonstrated, the primary goal appears to have been a suitable climate for the accumulation of oil and the creation of government supportive of American interests (ibid). Michael Dillon (2007) suggests that the term ‘war on terror’ is itself misleading, in that the US is not so much waging war on terror as it is "governing terror" through the creation
of a "massive global security effort". The "war on terror" is useful rhetoric (albeit rhetoric with very material and very drastic consequences) for intervention and for justifying pre-emptive warfare that protects American interests abroad by creating safe spaces of accumulation.

Mary Kaldor (2013), commenting on the changing nature of war and warfare over the last several decades, argues that these so-called “new wars” have resulted in an ever-increasing blurring of the lines “between state and non-state, public and private, external and internal, economic and political, and even war and peace” (Kaldor 2013: 2). To see these blurred lines in place, we need only look to the continued role of armed contractors in Iraq. While US troops have almost entirely withdrawn from the country, contractors, and security contractors in particular, are likely to remain a fixture in Iraq for the indefinite future. With an embassy the size of Vatican City and over 11,000 permanent employees, the DOD has “never before had to protect such a large number of people in such a hostile environment without direct US military assistance” (Stewart, 2011). According to the DOD quarterly report, there are over 12,000 contractors currently supporting the US mission in Iraq, 2,359 of which are defined as “private security personnel”: “contractors who perform personal security, convoy security, and static missions” (DASD 2013: 1).

The likely permanence of private contractors provides all the more reason for understanding their relationship to the law and legal accountability. Private contracting is frequently invoked as the “problem” at Nisour Square. A better understanding of their role and their influence on the changing face of war thus helps to better understand this “problematization” (Rose and Valverde, 1994). What I have sought to do in this section is situate the rise of the private security military contractor within a larger geo-economic framework. This means that, rather than framing this as “the era of the private contractor” as Glanz and Lehren
suggest, it is more accurate to conceptualize the contractor as but one part of larger global shifts.

Attention to the larger logics and rationales underpinning the US war effort provides a methodologically sensitizing device for examining the Nisour Square massacre. It also compels us to pay particular attention to the assumptions inherent in the laws and regulations that govern (or fail to govern) the now burgeoning private security industry. In the following chapter, I turn to a more incisive account of the Nisour Square shootings.
CHAPTER 4: THE NISOUR SQUARE SHOOTINGS

At 12:08 pm local time, on the 16th of September 2007, four heavily armed Blackwater tanks rolled into Nisour Square, a congested intersection in Baghdad’s Mansour district. According to Khalaf Salman, one of the Iraqi traffic cops on duty in Nisour Square that day, the Blackwater convoy behaved erratically, making a sharp U-turn before coming to an abrupt stop in the centre of the intersection. It was then, Salman recounts, that tank operatives opened fire, immediately striking a nearby vehicle (Sengupta, 2007). Twenty-year-old Ahmed Hathem al-Rubaie was shot in the head through his car window and died in his mother’s arms (Scahill, 2009b). While Salman and his colleagues are reported to have signaled the Blackwater operatives to stop firing, what ensued instead was sustained gunfire for the next fifteen minutes (Scahill, 2009b; see also Hurst and Qassim Abdul-Zahr, 2007).

According to Iraqi lawyer Hassen Jabar Salman, who was shot 4 times in the back and whose car was hit by 12 bullets, Blackwater’s shooting was indiscriminate and random. Speaking to reporters after the incident, Salman asked, “Why had they opened fire? I do not know. No one—I repeat, no one—had fired at them” (Salman, quoted in Scahill, 2009b). According to scores of witnesses on the scene, the Blackwater convoy continued to fire randomly even as it was withdrawing. As Sarhan Thiab, another Iraqi traffic guard on the scene, recalls:

> each of the four vehicles opened heavy fire in all directions, they shot and killed everyone in cars facing them and people standing on the street....when it was over we were looking around and about fifteen cars had been destroyed the bodies of killed were strewn on the pavement and road” (Thiab, quoted in Scahill 2009b).

Witnesses described it as “catastrophic,” “a horror movie,” and “a massacre;” in just over 15 minutes, the Blackwater operatives had killed 17 people and severely injured more than 20
others (Raghavan, 2007; Karadsherh and Duke, 2007; Daskal, 2007).

4.1 Blackwater USA

While private security companies had been active during the Iraq occupation since it began, the tragedy at Nisour Square served as a watershed moment for the industry. News of the day’s events projected a relatively unknown company into international infamy. Established in North Carolina in 1997, Blackwater was one of the earliest private players in the US-launched invasion and occupation of Iraq. In August 2003, Blackwater had been awarded a no-bid contract by then Coalition Provisional Authority (CPA) Administrator, Paul Bremer, to provide security to top US officials (U.S Congress Majority Staff, 2007). By 2004, Blackwater’s role in the occupation was sealed when it was granted another and much larger no-bid contract, this time by the US State Department (DOS). The contract authorized Blackwater with providing “protection of U.S and/or certain foreign government high-level officials whenever the need arises” (ibid: 2).

In 2004, Blackwater had 482 staff operating in Iraq; by the time of the Nisour Square shootings, it had over 1,020, making the company by far the largest PMC operating in Iraq at the time (U.S Congress Majority Staff, 2007). After the Nisour killings came to light, Blackwater was vilified by the media, whose attention also brought to light the extent to which the industry had become integral to US efforts in Iraq. This sparked both curiosity and outrage within and beyond the US. The shootings became the subject of intense legal and political debate, producing a slew of legal claims. But, as this chapter will document, each legal avenue proved a dead-end.
4.2 ORDER 17

Within days of the Nisour Square shooting, the American-installed Iraqi parliament vowed to bring those responsible to justice. Prime Minister Nuri al-Maliki called the shootings “criminal” and announced, just one day after the massacre, Blackwater’s expulsion from the country (Farinu, 2007). Al-Maliki also announced the government’s intention to prosecute the men responsible, stating, “We will not allow Iraqis to be killed in cold blood...there is a sense of tension and anger among all Iraqis, including the government, over this crime” (al-Maliki, quoted in Farinu 2007: A1). However, despite al-Maliki’s bold assertions, it soon became apparent that the Iraqi government had no legal avenue with which to pursue the criminals.

Only months before the Nisour Square incident, on June 27th 2007, the Coalition Provisional Authority (CPA)—the interim American governing body in Iraq—passed Order 17, an edict that effectively banned Iraqi courts and legislative bodies from having any legal control over the actions of contractors operating within their borders. Among other things, the order stipulated that “contractors shall be immune from Iraqi legal process with respect to the acts performed by them pursuant to the terms and conditions of a contract or any subcontract thereto” (CPA 2007: Section 4).

It further specified that all contractors “shall be subject to the exclusive jurisdiction of their sending states” (CPA 2004: Section 2). As Tom Engelhardt (2007) aptly points out, Order 17 was revealing of CPA Administrator Paul Bremer’s blatant contempt for Iraqi sovereignty: it granted coalition force foreigners in Iraq free run of the country and gave non-nationals the

10 Importantly, the order was passed the day before the CPA ceased to exist; it remained applicable until the expiration of the U.N Mandate for US operations in Iraq in December 2008.

11 Contractors” in this case, referred to contract workers working for the MNF (the Multinational Force), the CPA, Foreign Liaison Mission Personnel, and any International Consultants (CPA 2004: Section 4)
freedom to arrest and detain any suspect Iraqis or non-coalition foreigners. Indeed, Order 17 went so far as to stipulate that Iraq authorities could not interfere with the actions or movements of the contractors in any way, including parking fees, dues and tolls. Moreover, while Order 17 limited Iraqi jurisdiction, Iraqi sovereignty was further undermined by the refusal of the United States to acknowledge Prime Minister Nuri al-Maliki’s expulsion of Blackwater from the country. Iraq revoked Blackwater’s license the day after the massacre, but Blackwater remained in the country on a US State Department contract until 2009.\textsuperscript{12}

4.3 \textsc{American Criminal Courts}

While the prosecution of Blackwater operatives was not possible in Iraqi courts because of Order 17, a combination of ambiguous and untested legal frameworks meant that Blackwater also managed to sidestep legal culpability in Washington. In December 2008, five of the six Blackwater guards involved in the shooting were indicted by a United States federal grand jury on fourteen manslaughter charges and allegations that they used automatic weapons in the commission of a crime.\textsuperscript{13} This case marked the first time since the beginning of the Iraq occupation that the Justice Department brought criminal charges against armed private contractors for crimes committed against Iraqis.

