Holding "Hired Guns" Accountable: The Legal Status of Private Security Contractors in Iraq

David H. Chen
HOLDING “HIRED GUNS” ACCOUNTABLE: THE LEGAL STATUS OF PRIVATE SECURITY CONTRACTORS IN IRAQ

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Abstract: Since the 2003 U.S.-led invasion of Iraq, thousands of armed civilians have worked in that country providing security. The law governing these “private security contractors” (PSCs), however, has never been clear. Despite several instances involving Iraqi civilian deaths, there is still no set procedure for holding PSCs accountable. Several options have been suggested, and trying PSCs in federal district courts in the United States seems to be emerging as the preferred method. This Note argues, however, that military-run courts-martial in Iraq are preferable for several reasons.

Introduction

On September 16, 2007, members of a private security firm known as Blackwater Worldwide1 were escorting a convoy of U.S. State Department personnel through western Baghdad.2 As the convoy passed through Nisour Square, the Blackwater guards, perceiving some threat, opened fire on several civilian vehicles.3 Seventeen Iraqis were killed in the incident; a subsequent Federal Bureau of Investigation (FBI) report found that fourteen of these killings were unjustified.4

Prior to the Nisour Square incident, private security contractors (PSCs)5 had already been involved in several high-profile incidents in

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1 At the time, the company was known as “Blackwater USA”; it has since changed its name to “Blackwater Worldwide” but will be referred to simply as “Blackwater” in this Note. See Blackwater Home Page, http://www.blackwaterusa.com/about/ (last visited Nov. 17, 2007) (providing a brief description of the company and its capabilities).


3 See id.


Iraq. The killing of four Blackwater personnel in Fallujah sparked a fierce battle in that city in April 2004. Several civilian contractors were also involved in the notorious Abu Ghraib prisoner abuse. With traditional military forces in short supply, the United States has recently relied on PSCs to perform missions traditionally falling to soldiers or marines. Such missions include protecting fixed sites and guarding the numerous U.S. civilians in Iraq, such as members of the State Department and (until it was disbanded in 2004) the Coalition Provisional Authority (CPA). As PSC visibility has increased, however, their legal status has come under scrutiny. Nisour Square provides a telling example: the Iraqi government quickly declared the killings unjustified and demanded compensatory payments for the victims’ families, and some Iraqis have demanded prosecution. The incident has thus brought into sharp focus a question unanswered since the start of the Iraq War—what law should apply to PSCs for crimes committed in that conflict?

This Note attempts to answer that question. Part I contains an overview of three ways that PSCs might be prosecuted for crimes
committed in Iraq: Iraqi jurisdiction, U.S. civilian jurisdiction, and U.S. military jurisdiction. Part II presents some of the procedural and jurisdictional issues that might arise from each. Finally, Part III assesses their relative merits, and concludes that U.S. military jurisdiction is the best option.

I. Background

The United States made extensive use of contractors in its late-twentieth-century overseas involvements, but most provided supplies, not security, and were therefore not PSCs for the purposes of this Note. While armed contractors guarded U.S. diplomats in Haiti in 1994, they were few in number. It was not until the 2003 invasion of Iraq that PSCs appeared in force, performing tasks “far more extensive . . . than in past wars.”

The PSC phenomenon is so recent that there is little applicable case law. Any prosecution would be precedent-setting, and an analysis must begin with an overview of the laws that might apply should one occur. First, PSCs might simply be prosecuted under Iraqi criminal law, since states generally have jurisdiction over crimes committed within their territory, regardless of the defendant’s nationality. The law likely to be applied in this scenario is

