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# Private Security Companies: A Lack of Accountability

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Stephanie Kang first became involved in her project through the Political Science Honors Program. She found it particularly compelling to work on a subject most people do not know about within the area of U.S. security policies. Stephanie considers writing this paper to be an experience that will be of great value in writing a future dissertation. She has spent the last year teaching in South Korea, and hopes to move on to graduate school with an ultimate goal of becoming a university professor. Stephanie feels that her research experience has already given her a strong foundation—both methods and materials—for further research.

## Abstract

The emergence of the private security industry has blurred the distinctions between public and private domains because states are no longer the sole actors in the theater of conflict. Private security companies, or PSCs, have gained entry into war zones through lucrative military contracts and the global market. By providing instrumental military services and unique political advantages, PSCs can be a favorable option for U.S. military operations in Iraq and Afghanistan. However, despite their growing influence, the U.S. has yet to establish an effective legal framework for ensuring PSC accountability, transparency, and regulation abroad. This paper focuses on current U.S. efforts toward PSC regulation through the implementation of three key laws: the Patriot Act/Special Maritime and Territorial Jurisdiction Act, the Military Extraterritorial Jurisdiction Act, and the Uniform Code of Military Justice. Through four detailed case studies, this paper seeks to highlight the major flaws and loopholes in U.S. law and suggest viable solutions.

## Faculty Mentor



Stephanie's research on private security companies exposes a gap in American law. Private companies have been heavily involved in the wars in Iraq and Afghanistan, but when their employees commit crimes in war zones, it is not clear how to hold them legally accountable. Stephanie's research led her to sensible recommendations on how to fill that gap.



## Key Terms

- ♦ Military Extraterritorial Jurisdiction Act (MEJA)
- ♦ Patriot Act
- ♦ Private Security Company
- ♦ Private Security Contractor
- ♦ Private Security Industry
- ♦ Special Maritime and Territorial Jurisdiction Act
- ♦ Uniform Code of Military Justice

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## Introduction

The growing trend of private businesses working directly for and with the government raises issues of their accountability. An evident instance of this trend is the private security industry—made up of private security companies (PSCs)—which has become an attractive solution for states involved in conflicts and low-intensity wars. In response to globalization and expanding markets, new social demands and market pressures called for avenues outside of the state to meet these demands—thus states turned to the privatization of military services to cater to security demands (Avant 32–33). The U.S. in particular remains a dedicated customer of PSC services, having used an estimated 180,000 security contractors in Iraq alone (Thumner 2). Yet the uncertain boundaries created by PSCs between public and private sectors give rise to conflicts in legal accountability. This paper questions how PSCs can be held legally accountable for misconduct in the field under U.S. federal law. It examines the flaws and loopholes in the current U.S. laws against PSC misbehavior and attempt to offer viable solutions to the issues of regulation and accountability in the context of a globally-expanding private security market.

### *Private Security Companies Defined: Issues of Identification and Classification*

PSCs have a growing impact and influence on the nature of conflict. The private security industry of today is a publicized “market for force” where governments can hire contractors, or PSC employees, for a host of different military services, including operational logistics, construction of military facilities, and even armed troops (Avant 508). A better understanding of the private security industry and its services can provide clearer insight into the legal status of security contractors and ways to keep contractors accountable.

Peter Singer offers a compelling response to the question of what constitutes a PSC (also referred to as a private military firm, or PMF):

Today’s PMFs represent the evolution of private actors in warfare. The critical analytic factor is their modern corporate business form. PMFs are hierarchically organized into incorporated and registered businesses that trade and compete openly in the international market, link to outside financial holdings, recruit more proficiently than their predecessors, and provide a wider range of military services to a greater variety and number of clients. Corporatization not only distinguishes PMFs from

mercenaries and other past private military ventures, but it also offers certain advantages in both efficiency and effectiveness (191).

In the current global market, PSCs are no longer branded as vagabond mercenaries; instead, they have become publicized to an extent with ads and job listings available on the Internet (Avant 510). In contrast with mercenaries, the “modern corporate business form” of PSCs allows them to compete openly on the global market as a legal entity that is generally accepted (Schreir and Caparini 7–8). By expanding their services to function in a business environment, PSCs have broadened their image beyond that of being only mercenaries or mere soldiers for hire. As corporations, PSCs have unique roles, as well as limitations, in the military services they offer.