\textsuperscript{12} In fact, though the Obama administration refused to renew the company’s contract in January of 2009, Blackwater was given an airline contract to provide helicopter transport for embassy employees around Iraq until September 3 of that year (Associated Press, 2010). Moreover, in 2010, \textit{The New York Times}—using documents released during a Senate Armed Services Committee—revealed that Blackwater WorldWide had “created a web of more than 30 shell companies or subsidiaries in part to obtain millions of dollars in American government contracts” (Risen and Mazzetti, 2010). These contracts were primarily for the CIA, and the exact numbers and location of the contractors were not attained.

\textsuperscript{13} The indictment read that Blackwater operatives “knowingly used and discharged firearms,” including “an SR-25 sniper rifle; machine guns (M-4 assault rifles and M-240 machine guns); and destructive devices (M-203 grenade launchers and grenades), during and in relation to a crime of violence for which each of them may be prosecuted in a court of the United States” (quoted in Scahill, 2008b)
When the guards were arraigned at the Washington federal court in January 2009, it appeared they would be tried for a criminal offence. In press release the day the indictment was unsealed, Patrick Rowan, Assistant Attorney General for National Security, stated, “Today’s indictment and guilty plea demonstrates that those who engage in unprovoked and illegal attacks on civilians, whether during times of conflict or times of peace, will be held accountable” (USDOJ, 2008). Despite Rowan’s bold assertion, the case was dismissed before ever going to trial. In early January 2010, the presiding judge, Richard Urbina of the Federal District Court in Washington, issued a 90-page opinion dismissing the case. He argued that the State Department’s mishandling of the official investigation of the case “requires dismissal of the indictment against all defendants” (U.S v. Slough 2009: 85).

While the State Department took immediate action after the Nisour Square shootings, their apparent aim was the protection of the Blackwater forces and not their prosecution. Effectively, the State Department granted the operatives immunity in exchange for their cooperation in the investigation. The DOS investigators had Blackwater operatives sign a contract explicitly stating that whatever they said would never be used against them in criminal charges or used as evidence. This evidence was then used to indict the guards (or so Urbina argued), and it was thus deemed inadmissible.14

14 Importantly, the immunity agreement granted by the DOS to Blackwater was not common practice. As Michael Ratner, President of the Centre for Constitutional Rights, notes, such agreements have only ever been granted “after a Grand Jury or Congressional committee has been convened and the party has invoked their 5th Amendment rights against self-incrimination” (Ratner, quoted in Scahill, 2007).
But it is not simply the sweeping impunity granted to the contractors that allowed the Blackwater guards to escape culpability. More troubling was the fact, that even had the case gone to trial, the prosecution would have faced a difficult and perhaps insurmountable challenge, given that it was still unclear which, if any, federal statute applied to the guards in question. The Blackwater guards were indicted and charged under a relatively new statute, the Military Extraterritorial Jurisdiction Act (MEJA). Had the case gone to trial, it likely would have become a precedent-setting battle.

The MEJA was enacted in 2000 with the goal of subjecting contractors who worked abroad as part of the US military operations to US criminal jurisdiction. The immediate impetus behind the Act was the legal lacuna of extraterritorial jurisdiction brought to light following accusations of sex-trafficking by US-employed contractors during the US military operations in the Balkans (Kemp 2010:490). The MEJA was designed to fix a gap in US federal law by authorizing courts to subject civilians accompanying the armed forces abroad to the civilian jurisdiction of the United States. With the Act in place, the Department of Justice would be able to subject to civilian law “members of the Armed Forces” as well as “persons employed by the Armed Forces outside the United States” if they engaged in any conduct outside the US that “would constitute an offense punishable by imprisonment for more than one year, a felony, if it had occurred within the special maritime and territorial jurisdiction of the United States” (Military Extraterritorial Jurisdiction Act of 2000: § 3261(a)).

15The accusations were levied against employees of Dyncorp International—the company then holding the US Army Logistics Augmentation Program (LOGCAP) contract. Subsequent investigations by the US military appeared to confirm these claims (Capps, 2002)
Despite the intent of the MEJA, it was severely limited in application. When federal prosecutors sought to use the Act following the Abu Ghraib scandal in 2004, general counsel opinion found that the statute did not apply to contractors who were not working directly for the Department of Defense (Bina 2004: 1247-1250). The phrasing “employed by the Armed Forces” and “accompanied by the Armed Forces” was determined to limit inclusion to the employees of the DOD or DOD contractors (Military Extraterritorial Jurisdiction Act of 2000: § 3267(1)(A)).

The two contracting firms involved in the abuses at Abu Ghraib—CACI International Incorporated (who provided interrogation services) and TitanCorp (who provided translation services)—were both American-based companies working for the Department of the Interior and not the Department of Defense, so they escaped prosecution (see Gibson, 2004).

In order to address this loophole, Congress voted in late 2004 to expand the reach of the Act. The MEJA now applies to contractors working for the DOD, as well as “any other Federal agency, or any provisional authority, to the extent that such employment relates to supporting the Department of Defense Mission overseas” (Military Extraterritorial Jurisdiction Act of 2000 (updated)). However, at the time of the Nisour Square shooting, the new provisions were still untested, and media and legal experts questioned whether this untested statute would hold up in court.

While the Blackwater lawyers were determined to use the argument that the guards were attacked, there was also speculation that the lawyers would be able to contend that the statute—though created to hold private contractors accountable—would not have been applicable in the

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16 Employed by the armed Forces was defined as "employed as a civilian employee of the Department of Defense (including a non-appropriated fund instrumentality of the Department), as a Department of Defense Contractor (including a subcontractor at any tier)" (18 U.S.C.A.§ 3267(1)(A)). While the statute that defines "accompanying he Armed Forces" limits inclusion to this category "to dependents of members of either the Armed Forces, employees of the Department of Defense or Department of Defense contractors" (ibid,3267(2)(A)).
Nisour Square case for a number of logistical reasons. For one, MEJA’s departmental reach was still unclear, and thus it still might not have applied to contractors working for the CIA or other government agencies (Stein, 2005). As Ian Kierpaul (2007) points out, the Act's ambiguous wording opened it up to charges of vagueness "that might not survive constitutional scrutiny" such as “who determines the mission of the DOD? And what does support mean?” (417). To date, there is no clarification on these issues.

Moreover, even if the Act did apply to Blackwater contractors in this case, David Snyder argues that MEJA is hardly an effective tool as it presents a myriad of practical issues. Not only is there no explicit mandate for its oversight and enforcement but “prosecutions under MEJA must take place in the United States. This raises significant evidentiary hurdles for stateside Assistant U.S. Attorneys contemplating the prosecutions of alleged criminal acts that occurred thousands of miles away” (Snyder 2008: 88).

So glaring were the holes in the MEJA that the United States’ House of Representatives passed new legislation, the MEJA Expansion and Enforcement Act of 2007, as a direct response to the Nisour Square shootings. The revised Act eliminated the phrasing “supporting the mission of the DOD” in favour of wording that applied the Act’s provisions to anyone:

while employed under contract (or subcontract of any tier) awarded by any department or agency of the United States, where the contract is carried out in an area, or in close proximity to as area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation (MEJA Expansion Act, 2007).

This revised legislation should have cleared up a lot of the ambiguous MEJA wording. However, the Act failed to pass the Senate (Govtrack, 2013). Later, the Civilian Extraterritorial Jurisdiction Act of 2011, which was another bill meant to make up for the gaps in the MEJA, failed to move past the committee stage (Govtrack, 2013b).
Thus to date, the MEJA’s jurisdictional reach remains unclear, and, despite repeated evidence of criminal activity, has resulted in only one successful prosecution for abuse and violence by contractors against a civilian. In March 2011, a federal jury in Norfolk, Virginia convicted former Blackwater contractors Justin Cannon and Christopher Drotleff of involuntary manslaughter for a 2009 shooting in Kabul that resulted in the death of two Iraqi civilians. Cannon was sentenced to 30 months in prison, Drotleff to 37 (US v. Cannon, 2011 and US v. Drotleff, 2011). Both Cannon and Drotleff were working for Paravant LLC, a subsidiary of Blackwater (which had by then renamed itself Xe), under Department of Defense contracts when they were charged with the murder of two civilians during a roadside shooting (US v. Cannon, 2010 and US v. Drotleff, 2010).