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16 Another option would be to subject PSCs to the jurisdiction of some international body, such as the International Criminal Court; this raises jurisdictional issues beyond the scope of this Note. See generally Rome Statute of the International Criminal Court Part II, July 17, 1998, 37 I.L.M. 999, 1003–11.
19 See id.
20 Singer, Outsourcing War, supra note 5, at 120. The total number of PSCs in Iraq is not clear, but one estimate places the number at 6000. See id.
22 See id. at 581–86.
23 See Statute of the Iraqi Special Tribunal, art. 1(b) (2003) (Iraq), available at http://www.cpa-iraq.org/human_rights/Statute.htm (stating that the Tribunal, which was promulgated by the CPA, only has jurisdiction over Iraqi nationals and residents).
24 See American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (“[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”). One of several exceptions can include the “status of forces” treaties the United States often negotiates with states in which it maintains a permanent military presence. See Christopher Dickey, The
the Iraqi Penal Code of 1969, under which Iraqi courts currently operate.

Second, PSCs might be prosecuted under U.S. civilian law. The basis of jurisdiction under this option is nationality; states often exercise jurisdiction over their citizens even when they are abroad. The Military Extraterritorial Jurisdiction Act (MEJA) of 2000 appears to grant federal courts authorization to hear cases involving PSCs by giving them jurisdiction over those who commit crimes “while employed by or accompanying the Armed Forces outside the United States.” It is therefore possible that criminal charges could be brought against PSCs in U.S. district court.

Regarding this second option, it should be noted that because the MEJA language initially seemed to exempt PSCs whose contracts were not with the Department of Defense (such as Blackwater, whose contract was with the Department of State), Congress recently amended the statute, which now governs those “employed by the Armed Forces outside the United States . . . to the extent such employment relates to supporting the mission of the Department of Defense overseas.”

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27 See 18 U.S.C.A. § 1112(a) (2007) (defining voluntary and involuntary manslaughter, the charges most likely to be brought for the Nisour Square incident under federal civilian law); see also 18 U.S.C.A. § 1112(b) (2007) (establishing sentences for the respective crimes).

28 See Blackmer v. United States, 284 U.S. 421, 436 (1932) (“By virtue of the obligations of citizenship, the United States retained its authority over [Blackmer], and he was bound by its laws made applicable to him in a foreign country.”); see also United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2006) (“although there is a presumption that Congress does not intend a statute to apply to conduct outside the territorial jurisdiction of the United States . . . that presumption can be overcome when Congress clearly expresses its intent to do so”) (citation omitted).

29 See 18 U.S.C.A. § 3261(a) (2007). It is worth noting that the MEJA is inapplicable if charges are brought by a foreign government, but can apply even if charges are brought under the Uniform Code of Military Justice. See 18 U.S.C.A. § 3261(b)–(c) (2007).

30 See id.

31 See Stein, supra note 21, at 598–600.

The third and final option would be for PSCs to be prosecuted under U.S. military law; as with civilian law, the basis of jurisdiction would be the nationality of the accused. The Uniform Code of Military Justice (UCMJ) is the law that governs members of the U.S. Armed Forces, and its jurisdiction generally does not extend to civilians. Indeed, a military court “has no jurisdiction beyond that given it by statute, and, since there is no statute giving it jurisdiction over persons not in the military service, it may not assume such jurisdiction either as a matter of convenience or public policy.” As with the MEJA, however, recent changes to the UCMJ jurisdictional statute may have given military courts the necessary authority.

10 U.S.C. § 802(a) lists the categories of persons subject to courts-martial jurisdiction. Prior to 2006, one of these was, “in time of war, persons serving with or accompanying an armed force in the field.” In 1970, a court ruled that the first clause rendered the statute inapplicable except in times of declared war. Congress, however, recently addressed the “declared war” issue. In 2006, it added a key clause: UCMJ jurisdiction now extends over, “[i]n time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.” The purpose of this addition seems...
clear—to avoid the declared war distinction previously used to deny UCMJ jurisdiction over civilians.\textsuperscript{45}