In Singer’s *Corporate Warriors*, he characterizes the private security industry using three main categories based on a “tip-of-the-spear typology,” with companies closer to the tip representing the services that are closest to actual combat (91). The three classes of PSCs are: Military Provider Firms, specialized soldiers trained to engage in combat; Military Consulting Firms, providing long-term training and consulting; and Military Support Firms, providing logistics, intelligence, transportation, supply, etc. (Singer 92–100). Despite the attempts to distinguish between services offered by PSCs, these classifications cannot remain static in the context of the always changing environment of warfare. For instance, a Military Support Firm, which is usually not associated with combat-related tasks, can engage in conflict while transporting supplies or escorting a government official. Similarly, PSCs can provide a variety of military services from each category depending on the demands in their contract, making it “easy for them to move from one service type to another” (Avant 17). In Deborah Avant’s *The Market for Force*, she places PSC services into two categories: external and internal security (16). External security is parceled into operational, military advice and training, and logistical support, whereas internal security ranges from policing and intelligence to armed and unarmed site security (Avant 16). Thus, PSCs can be classified into multiple categories of force based on the services they provide.

A debate over how to classify security companies and their services persists. Some argue that private military companies (PMCs) and private security companies (PSCs) are inherently different; the former having the “potential for the use of lethal force” and the latter being a policing force (Chesterman and Lehnardt 3). Yet the line delineating traditional military services and security tasks offered by PMCs

and PSCs becomes blurred and indistinguishable, resulting in an industry whose services are hard to identify and label. This paper uses the term “PSC” to encapsulate the wide range of services provided by these companies as it remains the broadest term to encompass all military and security services available in the current private security market.

### *Private Security Industry: Current Implications and Issues*

The ambiguous nature of the private security industry has significant implications for foreign policy and the laws that apply to such a lucrative market. Due to the difficulty of identifying and classifying PSCs, the issue of maintaining accountability in such a market becomes even more difficult. The aggregation of military services places PSCs into a unique position that touches upon martial, corporate, and criminal law. Essentially, the private security industry is made up of civilian contractors who work for corporations involved in military operations. According to Steve Fainaru, private contractors police “themselves under their own unwritten code” known as “Big Boy Rules” (19). This self-policing is a direct result of a lack of accountability provided by the current U.S. laws that attempt to regulate security contractor behavior. Although contractors work closely with the U.S. military and are even given the right to use force in certain circumstances (such as for self-defense), the current U.S. PSC laws are inadequate in establishing an effective legal framework of accountability that can compare with U.S. military laws. The U.S. Army has the Uniform Code of Military Justice and a special court-martial system that is unique to the military, yet the private security industry lacks such a legal system.

Although national efforts have been made to create laws against PSC misbehavior, a lack of proper models or tests prevent the U.S. government from fully addressing the issue of lawlessness in war zones. In light of these legal issues, this essay highlights the challenges posed to PSC regulation and contractor accountability abroad by evaluating the flaws in current U.S. law through case studies of current PSC laws—the Special Maritime and Territorial Jurisdiction Act/Patriot Act, the Military Extraterritorial Jurisdiction Act, and the Uniform Code of Military Justice—and offers viable solutions for the lack of accountability.

## **U.S. Response to PSC Misconduct**

Due to a lack of regulation in the private security market, one might ask what efforts the U.S. government has made to address this lack of accountability. This next section

focuses on the measures the U.S. has taken to establish an effective legal framework for PSC regulation.

### *Special Maritime and Territorial Jurisdiction Act (SMTJ) and the Patriot Act*

The first major challenge in creating a legal framework to regulate PSC behavior is the issue of extraterritoriality, namely, the application of U.S. federal law to crimes committed abroad. More often than not, U.S.-based PSCs are contracted to serve outside the U.S. to aid military or peacekeeping operations in failing states. Legal scholars address the problem of contractor misbehavior abroad by applying domestic laws that grant U.S. federal jurisdiction outside the U.S., such as the Special Maritime and Territorial Jurisdiction Act (SMTJ) and the Patriot Act. The SMTJ grants U.S. federal jurisdiction over any vessel, citizen, or corporation subject to U.S. law in “any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof” (18 U.S.C. § 7). The SMTJ gives the U.S. federal government extraterritorial jurisdiction over security contractors working abroad in areas that are secured exclusively for U.S. use. Similarly, the Patriot Act amends the SMTJ by adding “the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States” under the umbrella of U.S. extraterritorial jurisdiction (U.S.A. Patriot Act). Thus, U.S. federal district courts are given jurisdiction to try crimes that are committed by or against American citizens within specific U.S. properties or territories. The expanded jurisdiction granted by the Patriot Act expands U.S. extraterritorial jurisdiction over a broader range of specified areas, such as American military bases and embassies.