While the prosecution of Cannon and Drotleff suggests that the MEJA has some clout in particular instances, it is telling that there has been only one successful prosecution for a crime against a civilian under the Act.\(^\text{17}\) Despite the culture of indiscriminate shooting among contractors, prosecutors appear reluctant or unable to enact the MEJA or to press charges against PMSCs. Moreover, there has still been no prosecution under the MEJA for a non-DOD contractor. Of note, if Drotleff and Cannon had been working for any other department, the case likely would not have gone to trial. The two contractors, who killed a car passenger and pedestrian after their own SUV broke down, were investigated by their company and an Army investigator. The involvement of the army investigator would not have been appropriate had they been working for a different federal agency.

\(^{17}\) Of note: the defendants did appeal the original ruling claiming the court lacked jurisdiction over them and the MEJA was unconstitutional but a 2012 court of appeals dismissed the appeal and affirmed the original conviction.
4.3.2 UCMJ

If Cannon and Drotleff had been soldiers, there would have been a clear legal avenue to follow. While it is certainly debatable whether the American army sufficiently doles out justice, it is a fact that, even by the early days of the Iraq war, scores of American soldiers have been court-martialed on murder-related charges in Iraq (Pelton, 2006). While there has been a push to subject private contractors to the Uniform Code of Military Justice (UCMJ), recent extensions of the UCMJ are more symbolic than they are substantial.

All members of the armed forces are subject to UCMJ, a statute that governs court-martials and military commissions. Both mechanisms are used for, among other things, the wrongful killing of civilians. Of note, the act does have a clause relating to civilians who accompany the armed forces. This much-debated clause reads, “[the UCMJ applies] in a time of war to persons serving with or accompanying armed force in the field.” However, during the Vietnam War, the clause “in a time of war” was interpreted by the U.S Supreme Court to mean a time of declared war (which Vietnam was not). This meant that, unless war was officially declared, the statute was inapplicable to “persons accompanying the armed forces.” Similarly, because Congress did not officially declare war against Iraq—even though, as Charles Tiefer notes, “when Congress enacted its authorization for the use of force in Iraq in 2002, the legislature legitimated almost all of what a declaration of war would” (Tiefer 2009: 755)—the precedent of the Vietnam ruling means that the UCMJ jurisdiction would almost certainly not be extended to civilian contractors accompanying armed forces in Iraq.

Prior to the Nisour Square incident, Congress did enact some changes to the UCMJ by adding an extra clause which extended military jurisdiction to civilians in a time of “contingency operation or declared war” (John Warner National Defense Authorization Act for Fiscal Year,
2007). But, as commentators have pointed out, it is unlikely that contractors will ever be subject to the UCMJ in the same ways as military personnel are (if at all).

One reason for this is that, even though UCMJ is extended to cover “contingency operations,” no formal mechanisms have been created for its enactment, and the DOD has yet to make any use of the provision. In fact, it is still unclear and untested how a claim would be brought against a contractor using the UCMJ. When soldiers are court-martialed for misconduct, the court-martial often stems out of a real or perceived failure to maintain military discipline and/or failure to obey the orders of the combat commander (Tiefner, 2009). A court-martial is generally only initiated when a commissioned officer with authority over the accused presses charges; thus, it is not clear in the case of private security contractors who has the capacity to press charges (see Tiefner 2009: 755; Hamaguch 2008; 1064–66).

Furthermore, there is speculation that the phrase “physically accompanied” might make it inapplicable to most contractors. Blackwater operatives at Nisour Square, for example, were not actually accompanied by members of the armed forces (Hamahuch, 2009). Finally, a 2007 Congressional Research Report on the topic stated that past courts have found that “a serviceman who had been discharged was no longer amenable to court-martial,” implying that even if the UCMJ were extended to apply to Blackwater, the company could protect its employees simply by firing them (Elsea 2010: 28).

4.4. Private Claims, Settlements, & Strange Subjectivities

Civilians injured abroad by US government agencies or US government actors can file private suits in US courts; these remedies have so far proved ineffective in holding private contractors accountable. Most commonly enacted is the Alien Tort Claims Act (ATCA) or the
Alien Tort Statue (ATS) that provides jurisdiction for a suit by aliens (or non-citizens) “for tort only, committed in violation of the law of nations or a treaty of the United States” (28 U.S.C§1350, 2000). Because the ATCA allows non-residents of the United States to file private suits in US court, it offers, as Adam Ebrahim (2010) puts it, “a least a theoretical basis of jurisdiction over suits filed by foreigners against PMCs” (198).

The two largest claims that resulted from the Nisour Square tragedy—Abtan v. Blackwater and Albazzaz and Aziz v Blackwater— sponsored by the Center for Constitutional Rights, were filed on behalf of 12 Iraqi families in late 2007. These cases, along with 4 others, were filed under the ATCA and were settled out of court in January 2010, shortly after Judge Urbina dismissed the federal case against the Blackwater contractors. While the amount of money was not disclosed, a plaintiff speaking to reporters after the verdict suggested that $100,000 was offered for each death, and $20,00-$30,000 to the wounded (Baker, 2010). The last active civil suit brought by victims of the Nisour Square tragedy was settled for an undisclosed amount on January 12, 2012 (Tilford, 2012).

Even if the Blackwater civil suits had not been settled out of court, the precedent set by a series of Abu Ghraib cases suggest that the ATCA is a dubious remedy for victims seeking redress against contractors. Cases regarding torture allegations at Abu Ghraib made it clear that private contractors would be excluded under international law. In 2005, a Washington District court, ruling on the case of Ibrahim v. Titan Corp, found that conduct by private contractors “is not actionable under the Alien Tort Statue grant of jurisdiction, as a violation of the law of nations” (Ibrahim v. Titan Corp, 14-15). The court reasoned that, since no international treaty directly governed the conduct of contractors, the plaintiffs could not bring a case against
employees of Titan Corp under ATCA. This 2005 ruling narrowed the scope of ATCA eligibility to state actors (Ebrahim 2010: 199).

Much like the problems I outlined in the US criminal and military systems, the fundamental problem in the tort system was that there was simply no legal consensus, or even a starting point, to think about how to categorize these actors. In a similar ruling, the courts dismissed Al-Shimari v. CACI in 2009 because “the specific use of government-contracted interrogators exists as a recent development and cannot be pigeonholed into the universal understandings of war crimes” (quoted in Ebrahim 2010: 201).

In June 2013 ATCA-based torture allegations against the US-based CACI International Inc. at Abu Ghraib were dismissed. The 30-page Memorandum Opinion and Order released by a US District Court on June, 25th 2013 reveals a vast legal lacuna made of contradictory geographies and ineffectual remedies. The court concluded that ATCA “cannot be extraterritorially applied” and that it was thus the laws of Iraq which would apply to the plaintiffs’ common law claims. At the same time, the Court found that because of the “governing law during the relevant time”—the CPA’s Order 17—CACI International would be protected from liability under Iraqi law (Al-Shimari et al. v. CACI, Memorandum Opinion and Order 2013: 7529).

Another case involving the torture at Abu Ghraib, Saleh v. Titan Corp, was dismissed on September 11, 2009 by a Court of Appeals for the District of Columbia; in a vote of 2-1, the court found that because contractors were involved in combat activities, they were protected from civil lawsuit. The court reasoned that “the combatant activities exception,” a federal law

18 On June 27, 2011 the Supreme Court denied the plaintiffs’ petition for certiorari (judicial review), officially ending the case. See CCR overview of the case: http://ccrjustice.org/Saleh-v-Titan
which bans tort claims against state actors in wartime (28 USC § 2680) exempted the contractors in this case because they were “engaging in combatant activities at the behest of the military and under the military’s command” (quoted in Saleh v. Titan Corporation, Amicus Brief of the United States 2011: 4)

Hence, in all the above cases, the claims of the plaintiffs that they or their relatives had been abused by contractors during their detention and interrogation at Abu Ghraib prison were dismissed due to the bizarre legal subjectivity of private contractors: at times, protected from the law because they were not state actors; at others times, protected from the law because they engaged in combat operations under military command. While there is significant debate as to how, or if, private contractors can be held accountable through civil lawsuit, to date every case civil remedies has either been settled or dismissed. As Charles Tiefer (2009) notes in his article on the legal complexities of private contractors, other possible avenues for civilians harmed by US government personnel abroad, (including the Federal Tort Claims Act) are likely to be derailed by the same kinds of ambiguity that surround the ATCA (765).