II. Discussion

A. Iraqi Law

The largest obstacle to prosecuting PSCs under Iraqi law is the immunity they have already been given from such prosecution.\textsuperscript{46} In 2004,\textsuperscript{47} CPA leader L. Paul Bremer (who relied on PSCs for his own personal protection) issued a proclamation (CPA Order 17) concerning the “status of certain . . . personnel in Iraq.”\textsuperscript{48} Section 4 of this order, entitled “Contractors,” stated that “[c]ontractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract.”\textsuperscript{49}

While the Iraqi government has expressed a desire to prosecute those responsible for Nisour Square, it has not (as of this Note) formally repealed CPA Order 17.\textsuperscript{50} Until and unless it does, the PSC immunity is still in effect, and there would be no Iraqi jurisdiction for the Nisour Square incident unless it was asserted retroactively.\textsuperscript{51}

B. U.S. Civilian Law

Despite legislative attempts to close gaps in the law, the jurisdiction of U.S. federal courts over PSCs (as defined by this Note) is untested.\textsuperscript{52} Only three persons have been prosecuted under the MEJA to


\textsuperscript{46} See Dickey, supra note 24.

\textsuperscript{47} See id. (noting that Iraqi sovereignty was formally restored, and Bremer departed the country on the following day—June 28, 2004).


\textsuperscript{49} Id. at 5.

\textsuperscript{50} See Alissa J. Rubin, Iraqi Cabinet Votes to End Security Firms’ Immunity, N.Y. Times, Oct. 31, 2007, at A10. Iraq has approved draft legislation to this end, which is pending ratification by its Parliament. See id.

\textsuperscript{51} See Steven Lee Myers & Sam Dagher, Agreement with Iraq over Troops Is at Risk, N.Y. Times, Sept. 19, 2008, at A6 (noting that disagreements over contractor immunity have prevented Iraq and the United States from reaching an “agreement to extend the American military mandate.”).

\textsuperscript{52} See Peters, supra note 45, at 385. As this Note was going to print, federal prosecutors had just indicted five of the Blackwater personnel involved in the Nisour Square incident for manslaughter. See 5 Guards Charged with Manslaughter in Iraq Deaths, Nytimes.com, Dec. 8, 2008,
date: the wife of a U.S. serviceman stationed in Turkey, a dual Canadian/Iraqi citizen serving as an interpreter, and a former Marine charged after leaving the military. There is thus no clear precedent for using the MEJA in a situation like Nisour Square.

There is reason to think that use of the MEJA against PSCs might be upheld, however, as Iraq certainly appears to be a “Department of Defense mission.” There are, after all, approximately 165,000 U.S. troops currently present, with a U.S. Army general (as opposed to a State Department official) in overall command. Furthermore, the clear intent behind amending the MEJA seems to have been permitting prosecution of PSCs in federal district court.

Notwithstanding the unanswered question of jurisdiction, the major difficulty with U.S. civilian prosecution of PSCs is logistical. For
example, any trial would involve transporting witnesses, parties, and evidence to the United States. Regarding investigations, although there are FBI personnel stationed in Iraq, their focus is counter-terrorism; the team that investigated the Nisour Square shooting had to be deployed from the United States. Investigations would undoubtedly be hampered by such delays, as well as by unfamiliarity with local culture, security issues, and interagency disputes that could well arise.

C. U.S. Military Law

As there have been no court rulings on the latest amendment to the UCMJ jurisdictional statute, it remains unclear whether PSCs may now be court-martialed. A remaining issue could potentially be the phrase “serving with or accompanying an armed force.” A court could interpret it to refer only to PSCs physically accompanied by troops at the time in question, which might exempt PSCs operating independently. A court could also interpret the “armed force” phrase to refer only to PSCs employed by the Department of Defense, as opposed to the Department of State or another federal agency; this would also exempt the PSCs involved in the Nisour Square incident.

