

**LEGAL ACCOUNTABILITY OF STATE DEPARTMENT
PRIVATE SECURITY CONTRACTORS IN IRAQ**

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POLICY QUESTION

How should the State Department address the legal issues that arise when private security contractors commit crimes in Iraq?

In Iraq, the United States has approximately the same number of civilian contractors as it does soldiers. Without civilian contractor support, agencies like the Department of State (“State”) could not effectively execute their missions. As the military begins to transition out of Iraq in 2011, State will hire more civilian contractors. In addition to providing logistics and supplies, State’s civilian contractors will also conduct missions that were previously carried out by the military. The most important of these missions is security.

Private security contractors (“PSCs”) are a subset of civilian contractors who provide protection to convoys, guard embassies and consulates, and act as the personal security detail for diplomats. Like the military, PSCs carry weapons and use deadly force. State has hired PSCs to fill critical manpower shortages. Six years ago, an award-winning investigative reporter noted that “at their best,” PSCs are “highly trained former special forces soldiers whose professionalism has saved countless lives. Their presence alleviates the need for additional U.S. forces. At their worst, critics say, the contractors are expensive, reckless mercenaries who complicate the U.S. mission in Iraq.”²

In a complex security environment like Iraq, it is impossible to prevent crimes from occurring. Whether security is provided by the military or by civilian contractors, misconduct will occur. Just like the military, PSCs have committed (and will likely continue to commit) crimes in Iraq. But without PSCs, State cannot engage in diplomacy, and it cannot help the Iraqi people build a peaceful democracy. Similar to civil-military relations, the principal-agent framework can be applied to State’s employment of PSCs.³ Indeed, one scholar suggested that

¹ This student paper was prepared in 2011 in partial completion of the requirements for the Masters of Public Policy Degree at the Terry Sanford School of Public Policy at Duke University. The research, analysis, policy alternatives, and recommendations contained in this paper are the work of the student who authored the document, and do not represent the official or unofficial views of the Terry Sanford School of Public Policy or of Duke University. Without the specific permission of the author, this paper may not be used or cited for any purpose other than to inform the client organization about the subject matter. The author makes no independent representations as to the accuracy of the data.

² T. Christian Miller, *Private Security Guards in Iraq Operate With Little Supervision*, L.A. TIMES, Dec. 4, 2005, <http://articles.latimes.com/print/2005/dec/04/world/fg-guards4>.

³ See Sebastian Drutschmann, *Informal Regulation: An Economic Perspective on the Private Security Industry*, in PRIVATE MILITARY AND SECURITY COMPANIES: CHANCES, PROBLEMS, PITFALLS AND PROSPECTS 443, 446–47 (Thomas Jäger & Gerhard Kümmel eds., 2007); Katherine E. McCoy, *Beyond Civil-Military Relations: Reflections on Civilian Control of a Private, Multinational Workforce*, 36

the use of PSCs should have “trigger[ed] a revisiting . . . of civil-military regulation or more appropriately of the regulation covering the role of ‘specialists on violence’ in shaping political priorities.”⁴ Thus far, only a handful of scholars have examined these issues.⁵ This project seeks to fill some of the gaps by focusing on the issue of PSC oversight. However, even the most vigilant oversight cannot prevent agents from deviating from the principal’s intentions. The principal must also sanction the agent, and this project addresses the problem of sanctioning PSCs for criminal behavior.

This project explores five policy options that State could adopt in order to assert jurisdiction over PSCs who commit crimes in Iraq. They include:

- (1) Establish jurisdiction under the Military Extraterritorial Jurisdiction Act
- (2) Encourage Congress to pass the Civilian Extraterritorial Jurisdiction Act
- (3) Prosecute PSCs under local Iraqi law
- (4) Rely on the military and the Uniform Code of Military Justice
- (5) Use other federal criminal statutes to prosecute PSCs

This project then conducts an analysis of each policy option by assessing each proposed option using the following four criteria:

- Advances U.S. interests in the region
- Maximizes administrative feasibility
- Maximizes domestic political support
- Garners support from the international community

Following the analysis, this project recommends that State implement the following two policy options in the near future: Option (1) Establish jurisdiction using MEJA; and Option (2) Encourage Congress to pass CEJA because these options complement one another. As the military transitions, State can continue to rely on MEJA until 2012. Over the next nine months, State should encourage Congress to enact CEJA.

State should consider the following option only under narrow circumstances: Option (3) Prosecute under local Iraqi law. Only for third-country nationals and only if State cannot establish jurisdiction using MEJA or CEJA, should it consider using local Iraqi law to prosecute PSCs. The American public would likely tolerate a non-U.S. citizen being prosecuted by a foreign government before it would tolerate subjecting a U.S. citizen to such prosecution.

At this time, I do not recommend the following options: Option (4) Rely on the military and UCMJ; and Option (5) Use other criminal statutes

ARMED FORCES & SOC’Y 671, *passim* (2010). For a further discussion of the principal-agent framework, see Appendix 1.

⁴ Anna Leander, *Regulating the Rule of Private Military Companies in Shaping Security and Politics, in FROM MERCENARIES TO MARKET* (Simon Chesterman & Chia Lehnardt, eds., 2007).

⁵ See *supra* note 2.

CHAPTER 1: POLICY QUESTION AND PROBLEM STATEMENT

This project focuses on addressing the jurisdictional loophole for PSCs employed by State, and it seeks to answer the following question:

POLICY QUESTION

How should the State Department address the legal issues that arise when private security contractors commit crimes in Iraq?

On December 31, 2011, the U.S. military is scheduled to officially leave Iraq,⁶ and it appears that the White House is committed to that plan.⁷ Even though U.S. military forces will leave, thousands of American civilians will remain. The United States already has (and plans to maintain) a very large civilian presence in Iraq that includes the U.S. Embassy in Baghdad, the largest in the world, and five consulate-like “Enduring Presence Posts.”⁸ However, Iraq remains a dangerous place,⁹ and in spite of billions of dollars and years of American training, the Iraqi army and police cannot adequately protect State Department employees.¹⁰ Without adequate

⁶ Under the terms of the 2008 Agreement with Iraq, all U.S. military forces must be out of Iraq by 2011. Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, Art. 24 (2008) (“All the United States Forces shall withdraw from all Iraqi territory no later than December 31, 2011.”). For a discussion of the negotiations that led to this agreement, see Greg Bruno, *U.S. Security Agreements and Iraq*, WASH. POST (Nov. 18, 2008, 9:17 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/18/AR2008111801118.html>.

⁷ See, e.g., John Leland, *In Iraq, Biden Reaffirms Deadline for Troops’ Exit*, N.Y. TIMES, Jan. 13, 2011, at A8 (reporting that the “administration was committed” to the 2011 withdrawal plan); Craig Timberg, *Gates: If Iraq Wants Some U.S. Troops to Remain, It Must Ask Soon*, WASH. POST, April 8, 2011, at A1 (describing the visit by Secretary Gates to Iraq and the difficulty in “negotiate[ing] a U.S. military presence past the end of the year”).

⁸ Warren P. Strobel, *State Department Planning to Field a Small Army in Iraq*, MCCLATCHEY NEWS, July 21, 2010, <http://www.mcclatchydc.com/2010/07/21/97915/state-dept-planning-to-field-a.html#>.

⁹ See, e.g., *Next Year’s Wars*, FOREIGN POL’Y (Dec. 28, 2010), http://www.foreignpolicy.com/articles/2010/12/28/next_years_wars?page=full (“Sectarian violence resurfaces in fits and spurts, and is far from quashed entirely; approximately 300 Iraqis died in violence in November [2010].”); *Iraq Soldiers Killed as Suicide Bomber Hits Army Base*, BBC NEWS (Mar. 14, 2011, 3:37 AM), <http://www.bbc.co.uk/news/world-middle-east-12729779> (reporting an attack that killed nine Iraqi soldiers and wounded another fourteen).

¹⁰ See, e.g., Timberg *supra* note 7, at A1 (noting that the State Department will “take over some functions now provided by the Defense Department” although “U.S. officials have been blunt about the limitations of Iraq’s military capabilities”).

protection, the State Department will need to employ private security contractors (“PSCs”) to protect its workforce.¹¹

To the average Iraqi civilian, there is no difference between a civilian PSC and an American soldier—both are part of the same occupying force.¹² Indeed, both military members and PSCs have committed crimes in Iraq against Iraqi civilians.¹³ Whether security is provided by the military or by civilian contractors, misconduct inevitably occurs. Despite the tightest system of control in complex security environments like Iraq, it is impossible to prevent crimes from occurring. The problem is not that PSCs commit crimes. Just like the military, they have committed (and will likely continue to commit) crimes in Iraq. **The problem is that PSCs might not be held accountable for the crimes that they commit.**

In terms of legal accountability, there is a big difference between the military and PSCs, particularly for those PSCs working under non-Department of Defense (“DOD”) contracts. When a military member commits a crime in Iraq, he or she is prosecuted under the Uniform Code of Military Justice (“UCMJ”) because the UCMJ applies all the time¹⁴ and “in all places” around the world.¹⁵ However, if a civilian PSC commits a crime in Iraq, it is not always clear that the government can establish jurisdiction to prosecute the accused individual. Simply put, there is no comprehensive civil and criminal accountability for the PSCs employed by non-DOD agencies like the Department of State.¹⁶

For PSCs employed by the military, the government has established jurisdiction under the Military Extraterritorial Jurisdiction Act (“MEJA”).¹⁷ When Congress enacted the law in 2000, it created statutory jurisdiction for federal courts to hear felony criminal offenses committed by members of the military and by persons “employed by or accompanying” the military overseas.¹⁸

¹¹ Rowan Scarborough, *Safety Burden Shifts to State Department After Iraq War*, WASH. TIMES, July 25, 2010, at A1 (“You either have to keep the State Department mission the way it is and add a lot of contractors, or change the mission . . .”) (quoting Clark Irwin, spokesman for the Commission on Wartime Contracting in Iraq and Afghanistan).

¹² See Renee Montagne & Dina Temple-Raston, *Iraqis See U.S. Contractors, Troops the Same*, NPR (Dec. 17, 2007), <http://www.npr.org/templates/story/story.php?storyId=17307607> (noting that Iraqi civilians cannot distinguish between U.S. military personnel and Blackwater employees).

¹³ See, e.g., SHAWN ENGBRECHT, *AMERICA’S COVERT WARRIORS* 2–4 (2011) (describing crimes committed by PSCs in Iraq); James Dao, *Ex-Soldier Gets Life Sentence for Iraq Murders*, N.Y. TIMES, May 21, 2009, at A12 (describing the prosecution of Steven Green for rape and murder); Tim Whitmire, *Wartime Prosecutions Come Under Scrutiny*, ASSOCIATED PRESS, June 5, 2005 (describing crimes committed by members of the military in Iraq).

¹⁴ See, e.g., 10 U.S.C. § 801–02 (2010) (providing court-martial jurisdiction); *Solorio v. United States*, 483 U.S. 435, 450–51 (1987) (holding that military jurisdiction under the UCMJ is based on the status of the accused as a member of the Armed Forces “at the time of the offense charged”).

¹⁵ 10 U.S.C. § 803 (2010).

¹⁶ See COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, *AT WHAT COST?* 52 (2011).

¹⁷ Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified as amended at 18 U.S.C. §§ 3261-3267 (2010)).

¹⁸ 18 U.S.C. § 3261 (2010).

As the title suggests, Congress enacted MEJA intending to narrowly cover the *military*.¹⁹ Therefore, as originally enacted, MEJA did not apply to contractors working for civilian agencies.²⁰ Because MEJA only applied to PSCs working for the military, State Department contractors had a “murky” legal status.²¹

In an attempt to expand jurisdiction, Congress amended MEJA in 2005.²² As amended, MEJA defines an employee of the military as anyone directly employed by the military or by any other federal agency “to the extent such employment relates to supporting the mission of the Department of Defense overseas.”²³ Critics have argued that this language is “imprecise;” without “any real legislative history to explain the language,” courts might be confused as to its meaning.²⁴ Nevertheless, in cases where State contractors have been subjected to MEJA, the federal courts have broadly defined civilian contractors as “accompanying” the military and “supporting the mission” of DOD because the alleged criminal incidents occurred during combat operations.²⁵

¹⁹ As initially enacted, under § 3267 “Definitions,” the text “employed by the Armed Forces” only covered civilian employees and contractors working directly for the Department of Defense, and the text “accompanying the Armed Forces” meant that the person was a “dependent” of a military member, civilian employee or contractor who worked directly for the Department of Defense. *See* Pub. L. No. 106-523, 114 Stat. 2488 (2000). For a more comprehensive description of the enactment of MEJA, *see* Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad – A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U.L. REV. 55 (2001).

²⁰ *See, e.g.*, Jonathan Groner, *Untested Law Key in Iraqi Abuse Scandals*, LEGAL TIMES, May 11, 2004, at A1 (“[T]he Military Extraterritorial Jurisdiction Act is narrowly crafted and, according to lawyers familiar with it, may not cover some of the abuses -- and abusers -- involved in the torture of Iraqi detainees at U.S.-run prisons.”); David Washburn & Bruce V. Bigelow, *Civilian Contractors Suspected in Abuses in a Legal Gray Area*, SAN DIEGO UNION TRIB., May 29, 2004, at A1 (“[U]sing the act [MEJA] to prosecute civilian abusers of Iraqi prisoners was not something congressional sponsors considered when they drafted the legislation.”).

²¹ P.W. Singer, *Beyond the Law*, GUARDIAN.CO.UK (May 3, 2004, 1:34 AM), <http://www.guardian.co.uk/world/2004/may/03/iraq.usa3> (commenting on the “murky” legal status of private contractors in war zones and noting that “application of U.S. law is problematic” because there is a “dearth of doctrine, procedure, and policy” to hold them accountable).

²² Under § 1088 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Congress amended 18 U.S.C. § 3267(1)(A). *See* PUB. L. NO. 108-375, 118 Stat. 1811, 2066-67 (2004).