The paradoxes revealed in the ATCA cases, when viewed alongside the inapplicability of criminal law, elucidates the ways the American legal and political complex de-subjectified the Iraqi civilians affected by the shootings. Rose and Valverde define legal subject positions as those “strategies that are offered to individuals to self-identify within a legal system” (1998: 547). The Nisour Square victims were actually stripped of their ability to legally self-identify in any way meaningful way.19 While ostensibly created to allow non-US citizens to file suit in US

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19 To say that the victims were de-subjectified does mean not they were without agency. In fact, by repeatedly bringing civil suits and speaking out against contractor violence, the victims and their families brought sustained attention to the issues and helped to reveal legal absurdities. The point is simply that US courts closed off all avenues for victims to legally self-identify.
courts, the ATCA has provided the victims of contractor violence with a Catch-22 of legal remedies. The ATCA “cannot be extraterritorially applied” even in situations where the United States is occupying and governing another country. But, at the very same time, because of a US crafted extraterritorial order (Order 17), victims cannot seek redress in the very jurisdiction the courts said the case must be heard (their home country).

In contrast, the ATCA cases reveal that PMSCs have an abundance of subject positions. Their similarity to combatants allowed them to sidestep tort claims, but their position as civilian contractors meant that they also sidestepped military law. Moreover, private contractors are protected under “the combatant activities exception,” because they are under military command but, because of their non-military status are protected from legal regulation that traditionally applies to US soldiers.

The enumerations of the Nisour Square legal complex above reveal that both the Blackwater contractors and their civilian victims occupied strange subject positions vis-à-vis the US legal system. But perhaps even more troubling is the fact that both Blackwater and the government for whom they worked seem to occupy no position in relation to the law at all. In the next section, I consider the absence of decision-maker accountability in the conversations about Iraq.

4.5 (Lack of) Claims Brought Against Blackwater and the United States Government: How Risk Was Downloaded to the Private Contractor

In investigating the legal complexities around Nisour Square, I have focused almost exclusively on the attempts to hold individual contractors—as opposed to the corporation or the US agencies who hire them—legally accountable. In so doing, I have contributed (inadvertently)
to a larger tendency, both in literature on PMSCs and more poignantly within American political discourse, to “problematize” the violence of the private security industry at the level of the private contractor. While the PMSCs who murdered civilians at Nisour Square and the private integrators who tortured prisoners at Abu Ghraib are hardly sympathetic figures, “it bears reminding,” as Catherine Gallaher (2012) puts it “that wars are rarely the responsibility of those who fight them…This point is not to suggest that soldiers are robots with no free will, but rather that while they may be a fundamental part of war, they are not synonymous with its decision makers” (794).

That the state is legally responsible for the actions of its agents is a long established legal doctrine in both international law as well as in most domestic legal systems (Hanson 2003; Crawford 2002). The doctrine, which permeates many International Human Rights Law (IHL) instruments, suggests that state and military decision makers are responsible for the actions of their agents. However, as Hansen (2007) notes, the doctrine, often referred to as “Command Responsibility” “currently does not exist as part of the U.S. domestic law” (338). In the aftermath of the Abu Ghraib scandal, for example, while many soldiers involved in the torture were convicted of crimes in military courts, no charges were brought against decision-makers higher up in the chain of command, who were supposedly ordering and/or condoning the torture.

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20 IHL or the ‘laws of war’—made up primarily of the Geneva Conventions of 1949 and the additional protocols of 1997—are defined by the International Committee of the Red Cross (ICRC) as “a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare” (ICRC 2004:1)

21 Though the idea of commander responsibility is generally widely accepted, there are significant debated about what it means in practice. Most of these debates, notes Frulli, are centered on the distinction between “omission” and “complicity”. If commander responsibility is based on complicity, then commanders, by this doctrine, would be liable for the criminal acts of their subordinates. If commander responsibility is based on “omission” of supervision or control, then commanders will be responsible for “derelict of duty” rather than being criminally responsible for the actions of others (436-437).
that took place (Hansen 2007). Hansen attributes this omission to a gap in the UCMJ, which lacks any mechanism that enables the military to “affix responsibility on its own military leaders for command failures that lead or contribute to law of war violations by subordinates” (388).

But if the doctrine of Command Responsibility is vague in its application to military commanders, it stands to reason that it would be even more so in the case of its application to private companies. For one, there is no consensus on how to incorporate these new private actors within an International Human Rights (IHR) framework. The Department of Justice, for example, has yet to charge a private contractor with a war crime in regards to the conflicts in Iraq and Afghanistan. This omission is not surprising, however, (at least at the time of Nisour Square) given the Bush administration’s manifest contempt for international law; exemplified by the passing of the Wartime Commission Act of 2006, which gave the Executive Branch almost complete interpretive control of the Geneva Conventions.

Taken together, the fact that the US judiciary has no recent history of implementing the “Command Responsibility Doctrine,” the Executive Branch’s reinterpreting of the Geneva Conventions such that almost nothing constitutes a “war crime,” and the private industry’s contested place in international law, it is not surprising that few of the debates focused on holding company executives or government officials criminally responsible for the behavior of their agents. As Kateryna Rakowsky, puts it, “the strongest punishment available to any authority, be it the PMF employer or military commanding officers, appears to be the employee’s ‘removal from the theatre and from the contract’” (Rawkowsky 2006: 395).23

22 But despite the many debates over classification of PMSCs (e.g. are they combatants or non-combatants?), it is a fact, as Renée De Nevers notes, that the torturing and killing of civilians constitutes a war crime (2007)

23 The last phrase in Rawkowsky sentence (“removal from the theatre and from the contract”) is a quote from a Titan Corp’ memorandum supporting the dismissal of it case by a court of appeals.
The flipside of downloading legal risk onto the contractor is that neither contracting companies nor the federal agencies for whom they work are obligated to provide employees with legal assistance or, indeed, with any kind of employment benefits. In the aftermath of several PMSC scandals (including Nisour Square and Abu Ghraib) for example, it was revealed that private companies often fail to provide sufficient training to employees before deploying them into high stress conflict situations (Avent 2005, Gallaher 2012). This is all the more troubling given the increasing prevalence of security companies to subcontract to local or third party nationals, whose legal position is even more precarious then that of an American or British contractor. Taken together, the lack of decision maker liability, the paradoxical scope of the ATCA, and the confusing applicability of the MEJA and UMCJ reveal a US legal system both unable and unwilling to regulate the private security contractors that have become integral to the ongoing “war on terror”. In the next chapter, I return the work of the critical geographers flagged in Chapter 2 in order to further interrogate the geographies at work in this legal system and to develop a larger conceptual framework to elucidate these geolegal processes.
Ian Kierpaul (2005) writes that “the lack [of PMSC] prosecution” following the 2005 Abu Ghraib torture scandal “gave way to a mad scramble, [as] Congress, lawyers, and law students introduced solutions on how to bring private military contractors to justice” (408, emphasis added). The result of this “mad scramble” was (as described in Chapter 4 above) changes to the MEJA in 2004, as well as a slew of private cases filed on behalf of the victims and their families. After the Nisour Square shooting—and an equally vitriolic response from the media and international community—the “mad scramble” continued. The result, among other things, was another round of ATCA cases and the creation of new legislation like the MEJA Expansion Act of 2007 (which, as noted above, passed the House but failed to pass Senate).

Kierpaul’s “mad scramble” description of the efforts by a variety of actors to use and update legal remedies to “solve the problem” of the private contractor is, I think, a particularly helpful one. For one, it suggests that law, from conception to interpretation, is always in flux. But even more pointedly, Kierpaul’s attention to the hasty efforts of a variety of actors to legally standardize contractors reminds us that objects of regulation (in this case the private security contractor and the victims of their violence) are “always spinning out of the grasp of various levels of law, spilling in and out of others, never completely subject to any one entity known as ‘the Law’ ” (Walby 2007: 557).