The actual procedures for court-martialed a PSC under the UCMJ are uncertain. For example, UCMJ action is initiated when a commissioned officer with command authority over the accused formally prefers charges against them. PSCs operate outside the military chain of command, however, and it is unclear which officers (if any) might have the authority to do so. Since the military does not

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63 See id.
64 See Jeremy Scahill, Op-Ed., Blackwater’s Loopholes, L.A. Times, Nov. 16, 2007, at A25; see also 5 Guards Charged with Manslaughter in Iraq Deaths, supra note 52 (noting that these same issues were projected to cause difficulties for the prosecution).
65 See generally Peters, supra note 45.
67 See id. U.S. military personnel do not appear to have been present during the shootings at Nisour Square. See Blackwater Incident: What Happened, supra note 2. State Department personnel, however, were presumably present as Blackwater was escorting a State Department convoy. See id. If any were armed, that might satisfy the “armed force” clause. See 10 U.S.C.A. § 802(a)(10) (2007).
69 See Fidell, supra note 42, at 30.
71 See id.
have a formal procedure for court-martialing PSCs, one would have to be improvised.\footnote{72}{See generally \textit{Manual For Courts-Martial, United States} (2008 ed.) (outlining court-martial procedures for uniformed service members only), available at http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf.}

Another issue is that all U.S. service members take an oath to obey orders “according to regulations and the Uniform Code of Military Justice.”\footnote{73}{10 U.S.C.A. § 502(a) (2007).} Lacking such a clause in their employment contracts, PSCs might argue that UCMJ jurisdiction is improper; they might also challenge constitutionality based on the absence of grand jury indictments or civilian juries—the primary differences between military and civilian trials.\footnote{74}{See Anthony Giardino, \textit{Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act}, \textit{48 B.C. L. Rev.} 699, 719 (2007). See generally \textit{Reid v. Covert}, 354 U.S. 1 (1957) (rejecting UCMJ jurisdiction over civilian in part because of Fifth and Sixth Amendment considerations).}

### III. Analysis

#### A. The Case Against Iraqi Jurisdiction

There are two main arguments for Iraqi jurisdiction. First, lifting PSC immunity could increase the legitimacy of the Iraqi government—a major goal, after all, of the current U.S. involvement.\footnote{75}{See Alissa J. Rubin & Andrew E. Kramer, \textit{Iraqi Premier Says Blackwater Shootings Challenge His Nation’s Sovereignty}, \textit{N.Y. Times}, Sept. 24, 2007, at A6.} Second, the U.S. Executive branch has thus far shown little inclination to hold PSCs accountable for their actions.\footnote{76}{See, e.g., Eric Schmitt, \textit{Report Details Shooting by Drunken Blackwater Worker}, \textit{N.Y. Times}, Oct. 1, 2007, at A10. In December 2006, after a Blackwater employee allegedly shot and killed a bodyguard of one of Iraq’s vice presidents, the State Department arranged for him to be sent back to the United States almost immediately. \textit{See id.} Although an FBI investigation is ongoing in Seattle, no charges have been filed as of this Note. \textit{See John M. Broder, \textit{Ex-Paratrooper Is Suspect in Drunken Killing of Iraqi}, \textit{N.Y. Times}, Oct. 4, 2007, at A10.}}

Although the FBI investigation into the Nisour Square incident may indicate a change in policy, it is unclear whether charges will follow.\footnote{77}{See Karen DeYoung, \textit{Immunity Jeopardizes Iraq Probe}, \textit{Wash. Post}, Oct. 30, 2007, at A1. Federal prosecution of the PSCs involved—presumably under the MEJA—was complicated recently by reports that State Department officials had granted limited immunity to Blackwater personnel involved in the incident during their initial investigation. \textit{See id.}}