²³ 18 U.S.C. 3267 (2010).

²⁴ Major Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole*, 2005 ARMY LAW. 41, 47.

²⁵ *See, e.g.*, *United States v. Gleason*, Cr. No. 07-349, 2009 WL 799645, at *5-6 (D. Or. March 24, 2009) (holding that a civilian contractor working for the Department of State in Afghanistan was subject to MEJA through § 3261(a) and § 3267(1)).

However, many high-ranking policymakers²⁶ and members of Congress²⁷ have interpreted the statutory language of MEJA as not applying to Department of State contractors. So far, the courts have disagreed. For example, in *United States v. Slough*,²⁸ civilian defendants working as PSCs in Iraq argued that the court did not have jurisdiction under MEJA because their “contractual work did not support the mission of the Department of Defense” since they were contracted by the State Department to provide diplomatic security for a “diplomatic, not military, function.”²⁹ The court denied the defendants’ motion to dismiss for lack of jurisdiction because the court ruled that MEJA applied.³⁰

There is problem with continuing to use MEJA—the military is leaving Iraq. If a PSC working for State commits a felony in Iraq after the military leaves, the government might not be able to establish jurisdiction under MEJA because it is likely that a court would reject the “supporting the mission” of the military element. Therefore, in spite of the 2005 amendment expanding the scope of MEJA, a “legal loophole”³¹ exists for those contractors employed overseas by non-DOD government agencies like the Department of State. This project provides policy options for State to consider in addressing this legal loophole.

²⁶ The State Department and the Iraq War: Hearing Before the H. Comm. on Oversight and Gov’t Reform, 110th Cong., at 97 (testimony of Sec. Rice); Department of Defense, “Private Security Contractor Accountability Questions,” at 2, attached to Letter dated Dec. 7, 2007 from Gordon England, Deputy Secretary of Defense, to Representative David Price.

²⁷ See Press Release from Sen. Obama, Obama Calls on Gates to Clarify Contractor Role in Iraq, Sept. 20, 2007; Press Release from Senate Approp. Subcomm. On State & Foreign Operations, Leahy Provisions Holding Private Security Contractors and War Profiteers Accountable Under U.S. Law Added to Iraq Supplemental Appropriations Bill, May 16, 2008.

²⁸ 677 F.Supp.2d 112 (D.D.C. 2009).

²⁹ Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss for a Lack of Jurisdiction at 2, Cr. No.08-360 (D.D.C. Jan. 13, 2009).

³⁰ See Memorandum Opinion Denying Defendants’ Motion to Dismiss for Lack of Jurisdiction, *U.S. v. Slough*, Cr. No. 08-0360, 2009 WL 5173785 at *7 (D.D.C. Feb. 3, 2009) (holding that the defendants’ actions were in support of the military mission).

³¹ Government’s Motion to Exclude Out-of-Court Legal Opinions Regarding Applicability of MEJA to Private Security Contractors in Iraq, Cr. No. 08-360, at 3 (D.D.C. Dec. 18, 2009); see also Press Release, Representative David Price, *infra* note 102 (describing the “overseas contractor loophole” and the desire to establish “clear legal jurisdiction and better investigative capacity” with CEJA).

CHAPTER 2: BACKGROUND

2.1. *U.S. Reliance on Civilian Contractors in Iraq*

Over the past two decades, the United States has increasingly relied on civilian contractors to accomplish many logistics, security, and training functions in support of military operations overseas.³² While civilians have accompanied the military on the battlefield since the Revolutionary War, the role of civilians was generally limited to logistical support.³³ Today, the DOD considers civilian contractors a component of the “total defense workforce,”³⁴ and DOD has reported that it employs 207,553 civilian contractors in Iraq and Afghanistan.³⁵ These civilian contractors permeate virtually every component of military operations—from washing laundry and serving food to using deadly force. Without civilian support, the military could not effectively execute its mission.

³² See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-695, CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS 3 (2003) (describing the military's use of contractors for a variety of services in support of forces deployed overseas); FRED SCHREIER & MARINA CAPARINI, PRIVATISING SECURITY: LAW, PRACTICE AND GOVERNANCE OF PRIVATE MILITARY AND SECURITY COMPANIES 3–5 (2005), available at <http://www.dcaf.ch/Publications/Publication-Detail?lng=en&id=18346>. (explaining the rapid growth of PSCs); P.W. Singer, *Outsourcing War*, FOREIGN AFFAIRS, March–April 2005, at 119, 120 (“The modern private military industry emerged at the start of the 1990s, driven by three dynamics: the end of the Cold War, transformations in the nature of warfare that blurred the lines between soldiers and civilians, and a general trend toward privatization and outsourcing of government functions around the world.”).

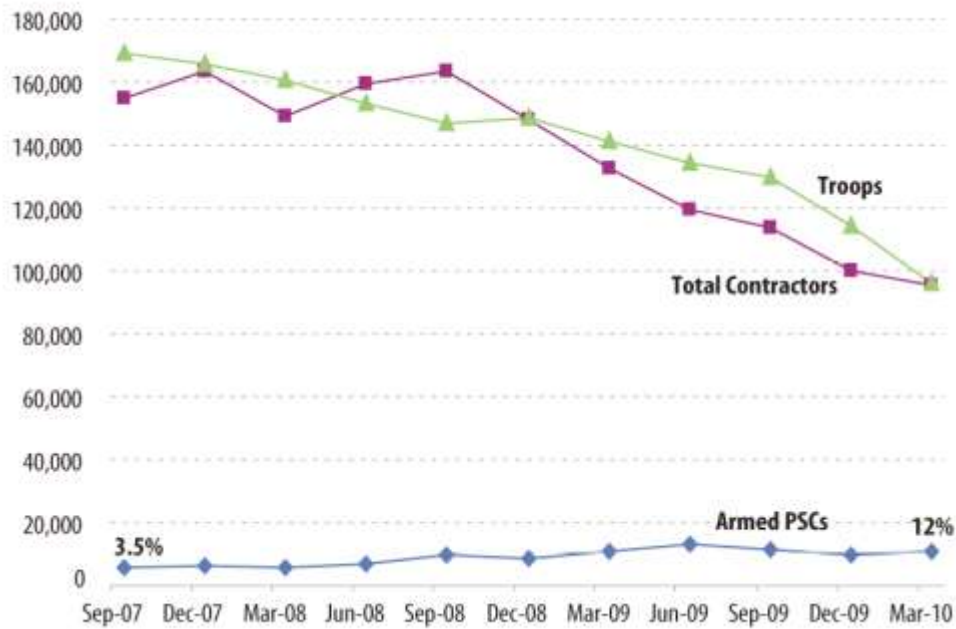
³³ For a discussion of the historical background of civilian contractors supporting military operations, see Major Michael J. Johnson, *Contractors on the Battlefield: Walking the Legal Combatant Tightrope 2–9* (Air Command & Staff College, Research Report, April 2007), available at https://www.afresearch.org/skins/rims/display.aspx?mode=user&ModuleID=be0e99f3-fc56-4ccb-8dfe670c0822a153&Action=researchprojects_bot. See generally Rebecca Rafferty Vernon, *Battlefield Contractors: Facing Tough Issues*, 33 PUB. CONT. L.J. 369 (2004) (exploring the legal and operational issues associated with increased number of contractors on the battlefield).

³⁴ U.S. DEP'T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 55–56 (2010) (assessing the role of civilian contractors); see also Walter Pincus, *U.S. Cannot Manage Contractors In Wars, Officials Testify on Hill*, WASH. POST, Jan. 25, 2008, at A5 (reporting that contractors have become part of the “total force” but the DOD is not prepared to address the “unprecedented scale of [its] dependence on contractors”).

³⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-1, IRAQ AND AFGHANISTAN: DOD, STATE, AND USAID FACE CONTINUED CHALLENGES IN TRACKING CONTRACTS, ASSISTANCE INSTRUMENTS, AND ASSOCIATED PERSONNEL 18 (2010) (listing DOD-reported number of contractors as of the second quarter in the 2010 fiscal year). DOD is the largest employer of civilian contractors, and it currently has \$24.7 billion obligated to these contracts. *Id.* at 27. In Iraq, DOD employs 95,461 total contractors (11,610 provide security). *Id.* at 18. In Afghanistan, DOD employs 112,092 contractors (16,733 provide security). *Id.*

In Iraq, the United States has relied on civilian contractors in unprecedented numbers³⁶ to provide a wide range of support services.³⁷ In fact, the United States has approximately the same number of civilian contractors as members of the military in Iraq.³⁸ Figure 1, found below, depicts the number of civilian contractors currently in Iraq working for the DOD.

Figure 1: Number of Total Contractors, Troops and Armed PSCs in Iraq Working for DOD



Source: Schwartz (2010) (citing Contractor data from CENTCOM Quarterly Census Reports; Troop data from CRS Report R40682, *Troop Levels in the Afghan and Iraq Wars, FY2001-FY2012: Cost and Other Potential Issues*, by Amy Belasco).

³⁶ COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, AT WHAT COST? 6 (2011), available at http://www.wartimecontracting.gov/docs/CWC_InterimReport2-lowres.pdf (“The wars in Iraq and Afghanistan have seen unprecedented reliance on contractors to support American operations and objectives.”); James Risen, *Use of Iraq Contractors Costs Billions, Report Says*, N.Y. TIMES, Aug. 11, 2008, at A11 (describing the “unprecedented” privatization and noting that the “Pentagon’s reliance on outside contractors in Iraq is proportionately far larger than in any previous conflict”).

³⁷ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-19, CONTINGENCY CONTRACTING: DOD, STATE, AND USAID CONTRACTS AND CONTRACTOR PERSONNEL IN IRAQ AND AFGHANISTAN 1 (2008).

³⁸ MOSHE SCHWARTZ, CONG. RESEARCH SERVICE, THE DEPARTMENT OF DEFENSE’S USE OF PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND, ANALYSIS, AND OPTIONS FOR CONGRESS 7 (2010).

Yet, not all civilian contractors are the same.³⁹ Private security contractors—a subset of civilian contractors as a whole—carry weapons to accomplish their mission because they provide protection to convoys of vital supplies to bases, guard embassies and consulates, and act as the personal security detail for diplomats.⁴⁰ Sometimes referred to as “hired guns”⁴¹ or “private warriors,”⁴² private security contractors (“PSCs”) have provided necessary support and filled critical manpower shortages at a lower cost to the U.S. government.⁴³ Nevertheless, some commentators have vilified PSCs as renegade “cowboys”⁴⁴ or mercenaries.⁴⁵ The term

³⁹ See P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 91–93 (2003) (using a “tip-of-the-spear” analogy and classifying security contractors into three groups: military provider firms, military support firms, and military consulting firms).

⁴⁰ Under Singer’s typology, PSC’s are employees of “military provider firms” that “focus on the tactical environment.” *Id.* at 92. Employees of military provider firms are most likely to engage in “active combat operations.” *Id.* at 93.

⁴¹ See, e.g., David H. Chen, Note, *Holding “Hired Guns” Accountable: The Legal Status of Private Security Contractors in Iraq*, 32 B.C. INT’L & COMP. L. REV. 101, *passim* (2009); Steve Fainaru, *Where Military Rules Don’t Apply; Blackwater’s Security Force in Iraq Given Wide Latitude by State Dept.*, WASH. POST, Sept. 20, 2007, at A1 (discussing the “uneven and largely dysfunctional regulatory system intended to govern tens of thousands of hired guns operating in Iraq”); Peter Spiegel, *Gates: U.S., Guards are at Odds in Iraq; Security Contractors’ Work Puts Them at ‘Cross-purposes’ with the Mission to Build Trust There, He says*, L.A. TIMES, Oct. 19, 2007 at A20 (referring to private security contractors as “hired guns”).

⁴² KEN SILVERSTEIN, *PRIVATE WARRIORS* *passim* (2000).

⁴³ CONG. BUDGET OFFICE, *CONTRACTORS’ SUPPORT OF U.S. OPERATIONS IN IRAQ* 14, 16–17 (2008) [hereinafter CBO Iraq 2008] (finding that “the costs of the private contractor did not differ greatly from the costs of having a comparable military unit performing similar functions,” but that in peacetime the military unit would “continue to accrue costs” while the contractor would not be renewed); GOV’T ACCOUNTABILITY OFFICE, GAO-10-266R, *WARFIGHTER SUPPORT: A COST COMPARISON OF USING STATE DEPARTMENT EMPLOYEES VERSUS CONTRACTORS FOR SECURITY SERVICES IN IRAQ*, *passim* (2010) (comparing the cost of contractors to the cost of federal employees or military members and finding that contractors cost less); cf. JOSEPH E. STIGLITZ & LINDA J. BILMES, *THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT* 12 (2008) (comparing the cost of a PSC who is earning “\$1,222 a day” or “\$455,000 a year” to an Army sergeant “earning \$140 to \$190 a day in pay and benefits, a total of \$51,000 to \$69,350 a year”); Laura Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 149, n.45 (2005) (suggesting that “[m]ilitary privatization can perhaps be explained primarily by the promise of cutting costs,” while suggesting in a footnote that these “cost savings have not been conclusively demonstrated”).