### *Military Extraterritorial Jurisdiction Act (MEJA)*

In 2000, in response to crimes committed by civilians accompanying the U.S. Armed Forces abroad, Congress passed the Military Extraterritorial Jurisdiction Act (Avant 234).<sup>1</sup> Whereas the SMTJ and the Patriot Act attempt to extend U.S. extraterritorial jurisdiction over specific places and property, the MEJA was created in order to apply extraterritorial jurisdiction directly to persons accompanying the military, namely employees of PSCs (Avant 6). The MEJA establishes a legal framework for trying civilian contractors abroad in U.S. federal courts for felonies that are punishable by more than one year in prison (Fallon and Keene 2). Initially, the MEJA only covered PSC employees and contractors working under the Department of Defense (DoD), but legal revisions made in 2004 extended MEJA’s coverage to any PSC contractor working in support of DoD missions

1. See footnote 54.

(not directly hired under the DoD). Thus, the MEJA covers a broader range of service types through its application to individuals.

### *Changes to the Uniform Code of Military Justice*

Traditionally, the U.S. federal government has held the U.S. military legally accountable under the laws laid out in the Uniform Code of Military Justice (UCMJ). Yet the unique feature of PSCs is the hiring of civilian contractors, not members of the Armed Forces. Despite cooperation with the U.S. military, private security contractors are solely bound by their contracts and the standards of the corporations they work for. In 2006, the UCMJ was amended to expand UCMJ jurisdiction “[in] time of declared war or a contingency operation” over “persons serving with or accompanying an armed force in the field” (Uniform Code of Military Justice). This revision to the UCMJ aimed to extend court-martial jurisdiction over civilian contractors who were involved in military operations abroad, namely in Iraq, whether Congress had officially declared war or not. The revised UCMJ provides that security contractors are held under the laws of the UCMJ and can be tried in military courts for crimes committed on the battlefield. The amendment to the UCMJ has created a legal framework that could potentially keep contractors accountable under U.S. law in zones of conflict, but issues concerning constitutionality and civil-military relations need to be addressed before its effectiveness becomes known.

### **Problems with Current U.S. PSC Regulation: A Lack of Transparency and Accountability**

Despite national efforts to address the issue of PSC misconduct in zones of conflict, current U.S. laws are inadequate in establishing a legitimate legal framework to hold security contractors accountable. Loopholes in the legal language of U.S. laws, a lack of clear definitions as to which laws apply directly to PSCs, and a lack of political will to address these problems continue to impede any progress towards an effective legal framework. This section highlights the underlying issues of the aforementioned U.S. laws and provides case studies demonstrating how these laws fail to create a network of effective PSC regulations that ensures transparency, legal ramifications for crimes committed, and accountability abroad.

#### *The SMTJ and the Patriot Act: The Triple Canopy Case*

Although the U.S. has managed to expand its extraterritorial jurisdiction with amendments to the SMTJ under the USA Patriot Act, the problem of contractor misconduct in

combat zones persists. The so-called Triple Canopy case in Iraq highlights limitations of the SMTJ and the Patriot Act’s inability to apply U.S. jurisdiction effectively over crimes committed outside the U.S.. The case brings to light the legal and pragmatic barriers that limit the application of U.S. extraterritorial jurisdiction as “it does not adequately create the judicial ability to prosecute misconduct in an occupied foreign state during wartime” (Cadieux 4).