A strong argument against Iraqi jurisdiction, however, is the potential for bias against PSCs by Iraqi courts.\footnote{78}{See Rubin & von Zielbauer, supra note 15.} Regardless of whether such bias is real, if the perception arose, subjecting PSCs to Iraqi ju...
risdiction would probably decrease the number of non-Iraqi civilians willing to work there.\(^\text{79}\) Besides PSCs, there are thousands of such contractors in Iraq performing such critical tasks as restoring the oil infrastructure, training police, and advising the Defense Ministry.\(^\text{80}\) These contractors might be unwilling to stay for fear of being brought before Iraqi courts of questionable fairness.\(^\text{81}\) Even if such an attitude was held only by PSCs, a mass exodus of that group alone would force many civilian agencies to find alternate methods of operating in a hostile environment.\(^\text{82}\) The gap might have to be filled by thinly-spread U.S. military forces; if these were unavailable, civilian agencies could be severely limited in their activities.\(^\text{83}\) Any legitimacy gained by Iraqi prosecution of PSCs could thus be offset by instability.\(^\text{84}\)

B. The Case for Military Jurisdiction

Courts martial are currently conducted in Iraq for military personnel; the infrastructure prosecuting PSCs is therefore already in place.\(^\text{85}\) Iraqi witnesses are more easily brought before tribunals in that country, and U.S. personnel who testify are likewise able to quickly return to their normal duties.\(^\text{86}\) PSC trials in district court, by contrast, could require transporting Iraqi, U.S. military, and PSC witnesses between Iraq and the United States, removing the latter two groups from areas where they are sorely needed for long periods.\(^\text{87}\)

Another argument supporting military over civilian jurisdiction is that military tribunals have experience with issues likely to arise with


\(^{80}\) See Merle, supra note 5.

\(^{81}\) See Knickerbocker, supra note 79, at 3.

\(^{82}\) See generally Broder & Rohde, supra note 18.

\(^{83}\) See Ned Parker, U.S. Restricts Movement of Its Diplomats in Iraq, L.A. Times, Sept. 19, 2007, at 1; see also Rubin & Kramer, supra note 75 (noting that the removal of Blackwater could create a “security imbalance”). In the days following the Nisour Square incident, State Department personnel were confined to the Green Zone in Baghdad while Blackwater’s activities were put temporarily on hold. See Parker, supra note 83. It is significant that despite fallout from Nisour Square, Blackwater’s contract was recently renewed, in part because there were simply no other security alternatives for the State Department. See James Risen, Iraq Contractor in Shooting Case Makes Comeback, N.Y. Times, May 10, 2008, at A1.

\(^{84}\) See id.


\(^{86}\) See Gonzalez, 2007 WL 2340508 at *1; Wise, 64 M.J. at 470.

\(^{87}\) See Singer, Above Law, supra note 10; Herszenhorn, supra note 62.
PSCs. While court-martialing civilians might infringe on the “Constitutional right . . . to a trial by one’s peers” in a strict constructionist sense, being judged by persons who are likewise familiar with the stress of combat is arguably closer to the Framers’ intent behind the “peers” language. The UCMJ could also be revised to require grand jury indictments in cases involving PSCs, thus solving the Fifth Amendment problem.

The application of military law has already proven effective. Following the prisoner abuse scandal at Abu Ghraib, eleven U.S. soldiers were convicted for their respective roles, receiving sentences of up to ten years in prison. Perhaps because the UCMJ was applied to such effect, no such scandal has since occurred; in contrast, there have already been two other reported killings of civilians involving PSCs since the Nisour Square incident.