In Chapter 4 I outlined the “mad scramble” to bring contractors into the legal fold following the Nisour Square massacre. In the process, I traced the histories of laws particularly relevant to the Nisour Square case—Order 17, the MEJA, the UCMJ, and the ATCA—and the way that each contributed to a legal indeterminacy that kept the security contractor beyond legal
accountability. Bearing in mind Rose and Valverde’s five foci of legal analysis (*Chapter 2*), I flagged how the “problem” of the Nisour Square massacre was framed, the legal subject positions open to both contractor and victim, and how, together, both worked to problematize some forms of PMSC violence, and normalized others. In this chapter I consider the spatializations at work in the Nisour Square case in more detail and, in so doing, build towards a conceptual framework for understanding the converging logics and processes that created and sustained Blackwater’s bizarre geolegal space.

5.1 SPATIALIZATIONS

Writing on Guantanamo Bay, Derek Gregory has said of the prison that it depends “on the mobilization of two contradictory legal geographies” one that puts Guantanamo in the United States and one that places it outside (Gregory 2006: 405). So too has the legal void of the Nisour Square incident arisen out of the contradictory legal geographies of Blackwater’s extraterritorial operations, as well as its status as a private firm. In this section I build on the work of the critical geographers flagged in *Chapter 2* (e.g. Gregory, 2006, 2007; Hannah, 2006; Morrissey, 2011) to further unpack the paradoxical legal spatialities made explicit in the post Nisour Square “mad scramble.”

I begin with the concept of lawfare, unpacking the way scholars have critically deployed the term in order to examine the deliberate mobilization of law to fight wars both defensively and offensively. I then turn to engage with Giorgio Agamben’s (1998, 2005) work on the “state of exception”. Agamben too is concerned with law’s power and violence in times of war or rupture, but, unlike lawfare scholars who focus on law’s tactical application, Agamben focuses instead on law’s power in its purported absence or withdrawal. Taken together, these two lenses both offer
incredibly useful insight onto the power of law and its operation as a discourse that governs political life.

However, by applying these lenses to my case study, I argue that they are limited by static and statist theories of law (in the case of Agamben’s exception) and an undue focus on the ends of law (in the case of lawfare). In order to move past these impediments to the explanatory power offered by both lenses I turn to the ways geographers have taken up and expanded on Agamben’s work. Focusing particularly on the work of Derek Gregory (2006, 2007), I consider how geographers have re-conceptualized “the exception” as both a legal and spatial process. In so doing, I demonstrate that they have created a framework that expands and enriches existing conceptions of lawfare and exception that adds valuable insights to the spatial practices which kept the Blackwater contractors who shot and killed unarmed civilians beyond legal oversight.

5.1.2 LAWFARE

The recent changes to war and warfare—especially the upsurge in privatization—have given rise to a host of new legal norms and categories. More specifically, observers have described the “war on terror” as a “war on law,” or, as Derek Gregory more aptly puts it, “a war fought through law” (Gregory 2006:205). The disputes over legal classifications and categories, and the strategic roles these classifications and categories play, has become so prominent that both US military and foreign policy specialists, as well as their critics, have begun using the term “lawfare” to denote the integral part that law plays in contemporary warfare. First coined by American general and military judge Charles Dunlop (2001), lawfare at its most basic is defined as “the use of law as a weapon of war” or as the use of law to gain military advantage. While Dunlop employed the term to describe the actions of weaker non-state actors, the term has since been turned on its head; legal scholars and others are increasingly using lawfare as a lens for
integrating the strategies of the state itself, especially with respect to the “war on terror” (Weizman 2010, 2013; Kennedy, 2006; Morrisey 2011).

In his 2006 book, Of War and Law, legal scholar David Kennedy provides a nuanced history of the changing nature of war and international conflict, and the dawn of an era where law and the interpretation of law has become integral to contemporary conflict. In particular, Kennedy shows how law serves a dual and often antagonistic role, both as an ethical restraint for state actions and, increasingly, as a kind of weapon. The increasing prevalence of lawfare is disturbing not only because law is such a powerful legitimizing discourse—insofar as being able to say something is legal is often used to justify the most egregious acts of violence—but, because, not surprisingly, this power to define and manipulate the law rests with the most powerful states.

Kennedy is primarily concerned with international law, arguing that the elasticity and ambiguity of international law makes it particularly amenable to tactical manipulation by lawyers, lawmakers, and other political actors. By using lawfare tactics, states are able to manipulate and mobilize law in order to “legally” justify surveillance and the targeting and killing of selected populations. This strategy, Kennedy argues, has become a pillar of contemporary warfare. As he reminds us: “We need to remember what it means to say that compliance with international law “legitimates,” it means of course, that killing, maiming, humiliating people is legally privileged, authorized, permitted and justified” (Kennedy 2006: 8).

In a similar argument, Eyal Weizman examines the lawfare tactics used by Israel in recent conflicts in the Gaza strip. Weizman traces the multiple ways that the Israeli government and military have invoked the language of international law to find ways to legally kill civilians. He notes how Israeli military spokespeople “routinely used such legal terms as ‘distinction’
(between civilians and combatant) and ‘proportionality’ (between civilians killed and military objectives) thus describing targets as ‘legitimate’ and civilian deaths as ‘unintended’ or ‘collateral’” (Weizman 2010: 15). Like Kennedy, Weizman emphasizes the ambiguity of international law and the “structural paradox” inherent in laws of war that when “laws prohibit some things, they authorize others….” that might be equally said to infringe on human rights (Weizman 2010: 14). What becomes authorized, and what is deemed legally “right” is often the interpretation of the strongest actor.

Building upon Kennedy’s work, geographer John Morrissey (2011) suggests that lawfare needs to be understood as both a defensive and offensive weapon. Drawing on examples from the US, Morrissey suggests that defensive action is exemplified, among other things, by places like Guantanamo Bay and through practices such as indefinite detention and extraordinary rendition (Morrissey 2011: 280). The concept of defensive strategy might also include the ways law is wielded (as Kennedy describes) or through the invocation of IHL as detailed by Weizmann.

Less discussed, Morrissey argues, are the ways law is used as an offensive strategy, or “preemptive juridical securitization” through the “careful legal designation and protection of US military personnel in forward deployed areas” (Morrissey 2011: 283: 280). Status of Forces Agreements, for example, set out the legal status of militaries on foreign soil, and usually provide some degree of immunity for troops. By attending to these agreements in detail, Morrissey shows how the battlefield gets legally constructed to serve the overseas reach of US colonial ambitions. While PMSCs are not military personnel, Morrissey’s conceptualization of “offensive lawfare” is still, I argue, a particularly apt descriptor for the ways in which PMSCs
have managed to escape legal culpability. Many forces converged to keep Blackwater, and the private military security industry more generally, beyond juridical oversight.

Within days of the Nisour Square shooting, it became apparent that Morrissey’s “pre-conditioned” legal battlefield had been put into place. Morrissey argues that the US engages in “proactive juridical warfare” so that it can “establish normative parameters in its exercise of legally sanctioned military violence and to maximize its ‘operational capacities of securitization’” (Morrissey 2011: 296). By pre-conditioning the legal battlefield in Iraq, through the Status of Forces Agreements and legislation such as Order 17, the US ensured that contractors remained beyond the purview of non-US courts. But while Order 17 circumvented Iraqi sovereignty, a combination of ambiguous and untested legal frameworks has also meant that Blackwater operatives managed to sidestep legal culpability in the US.

Offensively, Order 17 was used to “pre-codify” the battlefield such that Blackwater contractors were positioned outside the scope and reach of Iraqi law. Defensively, a whole series of legal maneuvers were used or invoked to ensure that the contractors would escape domestic liability. But, unlike the deliberate lawfare tactics described by Morrissey, Kennedy and Wiezman, these domestic maneuverings, while they have the same effects as deliberate lawfare tactics (in so far as they work to implicitly authorize egregious violence against civilians), cannot be clearly delineated as a unified and calculated state strategy.