⁴⁴ Christopher M. Kovach, *Cowboys in the Middle East: Private Security Companies and the Imperfect Reach of the United States Criminal Justice System*, CONNECTIONS, Spring 2010, at 17, 19 (comparing PSCs to “cowboys” and Iraq to the “Wild West”); Pratrapp Chatterjee, *Cowboy Contractors: Armed and Dangerous*, GUARDIAN.CO.UK (Sept. 20, 2010, 7:00 PM), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/sep/17/afghanistan-iraq> (depicting PSCs in Afghanistan as out of control cowboys); Sudarsan Raghavan & Thomas E. Ricks, *Private Security Puts Diplomats, Military at Odds*, WASH. POST, Sept. 26, 2007, at A1 (quoting a senior U.S. commander in Iraq as saying that PSCs “act like cowboys over here”).

mercenary evokes the sense that “such people are supposedly uncontrollable rogues who commit unspeakable atrocities and wreak havoc,”⁴⁶ but it is not quite that simple.⁴⁷

Before the invasion of Iraq in 2003, the United States had rarely used *armed* contractors in support of military operations.⁴⁸ Even at the outset of combat operations, the military did not have a plan as to how it would employ and control PSCs during combat operations⁴⁹ because the military apparently did not have a “clear understanding” of their role or the implications of having PSCs on the battlefield.⁵⁰ Furthermore, government planners—both civilian and military—had not anticipated the dangerous security environment for reconstruction in Iraq.⁵¹

⁴⁵ See David Bromwich, *Euphemism and American Violence*, N.Y. REVIEW OF BOOKS, Apr. 3, 2008 (“A far more consequential euphemism, in the conduct of the Iraq war—and a usage adopted without demur until recently, by journalists, lawmakers, and army officers—speaks of mercenary soldiers as *contractors* or *security*.”); Ralph Peters, *Trouble for Hire: The Mercenaries Who Murder in Your Name*, N.Y. POST, Sept. 30, 2007 (“[T]he United States has become the world’s No. 1 employer of hired thugs... [but,] [t]o be fair, not all of the mercenaries your tax dollars pay create problems.”); Noah Schachtman, *U.S. Hires Mercs for Africa Ops*, WIRED (March 9, 2007, 9:07 AM), http://www.wired.com/dangerroom/2007/03/us_hires_mercs/ (describing contractors as “guns for hire”).

⁴⁶ DAVID ISENBERG, *SHADOW FORCE: PRIVATE SECURITY CONTRACTORS IN IRAQ* 5 (2009).

⁴⁷ See, e.g., E.L. Gaston, Note, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT’L L.J. 221, 228–240 (2008) (contrasting PSCs and mercenaries and arguing for different treatment); Mateo Tausig-Rubbo, *Outsourcing Sacrifice: The Labor of Private Military Contractors*, 21 YALE J.L. & HUMAN. 101, 119–131 (2009) (examining the relationship between a private security contractor and ideas of sacrifice, sovereignty, and citizenship); Deborah Avant, *Think Again: Mercenaries*, FOREIGN POL’Y, July 1, 2004 (explaining that PSCs are not mercenaries).

⁴⁸ At the time, the U.S. Army Field Manual on contractors stated that “[t]he general policy of the Army is that contract employees *will not be armed*.” U.S. DEP’T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD (Jan. 2003) (emphasis added); see also SINGER, *supra* note 39, at 123–30, 142–46 (describing the government’s employment of MPRI, a “military consulting firm,” and the services provided by Brown & Root, a “military support firm” before 2003); SARAH K. COTTON, ET AL., RAND CORP., HIRED GUNS: VIEWS ABOUT ARMED CONTRACTORS IN OPERATION IRAQI FREEDOM 11 (2010) (“Before the 2003 invasion of Iraq, *armed* contractors had rarely been used in a war zone.”). For a discussion of how civilian contractors have “evolve[d]” from providing military supplies and logistics to an “industry [that] is specifically designed to kill human beings if necessary,” see ENGBRECHT, *supra* note 13, at 65–98.

⁴⁹ See GOV’T ACCOUNTABILITY OFFICE, GAO-03-695, CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS 2–3 (2003) (finding that “DOD has not fully included contractor support in its operational and strategic plans” despite its reliance on contractors for a “wide variety of services”); DINA RASOR & ROBERT BAUMAN, BETRAYING OUR TROOPS 221 (2007) (criticizing contingency planning and asserting that the military “had not planned for logistics, or anything else, for that matter, beyond just winning the war, handing the country over to the Iraqis, and getting out”).

⁵⁰ See GOV’T ACCOUNTABILITY OFFICE, GAO-05-737, ACTIONS NEEDED TO IMPROVE USE OF PRIVATE SECURITY PROVIDERS 4 (2005) (finding that the military did not have a “clear understanding of the role of [security] contractors” or the “implications of having [PSCs] on the battle space”).

⁵¹ See *id.* at 14.

Indeed, most planners anticipated that “the post-conflict environment in Iraq would be relatively benign and would allow for the almost immediate beginning of reconstruction efforts.”⁵² As it turned out, that assumption was wrong.⁵³

Violence in Iraq began to increase as early as April 2003,⁵⁴ and the unstable security situation created “a wealth of opportunity for the private industry of armed men [PSCs].”⁵⁵ With an already strained military force, the DOD, State, and the U.S. Agency for International Development (“USAID”) turned to armed PSCs to fill the gaps in security.⁵⁶ Indeed, without the support of PSCs, these agencies would have been unable to execute their missions in Iraq.⁵⁷

⁵² *Id.*

⁵³ In his memoir, Ambassador L. Paul Bremer noted that he experienced a “growing unease about deteriorating security” when insurgents started targeting “not only our troops, but also civilian contractors working on reconstruction” during the fall of 2003. L. PAUL BREMER, *MY YEAR IN IRAQ* 221 (2006). He attributed the escalation in violence to the military’s “garrison mentality” because, in his opinion, the military was more focused on the “troop rotation schedule” and not conducting “major operations” against the increasingly dangerous insurgents. *Id.* In other words, “the Pentagon’s mind-set [was] that we’re now in the ‘mopping-up’ phase” and not “in a major battle against terrorists.” *Id.* at 222 (quoting Vice President Dick Cheney); *see also* THOMAS E. RICKS, *FIASCO* 149–150 (2007) (providing anecdotal evidence that morale and motivation decreased as the military transitioned from combat operations to stability and support operations).

⁵⁴ *See, e.g.*, GEORGE PACKER, *THE ASSASSIN’S GATE* 297–307 (2006) (describing the rise in violence, explaining the roots of the insurgency, and chronicling the U.S. government’s initial reaction to it).

⁵⁵ ROBERT YOUNG PELTON, *LICENSED TO KILL* 104 (2006). Pelton described the insurgency as an “explosion of opportunity” for PSCs. *Id.* at 103. “Iraq has been to the private security industry what the development of the first user-friendly Web browser was to the dot-com boom.” *Id.* at 97. If the war in Afghanistan “opened the door to more widespread employment” of PSCs, then Iraq “kicked that door off its hinges . . .” *Id.*

⁵⁶ Different commentators have suggested a variety of theories which led to the increased reliance on PSCs to provide security. For example, one theory is that the reconstruction of Iraq was a State Department mission, and the State Department preferred to use civilian contractors for protection. *See* Karen DeYoung, *State Department Struggles to Oversee Private Army: The State Department Turned to Contractors Such as Blackwater Amid a Fight with the Pentagon Over Personal Security in Iraq*, WASH. POST, Oct. 21, 2007, at A1 (describing how President Bush gave “authority over all but military operations” to the State Department and noting the preference of State Department officials to use PSCs rather than the military for the protection of diplomats). Another theory suggests that size of the military force in Iraq was simply too small. *See* P.W. Singer, *Can’t Win With ‘Em, Can’t Go to War Without ‘Em: Private Military Contractors and Counterinsurgency*, FOREIGN POL’Y AT BROOKINGS, at 3 (2007) (“If a core problem that U.S. forces faced in the operation in Iraq has been an insufficient number of troops, it is not that the U.S. had no other choices, other than to use contractors to solve it. Rather, it is that each of them was considered politically undesirable.”). As a variation on that theory, it is possible that the United States simply “underestimated the number of troops that would be required for stability and security operations.” David Isenberg, *A Government in Search of Cover: Private Military Companies in Iraq*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES, 82, 83 (Simon Chesterman & Chia Lehnardt eds., 2007).

⁵⁷ SCHWARTZ, *supra* note 38, at 5.

With the military focused on fighting a growing insurgency, security contractors became increasingly prevalent in Iraq. The stereotypical image of a PSC was that of a “[m]uscle-bound, often tattooed and always armed” private security guard not wearing a military uniform—between twenty-five and fifty years old with a military background (ex-Special Forces)—who “insist[ed] on wearing wraparound sunglasses and strapping a pistol to one thigh.”⁵⁸ Indeed, security contractors were a highly visible presence in Iraq as reconstruction efforts began, and that stereotypical image was frequently on public display. For example, instead of providing military forces to guard Coalition Provisional Authority (“CPA”) Administrator L. Paul Bremer in 2003, the government hired PSCs from Blackwater.⁵⁹ When Bremer traveled on the roads, his convoy consisted of Blackwater “shooters” in white Chevy Suburbans “clutch[ing] short black submachine guns” scanning the streets of Iraq for potential threats.⁶⁰

2.2. Initial Lack of Oversight and Accountability

As the security situation deteriorated and more PSCs began operating in Iraq, contractor oversight and accountability did not improve. The military did not have command and control over PSCs, and the initial coordination and interaction between the military and PSCs were “informal.”⁶¹ Military units deployed to Iraq without receiving any training on how to interact with PSCs, and, once they arrived, they received no guidance from higher command as to how they would share their assigned battle space.⁶² PSCs already on the ground and operating in Iraq complained that military units arrived unprepared.⁶³

Moreover, the military could not assess the impact of PSCs in Iraq because it lacked fundamental information about the scope and nature of their contracts. The Pentagon initially did not gather data regarding the security firms or count the number of contractors operating in Iraq.⁶⁴ Security industry advocates estimated, however, that there were eventually sixty security firms with about 20,000 PSCs in Iraq by 2005—other estimates ran as high as eighty firms and 25,000 PSCs.⁶⁵ Three years later in 2008, the Congressional Budget Office (“CBO”) estimated

⁵⁸ Deborah Haynes, *Private Guards Set for Bigger Role Despite Fury at Blackwater Deaths*, *TIMES* (London), Oct. 15, 2007.

⁵⁹ See BREMER, *supra* note 53, at 148 (discussing his “new team of bodyguards, many of them tough former Navy SEALs from the contractor Blackwater USA” who “handled [his] personal security”); John M. Broder & David Rohde, *State Department Use of Contractors Leaps in 4 Years*, *N.Y. TIMES*, Oct. 24, 2007 (describing Blackwater’s \$27 million “no-bid contract” to guard Bremer); DeYoung, *supra* note 56, at A1 (“[T] the Pentagon hired Blackwater to provide protection for Bremer and other civilians.”).

⁶⁰ BREMER, *supra* note 53, at 148.

⁶¹ GAO-05-737, *supra* note 50, at 20.

⁶² *Id.* at 29.

⁶³ *Id.*

⁶⁴ The Pentagon first started to collect data in second half of 2007. SCHWARZ, *supra* note 38, at 5.

⁶⁵ Daniel Bergner, *The Other Army*, *N.Y. TIMES MAGAZINE*, Aug. 14, 2005, at 29, 32.

that the total number of PSCs in Iraq was “25,000 to 30,000” with approximately thirty to forty percent working directly for the U.S. government.⁶⁶

Since combat operations began in Iraq, DOD and State have employed the largest number of PSCs.⁶⁷ However, each agency had its own approach to oversight which created “tension” and a “bureaucratic tug-of-war” between them.⁶⁸ The presence of so many PSCs operating in the same battle space as military forces created inevitable conflict⁶⁹ and “introduced problems of coordination, discipline, and transparency.”⁷⁰ On the one hand, the military was trying to engage in “irregular warfare” by conducting counterinsurgency operations with the goal of “winning the hearts and minds of the people—which is critical to defeating an insurgency.”⁷¹ On the other hand, PSCs were hired to “protect the principal at all costs,”⁷² and this goal did not always align with the military mission. In fact, actions taken by PSCs had a detrimental impact on the military’s mission. As Retired Marine Colonel Thomas Hammes observed, protecting the principal meant that PSCs often used “very aggressive” tactics like “running [Iraqi] vehicles off the road,” and these tactics were perceived as “overpowering and intimidating” which often made enemies out of the civilian population.⁷³ Simply put, the PSCs “were actually [executing] our contract exactly as we asked them to and at the same time hurting our counterinsurgency effort.”⁷⁴

By 2004, the DOD started to implement changes designed to address issues of coordination and accountability.⁷⁵ Some of these changes occurred after the media increased its

⁶⁶ CBO Iraq 2008, *supra* note 43, at 15. “The remaining 15,000 to 20,000 work for the Iraqi government, other coalition governments such as Great Britain, or private companies.” *Id.*

⁶⁷ *See id.*; GAO-11-1, *supra* note 35, at 27; SCHWARTZ, *supra* note 38, at 5–6.

⁶⁸ John M. Broder & David Johnston, *U.S. Military to Supervise Iraq Security Convoys*, N.Y. TIMES, Oct. 31, 2007, at A1.

⁶⁹ For example, military members fired upon PSCs in various “blue on white” incidents. GAO-05-737, *supra* note 50, at 27.

⁷⁰ T. CHRISTIAN MILLER, BLOOD MONEY 167 (2006).

⁷¹ Erik Swabb, *Train Soldiers to Win Hearts and Minds*, CHRISTIAN SCIENCE MONITOR, Sept. 20, 2006, at 9.

⁷² Fainaru, *supra* note 41, at A1 (quoting Ann Exline Starr, a former CPA adviser, who reported the attitude of PSCs responsible for her protection in Iraq: “What they told me was, ‘Our mission is to protect the principal at all costs. If that means pissing off the Iraqis, too bad.’”).

⁷³ Interview by PBS Frontline, with Colonel Thomas X. Hammes (Ret.), PBS (June 21, 2005), <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/hammes.html>.

⁷⁴ *Id.*; *see also* T. Christian Miller, *Private Security Guards in Iraq Operate With Little Supervision*, L.A. TIMES, Dec. 4, 2005 (“The contractors are making the mission of the U.S. military in Iraq more difficult.” (quoting George Washington Law Professor Joshua Schwartz)).