Other problems that might arise with the application of military law are not insurmountable. UCMJ articles inapplicable to PSCs simply need not be applied. Judge Advocate officers could both prosecute and defend PSCs; the UCMJ already allows for civilian attorneys to supplement defense counsel and this provision could easily be ex-

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88 See generally Priest, supra note 11.
89 See id.
90 Giardino, supra note 74, at 738.
91 See U.S. Const. amend. V (“No person shall be held to answer for a . . . crime, unless on a[n] indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .”).
92 See, e.g., Gonzales, 2007 WL 2340508 at *1; Wise, 64 M.J. at 470; see also Singer, Above Law, supra note 10.
94 See Christian Davenport & Michael Amon, Three to Be Arraigned in Prison Abuse, Wash. Post, May 19, 2004, at A1 (noting that charges were preferred a month after the Abu Ghraib story became public); see also Graner Gets Ten Years, supra note 93 (noting that the Abu Ghraib story broke in April 2004).
tended. Acknowledgement of UCMJ authority could be required of all PSC contracts. Finally, PSCs could be brought under direct military control, thus facilitating the military’s ability to prosecute when necessary. This last action would have the added benefit of providing more oversight over PSC actions, a deterrence to future misconduct regardless of which law is applied.

Aside from potential Constitutional issues, there are several other negatives associated with UCMJ jurisdiction for PSCs. The increased case load would certainly burden the limited number of military lawyers in Iraq, and adding supervisory duties over PSCs would increase the burden for combat troops as well. The alternative, however, is to place that burden on either U.S. district courts on another continent, or an Iraqi judicial system unable to handle its own case load.

If the phrase “a person accompanying an armed force” is interpreted very broadly, there could be unintended consequences from expanding military jurisdiction. The phrase could theoretically include an embedded reporter, for example, allowing the military to court-martial members of the media. The UCMJ jurisdictional statute could be revised, however, to avoid this possibility.

**Conclusion**

PSCs must not remain outside any legitimate jurisdiction. Combat, in which PSCs are now unequivocally involved, is chaotic and deadly even with some force of law acting as a restraint; arming and training

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99 See John M. Broder & David Johnston, U.S. Military Will Supervise Security Firms, N.Y. Times, Oct. 31, 2007, at A1. The U.S. military is beginning to take this step; it has instituted a requirement that all State Department convoys (and implicitly, their PSC guards) fall under military control. See id.
100 See id.
101 See Giardino, supra note 74, at 738.
102 See Singer, Above Law, supra note 10.
103 See Stein, supra note 21, at 599.
people to kill without holding them accountable for their actions allows violence to spiral out of control.\textsuperscript{108}

Whether accurate or not, the perceived partiality of the Iraqi justice system makes this an unpalatable option for prosecuting PSCs. Such a move might appease Iraqis in the short term, but would likely reduce the number of foreign civilians willing to work there, and thus hamstring the country’s long-term rebuilding efforts. While district courts could provide a fair trial, the logistical challenges of investigating and prosecuting crimes in Iraq from the United States would be great. Furthermore, the question of which killings in combat zones are unjustified is one unfamiliar to most federal prosecutors, judges, and defense lawyers.

The best solution is to hold PSCs legally accountable under the UCMJ. To do this, they must be brought under direct military control to facilitate the military’s ability to prefer charges when necessary, and to deter unlawful conduct. Acceptance of UCMJ jurisdiction should be a prerequisite for the awarding of any U.S. government security contract. At a lower level, acknowledgment of UCMJ jurisdiction should be a clause in every individual PSC’s contract.

It is worth noting that if its military were large enough to meet the security requirements of its foreign policy, the United States’ need for PSCs would largely evaporate.\textsuperscript{109} This is not to say that PSCs have no role to play in international relations. There has been debate, for example, about using PSCs to help keep the peace in Darfur, where many states have been loath to commit regular troops.\textsuperscript{110}

A discussion on the merits of using PSCs is beyond the scope of this Note. What is clear is that PSCs must be legally accountable for their actions, as those actions, for better or worse, reflect directly upon those who employ them.

\begin{footnotes}
\footnotetext[109]{See Editorial, \textit{Blackwater’s Impunity}, N.Y. TIMES, May 16, 2008, at A22.}
\footnotetext[110]{See Rebecca Ulam Weiner, \textit{Peace Corp.}, BOSTON GLOBE, Apr. 23, 2006, at E1.}
\end{footnotes}