On July 8, 2006, Jacob Washbourne shot two Iraqi civilian cars on separate occasions, claiming he “want[ed] to kill somebody” that day (Human Rights First 48). Washbourne was assigned as a shift leader under the “Milwaukee” project, a “warzone taxi service” dedicated to escorting PSC executives around Iraq in heavily armored vehicles (Fainaru 18–19). The escort team was responsible for picking up a Kellogg Brown & Root executive from the Baghdad airport when the shooting incident occurred (Chivers 1). According to eyewitness accounts, Washbourne fired several shots into the windshield of an Iraqi truck without provocation (Fainaru 28). Washbourne claimed he had “never shot anyone with [his] pistol before” and proceeded to fire several rounds into the windshield of an approaching taxi (Fainaru 29). Despite several differences in later accounts of the incident, all three witnesses agreed that Washbourne had “turned his weapon on an innocent person for amusement” (Fainaru 29). Although three contractors witnessed Washbourne’s actions during the convoy’s assignment, failure to report the incident immediately placed the witnesses on the company’s blacklist, “rendering them unemployable in the lucrative trade of providing private security in Iraq” (Fainaru 1). Washbourne was eventually terminated from the company, but never faced criminal charges.

The Triple Canopy case reveals a lack of public accountability and the limitations placed on the SMTJ and Patriot Act’s jurisdictional reach. The major flaw in the SMTJ and the Patriot Act is the laws’ inability to apply U.S. jurisdiction over crimes committed outside of U.S. territories. The SMTJ and the Patriot Act grant U.S. extraterritorial jurisdiction over “any lands reserved or acquired for the use of the United States,” which includes—but strictly limits—federal jurisdiction over U.S. military bases, embassies, and diplomatic consulates (Avant 17). Although these premises are covered under U.S. law, the underlying problem with the SMTJ and the Patriot Act lies in the fact that, more often than not, contractor misconduct and crimes are committed outside of U.S. properties, particularly in areas where transparency is low and lawless actions are virtually ungovernable (Lindemann 87). The limitations placed on extraterritorial jurisdiction create a host of restrictions that hinder the abil-

ity of the U.S. to effectively prosecute crimes committed in the theater of conflict. Caparini and Schreir state that because U.S. criminal law is inapplicable outside of U.S. territorial jurisdictions, “if an employee of a US-based PMC commits an offense abroad, the likelihood of prosecution is very low” (Caparini and Schreir 68).

*Military Extraterritorial Jurisdiction Act: A Closer Look at the Abu Ghraib Prison Scandal*

In response to the restrictions placed on the SMTJ and the Patriot Act’s jurisdictional reach, Congress applied the Military Extraterritorial Jurisdiction Act (MEJA) to civilians working as contracted employees in foreign countries. The MEJA attempts to fully address the jurisdictional gap that is created when civilian contractors commit crimes abroad (Yost and Anderson 447), yet it fails to establish an effective legal framework for prosecution due to a host of loopholes and ambiguities. The Abu Ghraib prison incident reveals the gaps in the MEJA’s legal applicability and problems in the MEJA’s legal language. The Department of Justice (DoJ) has only charged twelve people under the MEJA since its initial passage in 2000, despite the numerous accounts of PSC misconduct and use of force abroad. As of this writing, the civilian contractors involved in the Abu Ghraib prison scandal have yet to be charged.

In 2004, the “Fay Report” was published, revealing the human rights abuses and acts of torture occurring at the Abu Ghraib prison in Iraq (Human Rights First 52). In spite of the vast coverage of the Abu Ghraib prison scandal in public media outlets, the involvement of civilian contractors is often unknown or overlooked by the general public. One account of the prison abuse claimed that “C.I.A. officers and linguists and interrogation specialists from private defense contractors were the dominant force inside Abu Ghraib” (Hersh 2). In fact, civilian interrogators from Titan Corporation and a civilian interpreter from CACI International were implicated in the Abu Ghraib incident for being involved in numerous acts of torture against Iraqi prisoners. Military personnel and servicemen/women involved in the Abu Ghraib abuses were eventually court martialled under the auspices of the UCMJ or suspended and discharged, but the implicated civilian contractors have yet to be prosecuted, or even charged, by the DoJ (Hersh 2). Despite many implicating photographs proving CACI International and Titan employees’ involvement in the Abu Ghraib tortures and numerous accounts given by others present at the prison, no criminal proceedings or charges have been brought forth due to the DoJ’s statement that there is a lack of clear evidence and access to witness accounts (Hersh 52–53).