⁷⁵ For a discussion of the DOD’s changes, see Jeffrey S. Thurnher, *Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts*, ARMY LAW, July 2008, at 64, 73–75. *See generally* Colonel Cliff D. Crofford, Jr., *Private Security Contractors on the Battlefield* (U.S. Army War College, Strategy Research Project, March 2006),

scrutiny of PSCs following the deaths of four Blackwater contractors in Fallujah in March 2004⁷⁶ and the involvement of civilian contractors in the Abu Ghraib prisoner abuses.⁷⁷ Some of the changes occurred because Congress included provisions in the 2005 National Defense Authorization Act directing the DOD to improve the oversight of contractors in Iraq and Afghanistan.⁷⁸ Regardless of the impetus for change, the goal was greater oversight of PSCs.

2.3. *Serious Criminal Violations*

In addition to tactical and operational problems, the increased reliance on PSCs in Iraq also resulted in incidents of alleged serious criminal violations.⁷⁹ For example, since the public release of secret field reports from Iraq obtained by WikiLeaks, the media have recently uncovered many “episodes never made public” where PSCs “often shot with little discrimination—and few if any consequences.”⁸⁰ Human Rights First, a non-profit international

available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/ksil320.pdf> (assessing some of the initial policies to control PSCs).

⁷⁶ On March 31, 2004, Iraqi insurgents attacked and then brutally killed four Blackwater PSCs in Fallujah. See, e.g., Dana Priest & Mary Pat Flaherty, *Slain Contractors Were in Iraq Working Security Detail*, WASH. POST, April 2, 2004, at A16 (reporting the incident). A jubilant crowd of Iraqi civilians rejoiced as the insurgents dragged the bodies through the streets and ultimately hung the charred, dismembered corpses from a bride. See Tony Karon, *Why the Killings in Fallujah Resonate With Americans*, TIME, Apr. 2, 2004. As a result of the incident, the media began to focus on the presence of “hired guns” in Iraq. *Id.*; see also RICKS, *supra* note 53, at 332 (describing the “powerful response” from the “televised atrocity”); Joseph Neff, *Private Military Contractors: Determining Accountability*, NIEMAN REPORT (Summer 2008), <http://www.nieman.harvard.edu/reports/article/100037/Private-Military-Contractors-Determining-Accountability.aspx> (discussing how the incident in Fallujah prompted investigative journalism regarding these “secretive” security companies).

⁷⁷ HUMAN RIGHTS FIRST, *PRIVATE SECURITY CONTRACTORS AT WAR: ENDING THE CULTURE OF IMPUNITY 6* (2008) (noting that the issue of criminal accountability of civilian contractors attracted increased public attention after the Abu Ghraib prisoner abuses).

⁷⁸ For example, under § 1205, “Guidance on Contractors Supporting Deployed Forces in Iraq,” Congress required the Secretary of Defense to issue guidance to address issues relating to the movement of contractors through military battle space, establishing rules of engagement for contractors and ensuring proper training and compliance with the rules, and “Establishing procedures for making and documenting determinations about which security, intelligence, law enforcement, and criminal justice functions will be performed by military personnel and which will be performed by private companies.” See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811.

⁷⁹ See Hearing on “Are Private Security Contractors Performing Inherently Governmental Functions” Before the Comm’n on Wartime Contracting in Iraq and Afghanistan (June 18, 2010) (written statement submitted by Human Rights First), available at http://www.wartimecontracting.gov/docs/hearing2010-06-18_statementforthecord-HumanRightsFirst.pdf (listing a “range of abuses” and “serious criminal violations” committed by PSCs).

⁸⁰ James Glanz & Andrew H. Lehren, *Use of Contractors Added to War’s Chaos in Iraq*, N.Y. TIMES, Oct. 23, 2010, at A1 (“The archive, which describes many episodes never made public in such detail, shows the multitude of shortcomings with this new system: how a failure to coordinate among contractors, coalition forces and Iraqi troops, as well as a failure to enforce rules of engagement that bind the military, endangered civilians as well as the contractors themselves.”).

human rights organization, has referred to such incidents as a “Pattern of the Questionable Use of Force.”⁸¹ Indeed, former PSCs acknowledged incidents of “wild shooting” where “innocent Iraqi civilians were fired upon,”⁸² and there was even a video posted online in 2005 depicting PSCs indiscriminately firing their machine guns at Iraqi civilians to the tune of Elvis Presley’s *Mystery Train*.⁸³

The most notorious shooting incident involving the excessive use of force by PSCs occurred at Nisur Square in Baghdad in September 2007 when Blackwater contractors shot and killed seventeen Iraqi civilians and wounded twenty more after a vehicle-borne improvised explosive device detonated near their position.⁸⁴ Almost immediately, the incident ignited a frenzy of negative worldwide media coverage,⁸⁵ and nearly every account of the incident reached the same conclusion: “It was obviously excessive, [and] it was obviously wrong.”⁸⁶

At the time of the Nisur Square shooting—described as a “massacre”⁸⁷ by one of the witnesses—all civilian contractors, including PSCs, were immune from prosecution under Iraqi law.⁸⁸ The broad language of CPA Order 17, issued June 27, 2004 (three days before Iraq officially gained its sovereignty), granted immunity to all non-Iraqi military and civilian personnel serving

⁸¹ See HUMAN RIGHTS FIRST, *supra* note 77, at 6–9 (listing reports of incidents where PSCs indiscriminately shot and killed Iraqi civilians).

⁸² Lisa Meyers, *U.S. Contractors in Iraq Allege Abuses*, NBC NEWS (Feb. 17, 2005, 4:15 PM), <http://www.msnbc.msn.com/id/6947745/>.

⁸³ See Jonathan Finer & Ellen Knickmeyer, *U.S. Military Probing Video of Road Violence*, WASH. POST, Dec. 9, 2005, at A1 (describing the video footage).

⁸⁴ *United States v. Slough*, __ F.Supp.2d __, (D.D.C. 2009), 2009 WL 5173785.

⁸⁵ See, e.g., Adam Zagarin & Brian Bennett, *Iraq Limits Blackwater’s Options*, TIME, Sept. 17, 2007 (describing the shooting incident after having obtained an “incident report prepared by the U.S. government”); Marc Pitzke, *Blackwater Blacklisted: “Whores of War” Under Fire*, SPIEGEL ONLINE INT’L, Sept. 19, 2007 available at <http://www.spiegel.de/international/world/0,1518,506554,00.html> (reporting a “deadly shootout involving Blackwater” while noting that “mercenaries” have immunity from Iraqi law); Alex Spillius & Damien McElroy, *Security Firms Face Inquiry After 11 Iraqis Die*, TELEGRAPH.CO.UK, available at <http://www.telegraph.co.uk/news/worldnews/1563594/Security-firms-face-inquiry-after-11-Iraqis-die.html> (citing allegations of the “criminal” shooting incident).

⁸⁶ Sudarsan Raghavan, et al., *Blackwater Faulted In Military Reports From Shooting Scene*, WASH. POST, Oct. 5, 2007, at A1 (quoting an anonymous U.S. military official).

⁸⁷ James Glanz, *New Evidence That Blackwater Guards Took No Fire*, N.Y. TIMES, Oct. 13, 2007, at A1 (quoting Omar H. Waso, one of the witnesses and a senior official in the party of the Patriotic Union of Kurdistan).

⁸⁸ Under CPA Order 17, the United States explicitly prevented Iraqi laws from applying to civilian contractors: “Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts.” COALITION PROVISIONAL AUTHORITY ORDER NUMBER 17 (Revised) (June 27, 2004), available at http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf [hereinafter CPA Order 17]; see also GOV’T ACCOUNTABILITY OFFICE, GAO-04-746R, IRAQ’S TRANSITIONAL LAW 10 (2004).

under the command of the Multinational Force (“MNF”).⁸⁹ CPA Order 17 made it clear that the “Sending State” had “exclusive jurisdiction” over all MNF military and civilian personnel.⁹⁰ Therefore, to hold PSCs accountable for their alleged criminal behavior, the United States needed to use the U.S. judicial system.

Nevertheless, in 2007, after four years of combat operations, the United States had not criminally prosecuted a single security contractor since the Iraq war began.⁹¹ In contrast, the military had accused twenty service members of crimes related to killing Iraqi civilians and convicted “at least ten” by 2005.⁹²

Just like soldiers, there is a “psychological toll” from the “mental and emotional stress” as the result of “prolonged contractor deployments.”⁹³ However, unlike members of the military, some PSCs had turned to “[c]oping mechanisms” like alcohol that were “not always the best remedy.”⁹⁴ For example, on Christmas Eve 2006, Andrew Moonen, a Blackwater security contractor working for the State Department, allegedly shot and killed an Iraqi bodyguard while Moonen was intoxicated.⁹⁵ He was never prosecuted for the apparent murder. When members of the House Oversight and Government Reform Committee questioned Secretary of State Condoleezza Rice regarding the “rogue behavior” of PSCs and Moonen specifically, she replied that the failure to prosecute him was due to a lack of evidence.⁹⁶ However, she also recognized that there was a potential “hole” in the law.⁹⁷

The “hole” in the law refers to MEJA. Commentators had noted a “legal loophole” for asserting jurisdiction over contractors who commit crimes overseas at least three years before Secretary Rice testified before Congress.⁹⁸ Indeed, even after Congress amended MEJA in 2005, one author asked the question: have we closed the barn door yet?⁹⁹

⁸⁹ CPA Order 17, *supra* note 88, at §§ 1–2.

⁹⁰ *Id.* at § 2.

⁹¹ *See* HUMAN RIGHTS FIRST, *supra* note 77, at 23–24.

⁹² Miller, *supra* note 74.

⁹³ ENGBRECHT, *supra* note 13, at 169.

⁹⁴ *Id.* at 170; *see also id.* at 173–76 (providing anecdotal evidence of bootlegging alcohol and prostitution).

⁹⁵ HUMAN RIGHTS FIRST, *supra* note 77, at 27; John M. Broder, *Ex-Paratrooper is Suspect in a Blackwater Killing*, N.Y. TIMES, Oct. 4, 2007, at A1.

⁹⁶ Johanna Neuman, *Rice Testifies about Iraq to House Panel*, L.A. TIMES, Oct. 26, 2007, at A16.

⁹⁷ John M. Broder, *Rice Says ‘Hole’ in U.S. Law Shields Contractors in Iraq*, N.Y. TIMES, Oct. 26, 2007, at A6.

⁹⁸ *See, e.g.*, P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B3 (describing alleged prisoner abuses at Abu Ghraib and the involvement of private contractor interrogators who cannot be held accountable because of a “legal loophole” in jurisdiction “that might prevent any attempt to bring charges against employees of the private companies”); Phillip Carter, *Hired Guns: What to Do About Military Contractors Run Amok*, SLATE (Apr. 9, 2004, 5:57 PM), <http://www.slate.com>

CHAPTER 3: POLICY OPTIONS

This chapter presents five policy options for evaluation. To address the legal issues that arise when private security contractors commit crimes overseas, the State Department should consider the following actions:

(1) Establish jurisdiction using MEJA

The provisions of MEJA are codified at 18 U.S.C. §§ 3261–3267.¹⁰⁰ MEJA creates jurisdiction for federal courts over felonies (“an offense punishable by imprisonment for more than 1 year”)¹⁰¹ committed outside the United States by two broad categories of persons described in the statute: (1) persons employed by or accompanying the armed forces; and (2) persons who are members of the armed forces when the conduct occurred.¹⁰² Under the first category of persons subject to MEJA, the government has traditionally prosecuted military dependents.¹⁰³ More recently, however, the government has expanded this category beyond military dependents by establishing jurisdiction over civilian contractors under MEJA.¹⁰⁴

So far, the United States has successfully used MEJA to prosecute civilian contractors who have committed crimes overseas. As of January 2009, the Department of Justice (“DOJ”) reported that it had secured a total of eight convictions from sixteen MEJA referrals.¹⁰⁵ Even though this might seem like an insignificant number of convictions, these cases are typically very

/id/2098571/ (noting the problems that arise when armed contractors engage in combat operations and finding that “legal murkiness helps shield the contractors from effective discipline”).

⁹⁹ Fredrick A. Stein, *Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act*, 27 HOUS. J. INT’L L. 579 (2005).

¹⁰⁰ 18 U.S.C. §§ 3261-3267 (2008); *see also* Fredrick A. Stein, *Have We Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act*, 27 HOUS. J. INT’L L. 579, 593-598 (2005) (providing a detailed explanation of each provision of MEJA).

¹⁰¹ 18 U.S.C. § 3261(a) (2010).

¹⁰² *Id. see also* H.R. REP. NO. 106-778, at 15 (2000) (discussing the two classes of people subject to prosecution).

¹⁰³ *See, e.g., United States v. Arnt*, 474 F.3d 1159, 1160-61 (9th Cir. 2007) (involving a wife of a military member who stabbed and killed her husband during a domestic dispute on Incirlik Air Base, Turkey).

¹⁰⁴ *See, e.g., U.S. v. Slough*, Cr. No. 08-0360, 2009 WL 5173785 (D.D.C. Dec. 31, 2009) (finding that civilian contractors were in Iraq “supporting the mission” of the military); *United States v. Gleason*, Cr. No. 07-349, 2009 WL 799645, at *5-6 (D. Or. March 24, 2009) (holding that a civilian contractor working for the Department of State in Afghanistan was subject to MEJA through § 3261(a) and § 3267(1)).

¹⁰⁵ Department of Justice, *The Accomplishments of the U.S. Department of Justice 2001-2009*, Jan. 16, 2009, at 38 *available at* <http://www.usdoj.gov/opa/documents/doj-accomplishments.pdf> (“The Department has filed a publicly available federal indictment, information or complaint based on 16 MEJA referrals, with a number of additional matters under investigation. To date, the Department has secured eight convictions resulting from MEJA referrals.”).

high-profile and have the potential to impact foreign relations.¹⁰⁶ However, there might be a “loophole” depending on the circumstances of the case when the PSC is contracted by State and not DOD.