The critical work on lawfare shows how laws are mobilized in the “war on terror” both with respect to how its elasticity and legal loopholes are mobilized to ‘legitimize’ acts of violence and destruction, and to the pre-determination of the legal battlefield. Yet, as helpful as this work is, it tends to attribute brute intentionality to laws, to those who craft them, and to those who interpret them, which does not always map neatly onto empirical reality. My case study
suggests, in fact, that legal loopholes or legal grey holes, arise as much out of deliberate state policies as out of contradictory and incompatible regulations and existing legal frameworks that are ill-equipped to deal with an increasingly complex and globalized battlefield. But lawfare isn’t the only analysis offered in explanation of Nisour Square. Another important analysis, and one that’s been taken up by geographers, lies in the work of Giorgio Agamben. Agamben has been widely read as arguing for the intrinsic and constitutive relationship between life and law, particularly through his concept, the “state of exception”. Though on the surface Agamben’s analysis seems almost opposite from lawfare, in that its focus is on the absence of law rather than on its strategic mobilizations, I will argue that lawfare and the state of exception can be read as complementary analytical lenses, allowing for a more empirically helpful framework for examining the kinds of legalities that emerged from Nisour Square.

5.1.3 From Lawfare to the State of Exception

Giorgio Agamben’s (1998, 2005) work on the constitutive relationship between states of emergency, law, and the regulation of life, has been formative to a vast body of work investigating the relationships between law and violence, especially in the context of contemporary warfare. And while Agamben has useful insights to impart, in my engagement with his work I pay particular attention to how commentators have taken up and expanded his theories in order to generate new ways of thinking about law and law’s absence.

According to Agamben, a state of exception arises when the sovereign suspends certain laws and rights when faced with an emergency situation. Agamben points to Guantanamo Bay as the locus par excellence of the state of exception: it is a “legally unnamable and unclassifiable” place, where internees have been designated as outside of the purview of US law (Agamben
2005:3-4). This suspension of law in times of emergency is “paradoxical,” for the suspension of law is made possible precisely because the sovereign has a legally authorized power to ignore and suspend the legal and juridical structure. The state of exception is thus both inside the law (for it only exists due to the sovereign’s legal declaration that the law no longer applies) and outside the law (for law is itself being suspended).

So too are the subjects in spaces of exception both inside and outside the law. The subject who has been abandoned by the sovereign—labeled the *homo sacer*—does not cease, in his or her abandonment, to have a relationship with the sovereign (Agamben, 1998). Agamben borrows the term *homo sacer* from a historical figure of Roman law where the subject is defined only through his or her exclusion and abandonment by the state. As Richard Ek succinctly puts it, the *homo sacer* “is a figure defined by double exclusion (from human jurisdiction and divine law) that it is possible to kill without punishment (the act of killing in this circumstance does not count as homicide) but is forbidden (due the figure’s sacral unworthiness being outside the religious order) to sacrifice” (Ek 2006: 363). This twin quality—of being both possible to kill but unable to sacrifice—is the fundamental feature of the *homo sacer* and exposes him/her to “bare life” (complete biological vulnerability). The *homo sacer* is thus completely at the mercy of sovereign violence, for this figure’s life has, according to the state, no value whatsoever. Importantly however, the *homo sacer*’s abandonment by the sovereign does not mean there is no longer a relationship between the two. Precisely the opposite is true: in being selected as someone to whom the law no longer applies, a relationship with the sovereign is maintained. Thus, Agamben argues, we need to understand the state of exception as a kind of “inclusive exclusion,” for in being abandoned by the sovereign the *homo sacer* is not simply left alone (as
in ‘a state of nature’) but rather is vulnerable to the most extreme violence at the hands of the state (Agamben, 1998).

Agamben’s work on the homo sacer and the state of exception have been formative to a great body of work on the ‘war on terror’ (e.g. Butler, 2004), but they have also been subject to significant critiques, and generative of new ways of thinking about law. But before considering some of the critiques of Agamben, I draw some insights from his works that help to elucidate the legal complexity around Nisour Square. Agamben’s conception of the homo sacer seems especially poignant in light of the lives lost during the 2007 shooting at Nisour Square, and the subsequent absence of legal accountability. This sense of abandonment was certainly articulated by the families and victims effected by the massacre. As reported by Abeer Mohammed (2010) for the Institute for War and Peace Reporting, despite suing Blackwater operatives and executives in civil courts, many victims and families of victims of the Nisour Square massacre were not interested in money; instead, they were motivated by a desire for justice and recognition of the horrific events that took place. In the words of Mohammed Kinani, whose 9-year old son Eli was killed in the massacre:

“I want Blackwater, who refused to apologize, to get what they deserve according to the rule of law […] I had no other option but to go down the legal path, to have justice applied—something that will be comforting to victims’ families and something that might deter other criminals from committing the same act” (quoted in Scahill, 2010).

Agamben’s conceptualization of the homo sacer gives us a language to talk about subjects who can be positioned outside law, but still be subject to its violence. Similarly, by drawing attention to the creation of legally exceptional spaces—that are in fact created and sustained through law—Agamben gives us a language for thinking about the kinds of paradoxical legalities exemplified by Nisour Square.
Despite Agamben’s powerful insights, his work has also resulted in significant critiques that call into question his theory’s explanatory power. A number of commentators have drawn our attention to the fact that by focusing solely on the outcome of law’s suspensions (e.g. Guantanamo Bay), Agamben gloss over a whole host of social and political processes that produce and maintain these spaces (Gregory 2006, 2007; Brännström 2008; Mesnard 2004). Brännström (2008), for example, suggests that Agamben’s analysis obscures the nuances around the creation, interpretation and suspension of law, and that he represents law “as a homogenous entity with a single border” (42). In a similar argument, Derek Gregory has argued that Agamben’s tendency to frame his analysis of exception and sovereignty within a single state obscures the role of law’s territoriality. This omission, as Gregory (2007) points out, is particularly glaring given Agamben’s choice of Guantánamo Bay as exemplar; Guantánamo Bay owes its very exceptionality to its extra-territoriality.

Derek Gregory and Amy Kaplan (also drawing upon Guantánamo Bay as exemplar) have successfully demonstrated the ways that territoriality, overlapping jurisdiction, and military occupation work together to create and sustain spaces of legal ambiguity. Kaplan looks at how multiple legal systems have been used strategically to create a space that is neither foreign nor domestic. For her, what is at stake is not whether or not Guantánamo exists in a legal or extralegal space, but rather how practices of colonialism, territory and jurisdiction work in tandem to create an “indefinite legal borderland between the domestic and the foreign” (Kaplan 2005: 847). Guantánamo is not “outside the law” but is, in fact, created and maintained through a careful collusion and negotiation of US, Cuban, and international law. As Gregory points out, most of the contested legalities that have emerged from the “war on terror”—from black sites, to extraordinary rendition and, of course, Guantánamo Bay—have resulted from the collusion of
multiple jurisdictions, national and international law, colonial history, and attempts by powerful nations to manipulate the legal playing field. Thus, in the analysis of Gregory, Kaplan, and others, the prison is treated as a kind of ongoing production or “performance” rather than as a point of departure (as it is for Agamben).

When read together, the critical work on lawfare and exception provide a nuanced understanding of how law operates even when it is seemingly suspended or rubs up against jurisdictional conflicts. Lawfare brings attention to the ways that the state uses law as a tactic of war but its focus on intentionality does not attend to the ways intersecting spatialities of law can create spaces of legal indeterminacy. What the critical geographical work on exception shows us, especially in the context of the “war on terror,” is the way that zones of legal indeterminacy can arise when the relationship between law and location gets confused. It also provides a reminder that law is not absolute, but is constantly being produced and reproduced.

The Nisour Square massacre can thus can be read as being shaped both by an absence, as well as an excess of law; it is a kind of exceptional space (in so far as the Iraqi victims were systematically placed beyond the law) but it is also, at the same time, the end result of both deliberate lawfare tactics and an ill-equipped US legal system. In the next section, I turn to consider how the these two lenses might be read together by returning to the example of Guantanamo Bay, which has been taken up over and over again by authors looking at the spatiality of the exception.
5.2 LAWFARE AND EXCEPTION: ONE COIN, TWO SIDES?