(2) Encourage Congress to pass CEJA

On February 2, 2010, Senator Patrick Leahy (D-Vt.) and Congressman David Price (D-NC) introduced companion bills in the House and Senate “to ensure accountability under U.S. law for American contractors and employees working abroad.”¹⁰⁷ The proposed legislation is titled the Civilian Extraterritorial Jurisdiction Act (“CEJA”) and it is designed to “close a gap in current law to make certain that American government employees and contractors are not immune from prosecution for crimes committed overseas.”¹⁰⁸ As of April 2011, Congress has not voted on this legislation.

The problem with using MEJA to prosecute civilian contractors working for non-DOD government agencies is that the government must establish “the extent [that] such employment relates to supporting the mission of the Department of Defense overseas.”¹⁰⁹ The government has the burden to present evidence at trial that will satisfy this requirement.¹¹⁰ CEJA eliminates this two-step process. In fact, CEJA would expressly apply to federal contractors or employees of “any department or agency of the United States other than the Armed Forces.”¹¹¹ Mirroring MEJA, the statute creates jurisdiction for those “employed by”¹¹² as well as “accompanying”¹¹³ any department or agency.

¹⁰⁶ For example, “just days” after Judge Urbina dismissed the case in *U.S. v. Slough*, the Iraqi government issued a “strong warning” demanding that all employees of Blackwater leave Iraq immediately. Tony Romm, *Iraq Asks Blackwater Employees to Leave, Will Sue Guards*, THE HILL, Jan. 3, 2010, available at <http://thehill.com/blogs/blog-briefing-room/news/74111-iraq-asks-blackwater-employees-to-leave-will-sue-five-guards>. These warnings echo Iraq’s response to the incident in 2007. Nuri-al-Maliki declared, “We will not allow Iraqis to be killed in cold blood. What happened was a crime . . . [i]t has left a deep grudge and anger, both inside the government and among the Iraqi people.” *Privateers Under Fire; Iraq*, THE ECONOMIST, Sept. 22, 2007.

¹⁰⁷ Press Release, Representative David Price, Price, Leahy Introduce Bill to Hold American Contractors Overseas Accountable Under U.S. Law, Feb. 2, 2010.

¹⁰⁸ *Id.*

¹⁰⁹ 18 U.S.C. § 3267(1)(A)(i)(II) (2010).

¹¹⁰ Government’s Opposition to Defendant’s Motion to Dismiss for Lack of Jurisdiction, *U.S. v. Slough*, Cr. No. 08-360, at 7 (D.D.C. Jan. 27, 2009).

¹¹¹ Civilian Extraterritorial Jurisdiction Act, S. 2979, 111th Cong. § 3272(a) (2010).

¹¹² CEJA defines “employed by any department or agency” as including employees, contractors, subcontractors, grantees, and employees of grantees. CEJA does not apply to nationals or ordinary residents of the host nation. S. 2979, 111th Cong. § 3272(d)(1) (2010).

¹¹³ CEJA defines “accompanying any department or agency” as including dependents and those “residing with such civilian employee, contractor, contractor employee, grantee, or grantee employee outside the United States.” S. 2979, 111th Cong. § 3272(d)(2) (2010).

(3) Prosecute PSCs under the local Iraqi law

Under Article 12 of the 2008 Iraq Withdrawal Agreement, “Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees.” Even though this provision allows Iraq to have “primary” jurisdiction, the United States could continue to exercise jurisdiction over U.S. contractors in cases where U.S. courts would have jurisdiction.¹¹⁴ However, Iraq is under no obligation under the Withdrawal Agreement to negotiate with the United States when it asserts its jurisdiction.¹¹⁵

To my knowledge, this provision has never been used. Congress has also criticized the agreement for failing to “specify the law to be applied or the procedural safeguards that must be observed by Iraqi courts to ensure due process and equal justice.”¹¹⁶ Nevertheless, it is possible for State to prosecute PSCs under Iraqi law.

(4) Rely on the military and prosecute using UCMJ

The government could prosecute crimes committed by PSCs under military law by using the UCMJ because Senator Lindsey Graham added an amendment to the national defense spending authorization bill in 2006 that essentially subjected civilian contractors to military law.¹¹⁷ The amendment changed the language of Article 2(a)(10) so that UCMJ would apply to “persons serving with or accompanying an armed force in the field” in times of “declared war or a contingency operation.”¹¹⁸ The simple addition of “contingency operation”¹¹⁹ significantly expanded the application of military law to civilians.¹²⁰ Peter Singer described the change as “single biggest legal development for the private military industry since its start.”¹²¹

¹¹⁴ Under Article 12 of the Withdrawal Agreement, the United States is permitted to request that Iraq waive its primary jurisdiction in a particular case.

¹¹⁵ See Article 12, 2008 Iraq Withdrawal Agreement.

¹¹⁶ H.R. Res. 1535, 110th Cong. (2008). Scholars have been direct in criticizing the provision. For example, one author argued that the law “abdicate[d] the jurisdictional reach of the United States.” Tara Lee, *SOFA Discards Contractors and the Rule of Law*, JURIST, Dec. 4, 2008.

¹¹⁷ See National Defense Authorization Act for Fiscal Year 2007 § 552, 120 Stat. 2083, 2217 (amending 10 U.S.C. § 802(a)(10)). See also Griff Witte, *New Law Could Subject Civilians to Military Trial*, WASH. POST, Jan. 15, 2007, at A1; Marc Lindemann, *Civilian Contractors Under Military Law*, PARAMETERS, Autumn 2007, at 83 (“The insertion of five words into Congress’s fiscal year 2007 defense authorization act may now subject every civilian contractor operating in a combat zone to the discipline of the *Uniform Code of Military Justice* (UCMJ).”).

¹¹⁸ 10 U.S.C. § 802(a)(10) (2008).

¹¹⁹ A “contingency operation” is defined as a military operation that “(a) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force;” or “(b) results in the call or order to, or retention on, active duty members of the uniformed services” under Chapter 15 of Title 10 “or any other provision of law during a war or during a national emergency declared by the President or Congress.” 10 U.S.C. 101(a)(13) (2006).

¹²⁰ Senator Lindsey Graham intended the changes to “give military commanders a more fair and efficient means of discipline on the battlefield” by “subjecting civilian contractors accompanying the armed forces

Some scholars have argued that the United States should use the UCMJ to prosecute PSCs.¹²² In spite of this new grant of jurisdiction DOD has nevertheless been reluctant to prosecute civilians under the UCMJ. For example, on March 10, 2008, Secretary of Defense Gates sent a memorandum to all military commanders to clarify his policy regarding the changes to military law and to “[p]rovide additional guidance...on the exercise of their UCMJ authority.”¹²³ Secretary Gates announced that he would personally determine “when, where and by whom such jurisdiction is exercised,” because of the “unique nature of this extended UCMJ jurisdiction over civilians.”¹²⁴ Rather than use UCMJ, it appears that DOD would prefer to use federal law. Accordingly, when alleged offenses “violate U.S. federal criminal laws,” the Department of Defense “shall notify” the Department of Justice.¹²⁵

In the past, military courts have interpreted Article 2(a)(10) quite narrowly. The Court of Military Appeals,¹²⁶ the highest appellate court for the military, rejected applying military law to civilians by interpreting “in time of war” as requiring that Congress formally declare war.¹²⁷ In *United States v. Averette*,¹²⁸ the court reviewed the general court martial of a civilian employee

in the field [to] court-martial jurisdiction.” William Matthews, *Contractor Crackdown*, ARMED FORCES J., Feb. 2007.

¹²¹ Frequently Asked Questions on the UCMJ Change and Its Applicability to Private Military Contractors, Brookings Institute, Jan. 12, 2007, http://www.brookings.edu/opinions/2007/0112/defenseindustry_singer.aspx.

¹²² See, e.g., Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Court-Martial Jurisdiction Over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U. L. REV. 367, 373 (2006) (arguing that federal district court prosecution has been ineffective, so military commanders can and should court-martial some private security contractors); David L. Snyder, Note, *Civilian Military Contractors on Trial: The Case For Upholding the Amended Exceptional Jurisdiction Clause of the Uniform Code of Military Justice*, 44 TEX. INT’L L. J. 65, 68 (2009) (“[S]ubjecting employees of private military firms to courts-martial is the only sensible and practical means to ensure battlefield discipline and accountability.”); Kevan F. Jacobson, Paper, *Restoring UCMJ Jurisdiction Over Civilian Employees During Armed Hostilities*, U.S. Army War College, March 15, 2006 (arguing that civilians should be subject to UCMJ if they accompany the military overseas).

¹²³ U.S. Department of Defense, Memorandum, UCMJ Jurisdiction Over Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations, March 10, 2008.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ The Court of Military Appeals is now called the United Court of Appeals for the Armed Forces *see* U.S. Court of Appeals for the Armed Forces. See “Establishment” <http://www.armfor.uscourts.gov/Establis.htm> (describing the history of the military’s highest appellate court).

¹²⁷ See, e.g., *Zamora v. Woodson*, 19 C.M.A. 403, 405-406 (C.M.R. 1970) (dismissing the charges against a civilian contractor serving in Vietnam for lack of military jurisdiction) (quoting *United States v. Averette*, 19 C.M.A. 363, 366 (C.M.R. 1970) (“We conclude that the words ‘in time of war’ mean...a war formally declared by Congress.”)).

¹²⁸ 41 C.M.R. 363 (C.M.A. 1970).

working for the Army in Vietnam.¹²⁹ Citing what the majority considered to be the “most recent guidance...from the Supreme Court”¹³⁰ considering the application of military law to civilians, the military court applied a “strict and literal construction” of the phrase “in time of war” from Article 2(10) because the court believed that a broader interpretation “would [have] open[ed] the possibility of civilian prosecutions by military courts whenever military action on a varying scale of intensity occur[red].”¹³¹ Of note, the military court decided *Averette* during the Vietnam conflict.¹³² Even though the court recognized that the fighting “qualified as a war as that word is generally used and understood,” the court refused to “shortcut” the requirement that Congress formally declare war because of “the sensitive area of subjecting civilians to military jurisdiction.”¹³³

The Court of Appeals for the Armed Forces has never overruled *Averette*.¹³⁴ Senator Graham’s 2006 amendment to Article 2(10) appears to have essentially overruled *Averette* and subjected civilian contractors to military law. However, DOD has been reluctant to use this jurisdiction.

(5) Use other criminal statutes to prosecute

It is possible to prosecute PSCs using other criminal statutes. MEJA is not the only federal statute that might apply to crimes committed by PSCs in Iraq. For example, under the Special Maritime and Territorial Jurisdiction Act (“SMTJ”), if a U.S. national is the perpetrator or victim of a crime that occurs on: (1) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States; and (2) the

¹²⁹ *Id.* at 363 (“A general court-martial at Long Binh, Vietnam, convicted Raymond G. Averette of conspiracy to commit larceny and attempted larceny of 36,000 United States Government-owned batteries.”).

¹³⁰ The majority in *Averette* listed a series of Supreme Court cases that it believed were an indication that the Court “disapproved the trial by courts-martial of persons not members of the armed forces.” *Id.* at 364. The list included: *U.S. ex. rel. Toth v. Quarles*, 350 U.S. 11, 24 (1955) (rejecting the court martial of an honorably discharged civilian for a murder that he allegedly committed while still a member of the military); *Reid v. Covert*, 354 U.S. 1, 5 (1957) (rejecting the court martial of two civilian spouses who murdered their military-member husbands while stationed overseas); *Kinsella v. U.S. ex. rel. Singleton*, 361 U.S. 234, 249 (1960) (rejecting non-capital crime court-martial for civilian dependents accompanying armed forces overseas).

¹³¹ *Averette*, 19 C.M.R. at 365.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Lower military courts grudgingly applied *Averette*. See, e.g., *United States v. Grossman*, 42 C.M.R. 529, 531 (1970) (“The offenses of which the accused was convicted involved the shooting of three soldiers of the United States Army. As far back as the Indian Wars, court-martial jurisdiction has been exercised over civilians serving with the armies in the field during hostilities which were not formally declared wars. (citation omitted) Despite this and the fact that this accused will probably never be retried for the offenses involved in this case, we are constrained to hold that the court-martial lacked jurisdiction because of the decision in *United States v. Averette*.”).

premises are located in a foreign State and used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities, then it is possible to establish jurisdiction. Criminal statutes that apply within the SMTJ include maiming, arson, assault, kidnapping, sexual abuse, assault or contact, murder, and manslaughter.¹³⁵

In addition to crimes that are punishable only if they occur certain places overseas, many federal statutes may expressly or implicitly cover crimes that occur abroad if committed by or against U.S. nationals.¹³⁶ For example, the War Crimes Act of 1996 covers conduct “whether inside or outside the United States,” so long as the victim or perpetrator is a U.S. national or member of the Armed Forces.¹³⁷ The statute does not appear to cover foreign nationals who commit war crimes in connection with U.S. contingency operations overseas, even if they are employed by the U.S. government or U.S. government contractors.

¹³⁵ DOJ convicted a CIA contractor using SMTJ for assault of a prisoner in Afghanistan.

See Department of Justice Press Release, *David Passaro Sentenced to 100 Months Imprisonment: First American Civilian Convicted of Detainee Abuse During the Wars in Iraq and Afghanistan*, February 13, 2007, <http://charlotte.fbi.gov/dojpressrel/2007/ce021307.htm>.

¹³⁶ See CRS Report 94-166, *Extraterritorial Application of American Criminal Law*, by Charles Doyle.

¹³⁷ Pub. L. 104-192, § 2(a), 110 Stat. 2104 (Aug. 21, 1996), codified as amended at 18 U.S.C. § 2441.

CHAPTER 4: CRITERIA

This chapter describes the four criteria used to assess each of the policy options proposed in the previous chapter. This project evaluates each of the policy options using the following four criteria:

Advances U.S. interests in the region.

A recommended option will strengthen the U.S. relationships with Iraq and not be detrimental to other regional relationships. When evaluating a policy option against this criterion, State should consider the impact of the policy on U.S. political, diplomatic, and security interests inside and outside of Iraq.

Maximizes administrative feasibility.

State cannot act alone in implementing a policy option. Therefore, this criterion refers to the degree to which an option would be realistic considering State's challenges when implementing the policy, the scarcity of personnel resources, and the potential requirement for interagency approval.


Maximizes domestic political support.


Even though each policy option is legally acceptable, it might not be politically desirable. This criterion assesses political feasibility. A recommended option will receive the support of Congress, the administration, and the American public.


Garners support from the international community.


A recommended option must be consistent with the United States' obligations under international law. In terms of international customary law, other countries should perceive the option as complying with accepted legal norms. This criterion therefore assesses how each policy option might affect the perception of the United States by other countries.


The following symbols are used to evaluate the criteria listed above:

 = strongly satisfies criterion

 = moderately satisfies criterion

 = neutral or does not address the criterion

 = may not satisfy criterion

 = fails to satisfy criterion

CHAPTER 5: ANALYSIS OF POLICY OPTIONS

Option 1: Establish jurisdiction using MEJA

Criteria:	Advances U.S. interests in the region	Maximizes administrative feasibility	Maximizes domestic political support	Garners support from international community
Option: (1) Establish jurisdiction using MEJA	↔	↑	↗	↗

This policy option is essentially the status quo. Using MEJA to prosecute PSCs maximizes administrative feasibility because nothing changes. In order to prosecute PSCs working under a State contract, the government must prove “the extent such employment relates to supporting the mission of the Department of Defense overseas.”¹³⁸ As long as the military remains in Iraq and continues its military mission, the government will likely be able to establish this element of MEJA for PSCs operating under State contracts. Therefore, in the short-term, this policy option remains available for State. There are, however, three potential problems with continuing to rely on MEJA to prosecute State PSCs.

First, it is unclear whether this policy option advances U.S. interests in the region. Because the United States has struggled in prosecuting some high-profile MEJA cases, it might be difficult to assure the Iraqi government, in addition to other regional governments, that the United States can continue to rely on MEJA to criminally prosecute PSCs in the future. For example, when Judge Urbina dismissed the charges in *U.S. v. Slough*—the criminal case stemming from the Nisur Square shooting that killed seventeen Iraqi civilians and wounded twenty more—Vice President Biden “promised Iraqi leaders” that the United States would appeal and expressed “personal regret” for the shooting.¹³⁹ As of April 2011, the appeal is still pending.¹⁴⁰

In *U.S. v. Slough*, the district court concluded that the government violated the defendants’ Fifth Amendment privileges against self-incrimination because it “used the

¹³⁸ 18 U.S.C. 3267 (2010).

¹³⁹ Anthony Shadid, *U.S. To Appeal Blackwater Case Dismissal, Biden Says*, N.Y. TIMES, Jan. 24, 2010, at A12.

¹⁴⁰ See, e.g., Government’s Motion to Hold Partially Closed Oral Argument on Feb. 8, 2011 (D.C. Cir. Jan. 17, 2011) available at http://www.politico.com/static/PPM153_black.html (noting that the government is prepared to begin its argument publicly but that it will need to “turn to sealed matters” in the case).

defendants' compelled statements to guide its charging decisions, to formulate its theory of the case, to develop investigatory leads, and ultimately, to obtain the indictment."¹⁴¹ These statements stemmed from interviews conducted by agents from the Department of State Diplomat Security Service ("DSS") immediately after Nisur Square shooting.¹⁴² DSS agents interviewed the defendants and obtained written statements from them on September 16, 2007 in accordance with what the government argued were "routine, job-related reporting requirements,"¹⁴³ but the court rejected these arguments.¹⁴⁴

When the shooting incident occurred in 2007, DSS was already somewhat overwhelmed.¹⁴⁵ In fact, Congress later held hearings to investigate State Department oversight and accountability practices.¹⁴⁶ Even Judge Urbina noted that "by all accounts, it was out of the ordinary for DSS agents to conduct interviews of all the members of a unit following a shooting incident."¹⁴⁷ In comparison and unlike the Department of State, the military had already addressed "implementing investigative policies" that were supervised by the DOD Inspector General for crimes potentially involving MEJA.¹⁴⁸

Since the high-profile case of *U.S. v. Slough*, State has addressed many of its oversight and accountability issues relating to PSCs. Nevertheless, the perception in Iraq is that the status quo for holding PSCs accountable is simply not good enough.¹⁴⁹ Iraqis perceive the actions of PSCs as "abuses of power" that are "carried out with impunity."¹⁵⁰ Moreover the local Iraqis' perceptions of PSCs and their activities, has arguably, impacted their view of coalition operations in general. Consequently, is more difficult for State to advance its interests in Iraq and the region if it relies on the status quo.

¹⁴¹ *United States v. Slough*, Cr. No. 08-0360, 2009 WL 5173785 (D.D.C. Dec. 31, 2009), at *2.

¹⁴² *Id.* at *3.

¹⁴³ *Id.* at *18.

¹⁴⁴ *See id.* at *20 ("[T]he court was presented with substantial evidence indicating that it was objectively reasonable for the defendants to believe that they would be fired if they refused to answer questions on September 16, 2007."). "Most obviously, the interviews were conducted in response to an extraordinary violent shooting incident that resulted in the death or injury of more than thirty people. . . [it was] anything but routine." *Id.* at *22.

¹⁴⁵ JENNIFER K. ELSEA, ET. AL., PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES, CONG. RESEARCH SERVICE, Aug. 25, 2008, at 6-7 (discussing the broad responsibilities of DSS agents and the observation that DSS "did not sufficient personnel" to accomplish all of its duties around the world); *see also* Raghavan & Ricks, *supra* note 44; DeYoung, *supra* note 56.

¹⁴⁶ *See* House Oversight and Government Reform Committee, Hearing on Private Security Contracting in Iraq and Afghanistan, 110th Cong., Oct. 2, 2007.

¹⁴⁷ *Slough*, Cr. No. 08-0360, 2009 WL 5173785 (D.D.C. Dec. 31, 2009), at *22.

¹⁴⁸ *See* DoD Instruction 5525.11 § 5.

¹⁴⁹ *See* COTTON, ET AL., *supra* note 48, at 25 (discussing Iraqi perceptions and how "PSCs are generally thought to be effectively immune from prosecution under U.S. law").

¹⁵⁰ *Id.* at 26.

Second, this option only moderately achieves domestic political support because critics have argued that MEJA has “shortcomings.”¹⁵¹ For example, the statute does not apply to non-U.S. citizens when “there is only a tenuous nexus between a third-country national and the United States.”¹⁵² In Iraq, there are approximately 30,000 civilians working as PSCs.¹⁵³ Many private security firms employ third-country nationals because some third-country nationals have extensive military training and experience, and they are generally cheaper than U.S. coalition contractors.¹⁵⁴ In Iraq, the DOD currently employs approximately 11,029 PSCs—81% or 8,907 of those contractors are third-country nationals.¹⁵⁵ Similarly, State employs approximately 4,250 PSCs in Iraq, and about 60% or 2,550 are third-country nationals.¹⁵⁶

State will “essentially have to duplicate the capabilities of the U.S. military,” so it will double the number of PSCs that it employs by the end of 2011—the number would increase to “between 6,000 and 7,000 security contractors.”¹⁵⁷ It is therefore likely that State, just like DOD, will soon employ a large percentage of third-country nationals in Iraq as PSCs. Because MEJA has a shortcoming as it applies to third-country nationals and State will likely need to employ third-country nationals, this option only moderately achieves domestic political support.

Third, the status quo continued use of MEJA would likely garner only moderate international support.¹⁵⁸ For example, the United States and sixteen other countries recently signed the Montreux Document¹⁵⁹ in an effort to clarify the international legal responsibilities with respect to PSCs. The agreement includes legal obligations that arise whenever countries use PSCs during armed conflict and develops a set of “best practices.” According to the document, states that contract with private military and security companies (“contracting states”) retain their obligations under international humanitarian and human rights law, and may not outsource certain functions assigned by treaty to states parties. Part II of the Montreux

¹⁵¹ See, e.g., Steven Paul Cullen, *Out of Reach: Improving the System to Deter and Address Criminal Acts Committed by Contractor Employees Accompanying Armed Forces Overseas*, 38 PUB. CONT. L.J. 509, 532 (2009).

¹⁵² *Id.* at 532–33.

¹⁵³ SCHWARTZ, *supra* note 38, at 3.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 6.

¹⁵⁶ See GAO-11-1, *supra* note 35, at 21; GAO-10-266R, *supra* note 43, at 10.

¹⁵⁷ COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, BETTER PLANNING FOR DEFENSE-TO-STATE TRANSITION IN IRAQ NEEDED TO AVOID MISTAKES AND WASTE 6 (2010).

¹⁵⁸ For a discussion of the “global issue” of PSCs that “demands an international regulatory framework,” see generally Michael Scheimer, Comment, *Separating Private Military Companies From Illegal Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support That Reflects Customary International Law*, 24 Am. U. Int’l L. Rev. 609 (2009).

¹⁵⁹ Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, UN Document A/63/467–S/2008/636 (October 8, 2009) Annex, available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/\\$FILE/Montreux-Documents-eng.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/$FILE/Montreux-Documents-eng.pdf).

Document provides detailed lists of “good practices” recommended for adoption by contracting states as well as by the PSCs themselves. The agreement urges contracting states to evaluate whether their legislation and procurement regulations are adequate to ensure accountability. Specifically, contracting states should provide for criminal and civil jurisdiction over the activities of PSCs and their actions abroad. As already discussed above, MEJA may not provide comprehensive criminal jurisdiction over PSCs working under State contracts. Thus, the continued use of MEJA would likely receive moderate international support.

Option 2: Encourage Congress to enact CEJA

Criteria:	Advances U.S. interests in the region	Maximizes administrative feasibility	Maximizes domestic political support	Garners support from international community
Options:				
(2) Encourage Congress to pass CEJA	↑	↗	↗	↑

Depending on the court’s interpretation of the extent to which a PSCs “employment relates to supporting the [military] mission” under MEJA, a court could plausibly reject jurisdiction.¹⁶⁰ In *U.S. v. Slough*, the case never got to the trial, so the government prevailed on its pretrial procedural argument establishing MEJA jurisdiction over State PSCs.¹⁶¹ However, the court never considered the factual sufficiency of the jurisdictional claim found in the indictment because it never considered the evidence that would have been admitted during trial. Accordingly, it is unclear if the government would have prevailed using MEJA.

CEJA eliminates the problems of trying to apply a jurisdictional statute enacted for the military to civilians. In fact, CEJA expressly applies to federal contractors or employees of “any department or agency of the United States other than the Armed Forces.”¹⁶² Unlike MEJA, the provisions of CEJA would cover third-country nationals employed as PSCs.

¹⁶⁰ Over the next many years, the United States will likely transition away from kinetic military operations (taking the fight to the enemy) to more nation-building operations in Iraq and Afghanistan. As the military mission diminishes, the diplomatic mission conversely increases in importance.

¹⁶¹ The government argued that the Supreme Court has articulated “long standing principles prohibiting pretrial litigation of claims relating to the insufficiency of evidence in advance of the presentation of such evidence.” Government’s Opposition to Defendant’s Motion to Dismiss for Lack of Jurisdiction, Cr. No. 08-360, at 10 (D.D.C. Jan. 27, 2009).

¹⁶² Civilian Extraterritorial Jurisdiction Act, S. 2979, 111th Cong. § 3272(a) (2010).

The sponsors of CEJA announced that the proposed legislation will do three things:

- (1) Direct the Justice Department to create new investigative units to investigate, arrest and prosecute contractors and employees who commit serious crimes;
- (2) Allow the Attorney General to authorize federal agents to arrest alleged offenders outside of the United States, if there is probable cause that an employee or contractor has committed a crime; and
- (3) Require the Attorney General to report annually to Congress the number of offenses received, investigated and prosecuted under the statute; the number, location, and deployments of the newly created investigative units; and any changes needed in the law to make it more effective.¹⁶³

Under CEJA, the “Attorney General, in consultation with the Secretary of Defense, the Secretary of State, the Secretary of Homeland Security and heads an other departments or agencies of the federal government,” shall create “Investigative Units for Contractor and Employee Oversight.” Given the expertise of the Federal Bureau of Investigations in comparison to DSS agents (like those who investigated the shooting incident in *Slough*), government prosecutors would likely not have to deal with the problems associated with using compelled statements.

Because CEJA creates a new jurisdictional framework for holding PSCs working under State contracts accountable for the crimes that they commit, this option advances U.S. interests in the region and garners support from the international community. The problem with this option is that Congress has not passed the statute. The bill was introduced in the 111th Congress on February 2, 2010 and referred to committee.¹⁶⁴ The bill never made it out of committee.

Following the 2010 elections, control of the House of Representatives shifted from the Democrats to the Republicans.¹⁶⁵ The original sponsor of H.R. 4567—the House bill for CEJA—was David Price (D-NC).¹⁶⁶ Without bipartisan support, it is unclear whether the bill will get reintroduced or even enacted in the 112th Congress. Therefore, this option only moderately addresses the criterion of maximizing domestic political support.

¹⁶³ Press Release, Representative David Price, Price, Leahy Introduce Bill to Hold American Contractors Overseas Accountable Under U.S. Law, Feb. 2, 2010 *available at* http://price.house.gov/list/press/nc04_price/020210a.shtml.

¹⁶⁴ *See* S. 2979 Bill Summary & Status, 111th Congress 2009-2010, THOMAS.GOV., <http://www.thomas.gov/cgi-bin/bdquery/D?d111:1:./temp/~bdpb0I:@@C/home/LegislativeData.php?n=BSS;c=111> |

¹⁶⁵ *See* Patricia Murphy, *Republicans Sweep the House*, POLITICS DAILY, Nov. 2, 2010, <http://www.politicsdaily.com/2010/11/02/2010-house-elections-news-and-results/>.