As flagged above, a number of commentators have taken issues with Agamben’s conceptualization of Guantánamo Bay and his static theorizing of law. Brännström (2008), for example, argues that Guantánamo Bay does not represent the suspension of law but, rather, law’s over-determination. For Brännström, “from the onset, the US executive either offered legal basis for its actions regarding the detainees at Guantanamo or gave explanation as to why laws were not applicable to them” as did those within and beyond the government presenting contrasting opinions (2008:25). It is for this reason that Fleur Johns has remarked that, in direct opposition to Agamben, Guantánamo Bay is “a space where law and liberal proceduralism speak and operate in excess” (Johns 2005: 614; emphasis in original). It is “a space filled to the brim with expertise, procedure, scrutiny and analysis” as lawyers, administrators, and other functionaries codify procedure (Johns 2005).

One way to account for the discrepancies between the accounts of Johns and Agamben is to differentiate between “law” and the “veneer of law”. According to numerous readings of Agamben, the creation of the state of exception actually results in a kind of “alternate paralegal universe”. In this reading, the kinds of memorandum and regulations that go into maintaining and producing Guantánamo amount to mere tokenisms. As Brännström remarks:

“It thus becomes not meaningful to look at the regime at Guantánamo from a legal point of view and judge it as a series of legislative acts…acts performed during the state of exception are mere facts, Agamben claims, and whether or not these acts are constitutive of new law or a set of actions executing or transgressing existing law can only be determined after the expiration of the state of exception” (2008, 32).

For Agamben, what defines the exception is the force of law. The strike through the term law is meant to imply the force of law without law or force of law without significance. What this
means is that, in a state of exception, the force of law is always intact—insofar as subjects can be compelled to do something in the name of law—it’s just that this thing called “law” does not constrain the actions of the state in any meaningful way. The state of exception thus produces a state of affairs where laws that limit power are still recognized as valid, but their application is suspended (Agamben 2005: 23).

The difference between “law” and “law so-called” also forms the basis of Judith Butler’s analysis of Guantánamo Bay as a “lawless place” that is “beyond the reach of national and international law” (Butler, 2004). For Butler, the moment of exception is reducible to "the moment when the Executive Branch assumes the power of the judiciary", a convergence which allows sovereign power to be extended “in excess of the law” (61). The rules that govern the management of the prison are not grounded in established law, Butler argues, but rather are "fully discretionary, even arbitrary, wielded by officials who interpret them unilaterally and decide the condition and form of their invocation" (61). The arbitrary and discretionary nature of the processes that takes place at Guantánamo (e.g. the decision to detain, the decision to activate military tribunals) are thus, Butler argues, nothing but “a deeming”: a unilateral decision, accountable to no law and without any legitimate authority. Through the convergence of executive and juridical power, Butler concludes, the state has effectively produced “a law that is no law, a court that is no court, a process that is no process…” (Butler 2005: 62). When Butler claims that law is absent at Guantamano she thereby means that the legal framework and procedures in place do not offer the detainees any real protection against the power of the US executive. It is because infinite detention and brutal treatment contradict or fail to live up to a basic requirement of justice inherent in either the American constitution or international law, that Butler sees Guantamano as embodying an absence of law.
While on the surface Butler’s argument appears congruent to Agamben’s, her argument ultimately rests on a substantive conception of law that is absent in Agamben’s account. This divide becomes clear when we apply to both thinkers the basic distinction in legal theory between conceptions of rule-by-law and rule-of-law, where the former represents an instrumental conception of law and the latter a substantive one. As David Dyzenhaus puts it, “where the [rule-by-law] means the use of law as a brute instrument to achieve ends of those with political power, [rule-of-law] means the constraints which normative conceptions of the rule-of-law place on the instrumental view of law” (Dyzenhaus, 2006, 3).

As we have seen in Agamben’s theory, the exception is essentially rule-by-law which traffics under the guise of rule-of-law in order to mask the fact that there is no substantive basis of law. But at the same time, Agamben’s claim that “the state of exception today has reached its maximum worldwide deployment” and the “normative aspect of the law can thus be obliterated and contradicted with impunity…” seems to imply the pre-existence of a juridical zone where sovereign actions could be modulated through law, that is a space where law and the veneer of law did not or do not coalesce (Agamben 2005: 87; also Brännström, 2008). But Agamben, unlike Butler, never articulates how it happened that the rule-of-law and rule-by-law came to be folded into one another, nor how it is that the two can never be unbundled.

But even Butler’s more nuanced understanding of law, says Brännström (2008), casts Guantánamo Bay as embodying an absence of law. By suggesting that all the “laws” that govern the prison are “mere fact” Butler precludes a legal analysis of the ways that the site gets created, maintained and contested through legal ordering strategies. Based on Agamben and Butler’s analysis, to then look to international law, US law or Iraqi law to explain Guantamano Bay would be a nonstarter – how the law has been manipulated in this instance, and similar instances,
is merely to submit to the charade of legality. To talk about law or lawfare in this instance would be confusing. Lawfare scholars, in contrast, are taking an instrumental view of the law, and are not so much concerned with distinguishing between the differences between law and law-so-called.

Walby’s post-sovereigntyist approach to law is, I argue, one way to move beyond these semantic problems. Moreover, it allows us to incorporate Gregory’s understanding of the exception as process and to move beyond what Gregory (2006) has termed “Agamben’s metropolitan predilections [his single-state focus]” (419). Walby’s post-sovereigntyist approach allows us to differentiate between laws that hold governments accountable and those that do not, without getting caught up in distinguishing what counts as law and what does not. He also reminds us that law emanates from multiple sites of authority, which, as the history of Nisour Square has shown, can sometimes be at cross purposes. Thus, while Agamben’s work on exception is useful in so far as it gives a language for speaking about those subjects who are placed outside the law (but still bear a relation to the law), we need to see this exceptional legality as being maintained and produced through both deliberate lawfare tactics and, in cases such as Nisour Square, through legal systems struggling to deal with the changing norms of an increasingly globalized battlefield.

The work on lawfare and exception allows us to focus both on the production of legal black holes and legal grey holes, while simultaneously seeing these ‘holes’ as themselves generative of new forms of law and regulation. By looking again at the critical work on lawfare, I argue that, as helpful as it is, it attends to how law is mobilized to particular ends. My case study suggest, however, that this legal lacuna arises as much out of contradictory, incompatible regulations and the waning influence of the state on an increasingly uncontrollable conflict, as it
does out of deliberate state policy. Moreover, as the geographers working with Agamben’s notion of the “exception” have pointed out, to grasp the complexity of law’s power, we need to move beyond static definitions of inside/outside law, and consider the ways in which law—and law’s territorality—create legal grey zones and legal black holes. Taken together, both of these frameworks help illuminate how law is used to legitimate violence in “the war on terror” and how law and its attendant geographies place some bodies, and some places, beyond legal oversight and legal protection.

As Kal Rustiala remarks, what we are witnessing in Iraq specifically, and in an increasingly globalized world more generally, is an unbundling of law and location that has allowed the US to cast itself as a kind of global sovereign “increasingly assert[ing] prescriptive jurisdiction beyond their territorial limits” (Rustiala 2005: 2511). Thus the presumption of “legal spatiality”—the idea that law and location are entwined and that location determines access to rights and rules—is slowly transforming and being replaced by other kinds of legal geographies. Kaplan, Gregory and Rustiala demonstrate that to conceptualize the current geolegal playing field we need to destabilize the state by acknowledging the role of imperial and internationalist frameworks. Walby adds to this analysis by pluralizing the state from within by bringing to attention the “decentered economy of power and governance” within which it circulates (Walby 2007: 552). The ambiguities of jurisdictions thus can equally exist within states, as I have shown with respect to the ways that the laws governing military personal abroad may not apply to PMSCs, or in the different tort statues available to citizens and ‘aliens’.