¹⁶⁶ There were also thirty-three co-sponsors, and all of them were Democrats. H.R. 4567 Bill Summary & Status, 111th Congress 2009-2010, THOMAS.GOV, <http://www.thomas.gov/cgi-bin/bdquery/z?d111:HR04567:@@P/home/LegislativeData.php?n=BSS;c=111> |.

If the bill were enacted, then State would need to coordinate with the DOJ and Federal Bureau of Investigations (“FBI”) in accordance with the provisions of CEJA. Because State would need to change the way it currently prosecutes PSCs, this option would require some administrative adjustment. Accordingly, this option moderately satisfies the administrative feasibility criterion.

Option 3: Prosecute PSCs under Local Iraqi Law

Criteria:	Advances U.S. interests in the region	Maximizes administrative feasibility	Maximizes domestic political support	Garners support from international community
Options:				
(3) Prosecute under local Iraqi law	↗	↔	↓	↗

The strength of this option is that it would likely receive the most support from Iraqi citizens and other regional governments. The perception that the United States is deploying PSCs who abuse and mistreat people has increased anti-American sentiment and strengthened insurgents, even when no abuses are taking place. Part of the problem is the history of coalition actions. As noted above, CPA Order 17 granted immunity from local Iraqi law to all non-Iraqi military and civilian personnel serving under the coalition. For many Iraqis, CPA Order 17 meant that PSCs were not accountable for their criminal behavior.

Because many Iraqis civilians generally do not distinguish between private contractors and U.S. or coalition forces, they may have already had a negative view of the entire military occupation and coalition forces as a whole based on reports of PSC crimes going unpunished. Under this option, State would allow Iraqi courts to prosecute any alleged PSC crimes. By allowing the Iraqi system to punish PSCs working for the U.S. government, the State Department would demonstrate its commitment to Iraqi sovereignty.

In spite of the potential political advantages of conceding criminal jurisdiction of PSCs to Iraq, it would probably be very difficult for the American public to accept. As one commentator noted:

The Iraqi legal system is vastly different from the U.S. in terms of the fundamental protections given the accused, the lack of an adversarial process and the authority and professionalism of the judiciary. In addition, corruption, religious influence, bias against foreigners, ignorance or disdain for the rule of law amongst judges, and significant security threats are all attendant in day-to-day

activities of the Iraqi courts. Unfortunately, it is a system that would be anathema to the average U.S. citizen’s perception of justice.¹⁶⁷

Therefore, this policy option fails to satisfy the criterion for maximizing domestic support. In terms of administrative feasibility, this option simply does not address the criterion.

Option 4: Rely on the Military and UCMJ

Criteria:	Advances U.S. interests in the region	Maximizes administrative feasibility	Maximizes domestic political support	Garners support from international community
Options:				
(4) Rely on the military and UCMJ	↗	↗	↘	↘

Using UCMJ to prosecute PSCs would moderately advance U.S. interests in the region because it would hold criminals accountable. Indeed, the United States has already tried one civilian. In June 2008, the military prosecuted the first civilian contractor by court-martial under the amendment to the UCMJ that expanded Article 2(10) to apply to civilians during contingency operations.¹⁶⁸ Alaa “Alex” Mohammad Ali, an interpreter with dual Canadian-Iraqi citizenship, pleaded guilty “to wrongful appropriation of a knife owned by a U.S. Soldier; obstruction of justice for wrongfully disposing of the knife after it was used in a fight with another interpreter; and making a false official statement to military investigators.”¹⁶⁹ The military provided Mr. Ali with “all the same rights, protections and privileges servicemembers receive in military court,” including his right to appeal.¹⁷⁰ Mr. Ali was ultimately sentenced to five months confinement (time served) for the offense; because of the length of time spent in confinement, he was barred from appealing the question of jurisdiction.¹⁷¹

¹⁶⁷ Ian S. Wexler, *A Comfortable SOFA: The Need for An Equitable Foreign Criminal Jurisdiction Agreement with Iraq*, 56 NAVAL L. REV. 43, 85–86 (2008).

¹⁶⁸ See Press Release, Multi-National Corps – Iraq Public Affairs Office, Civilian Contractor Convicted at a Court-Martial, June 23, 2008, available at http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=20671&Itemid=128.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Because his term of imprisonment was for a period of less than one year, he was unable to appeal the jurisdictional finding to the Court of Criminal Appeals under 10 U.S.C. § 866. The Court of Appeals of the Armed Forces denied relief. *Ali v. Austin*, 67 M.J. 186, Misc. No. 09-8001/AR (C.A.A.F. November 5, 2008) (summary disposition).

In December 2008, the military arrested James L. Adolph, a civilian contractor employed by Combat Support, and confined him at Camp Arifjan, Kuwait in anticipation of a court-martial.¹⁷² He petitioned the federal district court in the District of Columbia for a writ of habeas corpus, arguing that the Supreme Court has observed that courts-martial “have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.”¹⁷³ Before the district court ruled on the petition, the DOJ filed a motion for an extension of time since it had secured a three-count indictment in the Western District of Oklahoma pursuant to MEJA for crimes arising out of the events described in Mr. Adolph habeas petition.¹⁷⁴ Mr. Adolph voluntarily dismissed his habeas petition since his requests for relief (release from military confinement and no courts-martial) had been met.¹⁷⁵

In *United States ex. rel. Toth v. Quarles*,¹⁷⁶ the Supreme Court surveyed “the historical background of this country's preference for civilian over military trials” and observed that “free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.”¹⁷⁷ In recognition of the Court’s observation, this option may not satisfy the criterion for maximizing domestic political support or the criterion for garnering international support. The Supreme Court’s precedent sets a very high hurdle for proponents of using UCMJ to prosecute civilians. Nevertheless, some scholars have argued that it is possible to overcome.¹⁷⁸

UCMJ-opponents often cite *Reid v. Covert*¹⁷⁹ (which dealt with a wife murdering her Air Force husband at a base in the United Kingdom in the 1957) as the legal precedent that prevents the military from court-martialing civilians in military courts. But, the Supreme Court in *Reid* stressed that it was: (1) focusing on dependents; and (2) that things would have been different in its ruling if civilians were being prosecuted in time of war, which it defines as “in an area of actual fighting.”¹⁸⁰ The court goes further to hold that, “[i]n the face of an actively hostile

¹⁷² Adolph v. Gates, Petitioner’s Writ for Habeas Corpus, CV-00135 (D.D.C. Jan. 23, 2009), at 2-3.

¹⁷³ *Id.* (citing *United States ex. rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

¹⁷⁴ Motion for Extension of Time, Adolph v. Gates, CV-00135 (D.D.C. Feb. 19, 2009).

¹⁷⁵ Voluntary Dismissal Without Prejudice of Petitioner’s Petition for Writ of Habeas Corpus, CV-00135 (D.D.C. Feb. 26, 2009).

¹⁷⁶ 350 U.S. 11 (1955).

¹⁷⁷ *Id.* at 22 & n. 20.

¹⁷⁸ See generally Major Christopher S. Morgan & Major Shawn D. McKelvy, *Essay: The “Ethical” Case for Trying Civilian Contractors Under the Uniform Code of Military Justice*, 50 SO. TEX. L. REV. 859 (2009); Cullen, *supra* note 151; Colonel R. Peter Masterton, *Court-Martial Jurisdiction Over Civilians in Contingency Operations: A New Twist*, 35 N.E. J. ON CRIM. & CIV. CON. 65 (2009); Dan E. Stigall, *An Unnecessary Convenience: The Assertion of the Uniform Code of Military Justice (“UCMJ”) Over Civilians and the Implications of International Human Rights Law*, 17 CARDOZO J. INT’L & COMP. L. 59 (2009).

¹⁷⁹ 354 U.S. 1 (1957).

¹⁸⁰ *Id.* at 34.

enemy, military commanders necessarily have broad power over persons on the battlefield.”¹⁸¹ Finally, the Court both alludes to a broader reading of “land and naval forces” and favorably cites 10 U.S.C. § 802(10), the “accompanying the forces” section, saying this sets out the “maximum historically recognized extent of military jurisdiction over civilians under the concept of ‘in the field.’”¹⁸²

Those favoring UCMJ as an option for prosecuting civilian PSCs argue that military law should only apply in narrow circumstances. For example, the military should only court-martial PSC’s operating overseas who have committed serious felonies. Assuming the Constitution permits the trial of civilians accompanying the military during times of war or contingency operations, any potential case will also have to satisfy the statutory requirements of the UCMJ. To determine whether a civilian contractor who is suspected of having committed an offense is subject to prosecution under the UCMJ, it will be necessary to determine whether he is “serving with or accompanying an armed force” that is operating “in the field.” The phrase “serving with or accompanying” the forces was historically construed to require that the civilian’s “presence [must be] not merely incidental to, but directly connected with or dependent upon, the activities of the armed forces or their personnel.”¹⁸³ Courts have found that military jurisdiction over a civilian “cannot be claimed merely on the basis of convenience, necessity, or the non-availability of civil courts.”¹⁸⁴

The most persuasive argument put forth by UMCJ-proponents is that PSCs’ deserve a jury of their peers.¹⁸⁵ Since many PSC’s served in the military and would likely be acting in a military capacity (providing protective services to diplomats or government officials), a military jury is closer to their peers than a civilian jury in the United States. If the military were to convene a court-martial, the military jury would likely consist of military members also serving in the same contingency operation (*e.g.*, Iraq). If Article III courts were to prosecute the civilian contractor PSC, the jury would be drawn from that federal district and consist of civilians with presumably no military experience or exposure to operating overseas. Regardless of this perceived benefit, this option would be difficult for the State Department to implement.

¹⁸¹ *Id.*

¹⁸² *Id.* n.61.

¹⁸³ *United States v. Burney*, 21 C.M.R. 98 (1956) (concluding that a contractor’s connection with the military, despite his indirect employment through a private company, was sufficient to constitute “serving with or accompanying” an armed force).

¹⁸⁴ *In re diBartolo*, 50 F. Supp. 929, 930 (S.D.N.Y. 1943).

¹⁸⁵ *See, e.g., Morgan & McKelvy, supra* note 178, at 876 (“[J]ustice is best served by submitting complex questions involving battle space decisions to a fact finder most familiar with that landscape.”); Peters, *supra* note 122, at 411 (discussing the “unique context” of a “jury of one’s peers” for a civilian contractor who has “served in a zone of active combat operations” and noting that the contractor may actually prefer service members “who have shared a common purpose and mission” over “twelve civilians thousands of miles away from the battle zone, drawn from the safety and comfort of suburban America”).

Option 5: Use Other Federal Criminal Statutes

Criteria:	Advances U.S. interests in the region	Maximizes administrative feasibility	Maximizes domestic political support	Garners support from international community
Options:				
(5) Use other criminal statutes	↗	↗	↓	↑

Instead of relying on MEJA or CEJA, State could use other criminal statutes to prosecute PSCs who commit crimes in Iraq. There are two possible statutes:

(1) SMTJ:

The government can establish jurisdiction for murder,¹⁸⁶ manslaughter,¹⁸⁷ maiming,¹⁸⁸ kidnapping,¹⁸⁹ assault,¹⁹⁰ arson,¹⁹¹ and sexual abuse¹⁹² under 18 U.S.C. § 7, (referred to as

¹⁸⁶ 18 U.S.C. § 1111 (unlawful killing of a human being with malice) applies within the special maritime and territorial jurisdiction.

¹⁸⁷ 18 U.S.C. § 1112 (voluntary or involuntary unlawful killing of a human being without malice) applies with the SMTJ.

¹⁸⁸ 18 U.S.C. § 114 punishes any individual who, within the special maritime and territorial jurisdiction and with the intent to torture, maim, or disfigure, “cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or . . . throws or pours upon another person, any scalding water, corrosive acid, or caustic substance. . . .”

¹⁸⁹ 18 U.S.C. § 1201 (punishing “whoever seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof . . .”).

¹⁹⁰ 18 U.S.C. § 113 (prohibiting assault with intent to commit murder or a felony, assault with a dangerous weapon, assault “by striking, beating, or wounding,” simple assault, and assault resulting in serious or substantial bodily injury).

¹⁹¹ See 18 U.S.C. § 81 (punishing those who willfully and maliciously set fire to or burn any building, structure or vessel, any machinery or building materials or supplies, military or naval stores, munitions of war, or any structural aids or appliances for navigation or shipping, or who attempts or conspires to do such an act).

¹⁹² See 18 U.S.C. §§ 2241–45, 2248. First, 18 U.S.C. § 2241 criminalizes aggravated sexual abuse, which includes the use of force or threat of death, serious bodily injury, or kidnapping, or the rendering of a victim unconscious or impaired, to induce another person to engage in a sexual act. Second, 18 U.S.C. § 2242 prohibits sexual abuse using less serious threats or taking advantage of an impairment not of the aggressor’s making. Third, 18 U.S.C. § 2243 applies where the victim is a minor or ward. Fourth, 18 U.S.C. § 2244 criminalizes sexual contact (other than sexual acts as defined in § 2246) under similar conditions. Finally, 18 U.S.C. § 2245 provides for increased punishment if any of these acts results in

“SMTJ”),¹⁹³ if the crime is committed inside the “special maritime and territorial jurisdiction” of the United States. Historically, prosecutors used SMTJ to establish jurisdiction in admiralty cases or for situations where the crime was committed on the “high seas.”¹⁹⁴ In 2007, DOJ used this statute to convict a contractor employed by the Central Intelligence Agency (“CIA”) for the assault of a detainee in Afghanistan.¹⁹⁵ The Fourth Circuit upheld the conviction and noted that a firebase in Afghanistan, although only temporary, did constitute the “premises” of a “military mission” within the meaning of the SMTJ provisions.¹⁹⁶ Accordingly, the district court was correct in finding that it had subject matter jurisdiction to convict the contractor of assault under 18 U.S.C. § 113.¹⁹⁷ This case illustrates the potential reach of SMTJ as it could apply to PSCs. However, unlike MEJA or the UCMJ, SMTJ does not apply to third country nationals.

(2) *War Crimes Act:*

In 1996, Congress passed the War Crimes Act,¹⁹⁸ which prohibits “grave breaches” of Common Article 3 of the Geneva Conventions¹⁹⁹—these include torture, cruel or inhuman treatment, performing biological experiments, murder of an individual not taking part in hostilities, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages.²⁰⁰ In *In Re XE Services Alien Tort Litigation*,²⁰¹ Judge

death. All of these crimes are felonies. Offenders may also be required to pay restitution to victims under 18 U.S.C. § 2248.

¹⁹³ The special maritime and territorial jurisdiction (“SMTJ”) includes:

- (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and
- (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

18 U.S.C. § 7 (2010).

¹⁹⁴ § 7(1).

¹⁹⁵ Press Release, Dep’t of Justice, David Passaro Sentenced to 100 Months Imprisonment: First American Civilian Convicted of Detainee Abuse During the Wars in Iraq and Afghanistan, Feb. 13, 2007.

¹⁹⁶ *United States v. Passaro*, 577 F.3d 207, 213 (4th Cir. 2009) (finding that 18 U.S.C. § 7(9) applied to the firebase).

¹⁹⁷ *Id.* at 216 (“[W]e believe that § 7(9) extends federal criminal jurisdiction over assaults committed by U.S. nationals at [the firebase] in June 2003. By that time, the United States had retained control for nearly a year and a half over this significant, discrete tract of land, maintaining a meaningful permanent presence to conduct significant military operations, which the Afghan government sanctioned.”).

¹⁹⁸ Pub. L. 104-192, § 2(a), 110 Stat. 2104 (Aug. 21, 1996), codified as amended at 18 U.S.C. § 2441.

¹⁹⁹ 18 U.S.C. § 2441(d).

²⁰⁰ Congress passed the Military Commissions Act of 2006 that defined this list of crimes in § 6 as “grave breaches.”

²⁰¹ 665 F. Supp. 2d 569 (E.D.Va. 2009). The case is actually a consolidated case consisting of sixty-four plaintiffs who are Iraqi nationals or representatives of the estates of Iraqi nationals. *Id.* at 574.

Ellis from the federal district court for the Eastern District of Virginia held that the War Crimes Act codified the provisions of “grave breaches” under international law into the federal criminal statutes.²⁰² Moreover, these “war crimes claims are cognizable against non-state actors.”²⁰³ Consequently, PSCs can be held liable for “grave breaches” under federal criminal law.

Both of these statutes potentially advance U.S. interests in the region by holding PSCs accountable, but there are limitations to each statute that prevent State from using them in all cases. Indeed, the government has used both of these criminal statutes less frequently than MEJA, so administrative feasibility could also be an issue for State.

The strength of this option is that it likely garners tremendous support from the international community, particularly if State chose to use the War Crimes Act. Many countries already have a negative view of PSCs, and the United Nations has rejected the idea of using private military firms and hiring PSCs.²⁰⁴ For the most part, the international community has been critical of the U.S. reliance on PSCs,²⁰⁵ so this option would likely garner support around the world.

Although this option may garner international support, it fails to satisfy the criterion for maximizing domestic support. Even to punish the most heinous criminals, it is unlikely that the American public would support using the war crimes statute to prosecute an American citizen employed as a PSC in Iraq under a State contract. As an example of how the DOJ prosecutes criminals under different statutes, the Department tried and ultimately convicted Roy M. Belfast Jr. (aka Chuckie Taylor) using the torture statute, 18 U.S.C. § 2340A (and not the war crimes statute).²⁰⁶ The defendant, the son of former Liberian President Charles Taylor, was found guilty torture for “repeatedly burning the victim’s flesh with a hot iron, burning various parts of his body with scalding water, including forcing the victim to hold scalding water in his hands at gunpoint, repeatedly electrically shocking the victim’s genitalia and other body parts, and rubbing salt into the victim’s wounds.”²⁰⁷ In spite of these actions, the DOJ did not use the war crimes statute. If the DOJ is unwilling to use the war crimes statute for such an extraordinary case of torture, it is unlikely that the statute could be used to prosecute PSCs in Iraq.

Collectively, the plaintiffs alleged that private security firms, like Blackwater (Xe Services), and their employees committed shootings and beatings in Iraq. *Id.* In all of the cases, plaintiffs sought recovery from defendants under the Alien Tort Statute, 28 U.S.C. § 1350, for injuries resulting from the alleged commission of war crimes. *Id.* at 576.

²⁰² *Id.* at 585.

²⁰³ *Id.*

²⁰⁴ Haider Rizvi, *Peacekeepers-for-Hire? Not So Fast, Critics Warn*, INTER PRESS SERVICE, Mar. 30, 2009, available at <http://www.ipsnews.net/news.asp?idnews=46319> (reporting that the United Nations Department of Peacekeeping Operations does not employ and has no plans to employ PSCs).

²⁰⁵ See *supra* note 85 (noting international reaction to Nisur Square shooting).

²⁰⁶ See Press Release, Dep’t of Justice, Roy Belfast Jr. aka Chuckie Taylor Indicted on Torture Charges (Dec. 6, 2006), http://www.justice.gov/opa/pr/2006/December/06_crm_813.html.

²⁰⁷ *Id.*

CHAPTER 6: POLICY RECOMMENDATIONS

Criteria: Options:	Advances U.S. interests in the region	Maximizes administrative feasibility	Maximizes domestic political support	Garners support from international community
(1) Establish jurisdiction using MEJA	↔	↑	↗	↗
(2) Encourage Congress to pass CEJA	↑	↗	↗	↑
(3) Prosecute under local Iraqi law	↗	↔	↓	↗
(4) Rely on the military and UCMJ	↗	↗	↖	↖
(5) Use other criminal statutes	↗	↗	↓	↑

<u>Key</u>	
↑	= strongly satisfies criterion
↗	= moderately satisfies criterion
↔	= neutral or does not address the criterion
↖	= may not satisfy criterion
↓	= fails to satisfy criterion

Based on my research and findings, I recommend that State implement the following two policy options in the near future:

Option 1: Establish jurisdiction using MEJA

Option 2: Encourage Congress to pass CEJA

These options complement one another. Even though MEJA has potential “loopholes” in its application to PSCs working under State contracts, federal courts have nevertheless broadly defined the statutory text as applying to State PSCs. The courts have found that the State PSCs were “accompanying” the military and “supporting the mission” of DOD because the alleged criminal incidents occurred during combat operations. Therefore, it is likely that Option 1 will suffice at least until January 2012.

By relying on MEJA in the near term, State has time to encourage Congress to enact CEJA or another statute that is similarly constructed to apply to federal civilian contractors or employees of “any department or agency of the United States other than the Armed Forces” operating overseas in places like Iraq. This option is critically important for State because it will assume the lead role in Iraq as the military officially leaves. State expects to double the number of PSCs that it employs in Iraq. Whether civilian or military, security providers face life and death threats every day, and they do not always make the right decision. If a crime is committed, then State needs to ensure that the criminal is held accountable. Without MEJA, State will need to rely on a statute like CEJA to ensure that it can criminally prosecute its PSC employees.

State should consider the following option only under narrow circumstances:

Option 3: Prosecute under local Iraqi law

In the event that State cannot establish jurisdiction using MEJA or CEJA to prosecute a third-country national PSC, it should consider using local Iraqi law. Because the Iraqi government and people already perceive most PSCs as immune from prosecution, State could demonstrate that it is committed to working with Iraq as a partner (and not as an occupying power) if it allowed the Iraqi courts to prosecute third-country national PSCs that would otherwise escape prosecution. By limiting this option to third-country nationals, State can mitigate the lack of domestic public support because the American public would likely tolerate a non-U.S. citizen being prosecuted by a foreign government before it would tolerate subjecting a U.S. citizen to such prosecution.

At this time, I do not recommend the following options:

Option 4: Rely on the military and the UCMJ

Option 5: Use other criminal statutes

Even though both policy options are available to State, neither option provides a sustainable, long-term solution for prosecuting PSCs who commit crimes in Iraq. Without the

military continuing to operate in Iraq, State cannot rely on the UCMJ. Moreover, the other criminal statutes—the SMTJ and the War Crimes statutes—are too narrow to adequately cover the range of potential crimes that might be committed. Even if State chose to use these statutes, it is likely that it would create serious political problems that are avoidable under other policy options.

APPENDIX: PRINCIPAL-AGENT FRAMEWORK—A MODEL FOR OVERSIGHT

Scholars have examined issues associated with an employer's oversight of its employees. For many decades, economists have grappled with issues related to agency—where one entity (the principal) has delegated authority to someone else (the agent) to act on its behalf.²⁰⁸ The economic model of the relationship—sometimes called “agency theory”²⁰⁹—is based on the legal definition of agency that imposes “consequences” on the principal for the conduct of the agent.²¹⁰ Many authors have explained the relationship between the principal and agent in various ways,²¹¹ but the essence of the model is that the “employer (principal) would like to hire a diligent worker (agent), and, once hired, would like to be certain that the employee is doing what he is supposed to be doing (working) and not doing something else (shirking).”²¹²

Under the a principal-agent framework, the principal's primary goal is to structure its relationship with the agent—frequently through the use of a contract—in a way that encourages the agent to act in accordance with the principal's preferences rather than his own. However, because of incomplete information and uncertainty, two problems arise in the principal-agent relationship. First, the employer (principal) is trying to select the best employee (agent), but there is the problem of “adverse selection” because the employee (agent) wants to be hired, and he has an incentive to misrepresent his ability and skill to get the job.²¹³ Second, even after the employee (agent) is hired, the employer (principal) faces the additional “moral hazard” problem

²⁰⁸ See generally Armen Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, AM. ECON. REV., Dec. 1972, at 777, 777–95 (examining “team” organizations and how actors might “monitor” individual members to prevent “shirking”); Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, Acad. of Mgmt. Rev., Jan. 1, 1989, at 57, 57–74 (providing a analysis of agency theory and reviewing the literature related to it); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, J. FIN. ECON., Oct. 1976, at 305, 305–360 (exploring the theory of the firm in terms of an agency relationship).

²⁰⁹ See generally Susan P. Shapiro, *Agency Theory*, ANN. REV. SOC. 2005, at 263, 263–84 (reviewing academic literature in economics, political science, law, and sociology as it pertains to “agency theory”).

²¹⁰ Deborah A. DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. 1035, 1038 (1998); see also Shapiro, *supra* note 209, at 273 (“[T]he law of agency provides rich grist for the social scientists’ mill . . .”).

The Restatement (Third) of Agency § 1.01 contains the following definition: “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”

²¹¹ Eisenhardt, *supra* note 208, at 61.

²¹² PETER FEAVER, ARMED SERVANTS 55 (2003). Some authors have critiqued the assumptions inherent in agency theory. See, e.g., Lex Donaldson, *The Ethereal Hand: Organizational Economics and Management Theory*, 15 ACAD. MGMT. REV. 369, 377 (1990) (discussing the “stewardship theory” to suggest that corporate managers might not always act in their self-interest); Charles Perrow, *Economic Theories of Organization*, THEORY & SOC’Y, Jan 1986, at 11, 12–14 (rejecting the assumption that all agents are work averse and driven by self interest).

²¹³ See Eisenhardt, *supra* note 208 at 61.

because the employee has an incentive to put forth as little effort as possible while trying to convince the employer that he is doing a good job.²¹⁴

To address the problems of adverse selection and moral hazard, the “standard solution” for the principal is greater oversight.²¹⁵ Yet oversight comes at a cost because the principal must invest time and money to collect information about the agent’s behavior.²¹⁶ By itself, oversight does little to actually control the agent if the principal cannot take corrective action. Therefore, principals must first be able to monitor the agent, but the principal also needs to sanction the agent if necessary to correct the agent’s errant behavior.²¹⁷

Using the principal-agent framework, scholars have examined civil-military relations.²¹⁸ The civilian principal “contracts” with the military agent to provide security and “to develop the ability to use force in defense of the civilian’s interests.”²¹⁹ The military agent possesses experience and technical expertise in military tactics and operations, and that creates an informational advantage over the civilian principal. This informational asymmetry is especially important in the civil-military context because it directly impacts “controlling the use of deadly force,” so the “stakes are much higher” than in the traditional business setting.²²⁰ In the context of civil-military relations, if the military operates in accordance with the civilian’s interests, then the military is “working.”²²¹ If the military acts in its own interest or not to the principal’s satisfaction, then it is “shirking.”²²²

²¹⁴ *See id.*

²¹⁵ Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434 (1989).

²¹⁶ *See Eisenhardt*, supra note 208, at 61 (describing “information systems” as “investments that reveal the agent’s behavior to the principal”).

²¹⁷ *See McCubbins et al.*, supra note 215, at 444.

²¹⁸ *See generally* Deborah Avant, *POLITICAL INSTITUTIONS AND MILITARY CHANGE: LESSON FROM PERIPHERAL WARS* (1994) (arguing that because of a divided principal—Congress and the President—the agent (military) will pursue cautious strategies); FEAVER, supra note 212; Damon Coletta & Peter D. Feaver, *Civilian Monitoring of U.S. Military Operations in the Information Age*, ARMED FORCES & SOC’Y, Oct. 2006, at 106; Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815 (2007).

²¹⁹ FEAVER, supra note 212, at 57.

²²⁰ *Id.* at 69.

²²¹ *Id.* at 60.

²²² *Id.* at 68 (“The military agent is said to shirk when, whether through laziness, insolence, or preventable incompetence, it deviates from its agreement with the civilians in order to pursue different preferences, for instance by not doing what the civilians have requested, or not in a way the civilians wanted, or in such a way as to undermine the ability of the civilians to make future decisions.”).

Feaver notes that “[s]hirking is part of a broader range of deviant behavior in which a soldier might engage—for instance, looting, going to sleep on duty, showing insubordination to an officer, mistreating prisoners of war, or failing to clean one’s weapon.” *Id.* at 60. For Feaver, it is self-evident that the civilian principal “wants the military to obey all laws—not to rape, murder, steal, and so on.” *Id.*

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