Moreover, the legal ambiguity around private contractors suggests that this “prescriptive jurisdiction” is also convoluted, emanating from different sources of authority (e.g. judges, lawmakers, and members of Congress) who may not share a common goal or speaking a
common (legal) language. The US asserted global sovereignty in Iraq through the establishment of a Status of Forces Agreement, the creation of the CPA, and the passing of Order 17. At the same time, it gave private security forces an integral role in the ensuing occupation. The intended goal, it seemed, was US domestic regulation of this new private international actor. But, as Congress’s mad scramble demonstrates, the domestic system was not able to keep up with this new legal territorialization. The result is that Congress, and the multiple agencies that employ contractors, now find themselves in the unfortunate positions of searching for ways to control a monster of their own making.
CHAPTER 6: CONCLUSIONS: CREATING AND CONTESTING THE JURIDICAL OTHER

This thesis has explored the ways that laws and legal systems have been formulated, articulated, and interpreted so that both private security contractors and the victims of contractor violence have been constructed as beyond the scope of law. Through an in-depth case study of the legal arguments and interpretations that emerged in light of the 2007 Nisour Square massacre, I have demonstrated the way, to use John Morrissey’s term, the legal battlefield was “pre-codified” to position subjects—both Blackwater contractors and Iraqi civilians—outside of legal protection and legal regulation. Moreover, by focusing on the particular spatializations at work, I showed how this ‘placing outside’ was a multi layered, fraught, and ongoing process.

First, a non-elected CPA passes an edict giving contractors free reign in Iraq. In so doing, the CPA relegated the job of holding contractors legally accountable to a wholly underprepared domestic legal system; a legal system that cannot keep up with an ever-evolving geo-economic battlefield and the introduction of new actors who do not fit neatly into the “foreign/domestic” “civilian/soldier” categories. Existing legislation regarding military code of conduct only applies ambiguously to PMSCs. But even the MEJA, passed to facilitate the prosecution of PMSCs, contains a number of loopholes and exclusions and has never been used to hold a non-DOD contractor accountable for a crime against a civilian. While the ATCA provides a remedy for victim claims by non-citizens, and hence opens the possibility for extraterritorial cases, its interpretation has meant it has limited applicability with respect to private contractors abroad. In the Abu Ghraib cases described above, the claims by the plaintiffs that they or their relatives had been abused were dismissed because existing law was interpreted as not pertaining to private contractors, or as outside the purview of US courts.
In the process of exploring and trying to make explicit the kinds of processes and practices that engendered the Nisour Square atrocity, as well as the ongoing dearth of regulation to hold contractors and decision makers criminally accountable, I brought together two conceptual frameworks—lawfare and exception—that have been deployed within geographical scholarship to conceptualize the ways that law and war work in tandem as discourses that govern political life. I have attempted to bring insights from both approaches together, by arguing that the two frameworks, though conflicting on the surface, actually supplement and enhance each other.

Though less explicitly, this thesis also represents an attempt (inspired by the work of geographer Joshua Barkan) to bring the important insights of sociolegal theorists like Kevin Walby and Nikolas Rose and Mariana Valverde into conversations with geographical scholarship about lawfare and exception. To that end, and building on Rose and Valverde’s foci of analysis, I have tried to draw out the ways that the laws and legal framings I engaged with emanated from multiple authorities (the CPA, the US Congress, the US Executive and the US Judiciary), and created paradoxical subjectivities (denying Iraqi civilians the opportunity to enact any rights in any court and casting the private contractor as at times analogous to military personnel and at other times, distinct from the military apparatus). Moreover, though cursory, I also examined possible explanations for the repeated downloading of legal risk and legal responsibility onto the shoulders of individual contractors and away from both public and private decision makers.

This attention to the kinds of subjectification, problemitizations, and authorizations revealed by the Nisour Square tragedy directly informed the more detailed focus on spatializations and my subsequent reflections on the lawfare and exception literature. These analytical foci, which compelled me to pay attention to the kinds of logics and framings inherent
in the US legal system, influenced my analysis of Agamben’s conception of the homo sacer, and on the need to think about how less explicit lawfare tactics get enacted alongside the offensive and defensive tactics described by Morrissey.

In Chapter 5’s focus on spatializations, I proposed that lawfare’s assumptions of legal coherence and intentionality, and Agamben’s assumption of static and state-centric law, lessens each theory’s explanatory power. In order to overcome these gaps, I built on the work of critical geographers (e.g. Gregory), to suggest a more fluid approach to lawfare and exception. This thesis suggests that we need to see lawfare as both an offensive and defensive strategy capable of creating and maintaining legal spaces and legal subjects that exist outside and beyond legal oversight or legal protection. At the same time, however, this fluid legal framework needs to incorporate the unintentional lawfare practices that arise when legal categories and material realities diverge; or when the differing legal strategies of various state actors and lawmakers create legal stalemates. The changing legalities engendered by the “war on terror”, as well as the increasing prevalence of the US’s policy of full spectrum dominance and military function outsourcing, suggests that such a framework will continue to be important in future analysis.

Moreover, given that so much of the legal contestation and legal maneuvering engendered by the “everywhere war” centers around the mobilization of categories like citizenship, sovereignty, territory and jurisdiction, it is all the more important for geographers to clarify how they think about the law.

In this final section, I turn to the work of Jamieson and McEvory (2005) to suggest that their concept of “juridical othering” is one way to incorporate the multiple convergences of explicit and unintentional lawfare exemplified by the Nisour Square case. “Juridical othering,” as understood by Jamieson and McEvory, describes strategies by states to circumvent law and
international justice. Particularly salient to my case studies, Jamieson and McEvoy chart the ways that states use proxy actors to “other” both the perpetrators and victims of state violence. By using PMSCs, the US and other powerful states manage to circumvent a basic principle of human rights law and most domestic legal systems “that the state is legally responsible for the actions of its agents” (Jamieson and McEvory 2005: 511) (e.g. “Command Responsibility”).

Moreover, as Jamieson and McEvory point out, the victims of crime are also “othered,” not only through imperial constitutions of difference that demarcate belonging and not-belonging, but through the law itself in that they are constituted as beyond legal protection (Jamieson and McEvoy 2005: 515). The hegemonic role of the US as global sovereign is thus undermined by extra-territorial, sub-national and non-national practices and processes. While, as they argue, none of these non-national practices are new, they have come together in particular ways in Iraq and Afghanistan, where, as was noted above, the changing dynamics of warfare are blurring the lines between “state and non-state, public and private, external and internal, economic and political, and even war and peace” (Kaldor 2013: 2).

In my analysis, I have suggested that to better understand this new landscape of law and warfare, it is helpful to distinguish between more intentional, and arguably more straightforward lawfare tactics, such as Order 17 and the Status of Forces Agreement, and the more insidious forms of lawfare that result when states employ proxy actors without also regulating their behavior. The fundamental problem, as articulated in Salon shortly after the Nisour Square shootings, is that “the introduction of private contractors into Iraq was not accompanied by a definitive legal construct specifying potential consequences for alleged criminal acts” (Koppelman and Benjamin, 2007). By outsourcing security services in contingency operations to private security practitioners, the US has created a figure, a proxy agent, who hovers outside and
above the law. So to do their victims of violence. As my study has shown, the lack of a definitive legal construct is not so much a legal black hole as a legal grey hole—a bundle of ambiguous, impractical, and often inapplicable laws and regulations. This legal grey zone has individualized risk and responsibility in the private contractor, while also making it near impossible to regulate their conduct.

Practices of judicial othering, which normalize the most egregious acts of violence by circumventing long-established legal norms, are, I think, a particularly troubling outcome of the war on terror. I thus do not want suggest that more law and more regulations would necessarily redress the wrongs identified in this paper. The creation of new laws (or revisions of existing laws) that further legitimized the actions at Nisour Square would not morally make the actions of the PMSCs more justifiable. It might only result in a different iteration of lawfare. Instead, recognizing, as Gregory (2008) articulates it, that law is a “site of political struggle not only in its suspension but also in its formulation, interpretation and application” suggests that resistance might lie in drawing attention to law’s growing territorial reach and making explicit the absurdities and contradictions in both domestic and international legal systems (58). It also means paying attention to the claims and voices of the victims of law’s violence. Indeed one of the major critiques of Agamben’s static and a-temporal understanding of law is its focus on, as Mathew Coleman puts it, the “interned and all-powerless cadaver” (Coleman 2007: 188; also Mesnard 2004). But, as the plaintiffs in both the Abu Ghraib and Nisour Square cases demonstrated, it is possible to use law itself to reveal the very dangerous absurdities that can lie within it.
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