In an attempt to address the issues of liability brought forth by the Abu Ghraib prison scandal, Congress amended the MEJA’s jurisdictional scope to cover all contractors, subcontractors, and employees under any federal agency with the requirement that the person be supporting a DoD operation (Avant 234). Even though this congressional response expanded the MEJA’s applicability, the continued lack of assertive legal responses to the crimes committed at Abu Ghraib further reveal the MEJA’s inability to prosecute civilian contractors effectively and the DoJ’s inadequate response to the use of force abroad.

In tandem with the Patriot Act’s limited jurisdictional reach, the legal language of the MEJA restricts its applicability to all civilian contractors and PSC employees working in foreign countries. Initially, the MEJA only covered contractors who were hired under the DoD (Avant 234). Thus, the MEJA did not apply to civilian contractors involved in the Abu Ghraib case because the implicated contractors were hired by the Department of Interior, not the DoD (Human Rights First 25). Even after Congress’ expansion of the MEJA, it still does not cover PSCs working on overseas operations apart from DoD mandated operations. In many instances, foreign operations are carried out through agencies under the Department of State, the U.S. Agency for International Development (USAID), or the C.I.A., allowing contractors serving these operations to fall into a jurisdictional gap that the MEJA cannot cover (Prystowsky 6). The Joint Campaign Plan in Iraq—led by the DoD with support from other federal agencies—encompasses almost every civilian contractor working in Iraq (Human Rights First 26). Thus, the 2004 revised MEJA remains applicable to contractors in Iraq; however, this cannot be said of U.S. operations in other countries. If the U.S. government wanted to employ private security contractors for covert and legally questionable operations abroad, it could essentially hire PSCs that do not “support” DoD missions and escape the MEJA’s applicability.

Another area of concern is the MEJA’s failure to cover nationals of the host country and foreign nationals working for U.S.-based PSCs. According to the Congressional Budget Office (CBO), only about 20 percent (roughly 38,700) of contractors working in Iraq are U.S. citizens (Frisk and Trunkey 8). The majority of employed civilians in Iraq are Iraqi citizens or third-country nationals (who are neither U.S. citizens nor host country nationals), accounting for approximately 40 percent of the contractors in Iraq (70,500 and 81,000 respectively) (Frisk and Trunkey 8). As a result, the largest percentage of contractors working in Iraq is unaccounted for under U.S. law. Although the MEJA cov-

ers third-country nationals working under U.S. contracts, “it does not appear to extend federal jurisdiction over crimes not expressly defined as covering conduct occurring within the SMTJ” (Frisk and Trunkey 8). Essentially, Iraqi citizens and foreign nationals committing crimes in Iraq are immune to U.S. law. Additionally, many countries (besides the U.S.) cannot even account for crimes committed extraterritorially (Avant 235). The weak legal structures and underdeveloped court systems in Iraq and other conflict-ridden countries continue to allow the number of unpunished crimes committed by non-U.S. citizens working under U.S. PSCs to increase. Because “criminal jurisdiction is not exclusive to one country,” issues of “dual sovereignty” and which country’s laws apply to which contractor become muddled and hard to discern due to the diverse and heterogeneous population of contractors working overseas (Frisk and Trunkey 23).

Perhaps the greatest impediment to the MEJA’s application to private security contractors is the DoJ’s inadequate response to PSC misbehavior in the field. Despite the numerous accounts of contractor misconduct and involvement in human rights abuses, the MEJA has been used sparingly (Frisk and Trunkey 24). Between the MEJA’s passage in 2000 through March 2008, the DoD has referred fifty-eight cases to the DoJ, of which only eight have resulted in a conviction (Frisk and Trunkey 24). Of the twelve cases that proceeded to court hearings and charges, only one case indicted a contractor for a violent crime (Human Rights First 26).<sup>2</sup> The DoJ is responsible for handling the prosecution of civilian contractors working overseas, but a lack of case precedents and legal tests along with an inactive role in prosecution hinder the applicability of current PSC law.

### *The Uniform Code of Military Justice: Constitutional Issues*

In response to a lack of governmental oversight over PSCs in conflict zones, the U.S. government has implemented revisions to the Uniform Code of Military Justice (UCMJ) to include provisions specifically designed for civilian contractors supporting or accompanying the U.S. Armed Forces in military operations. The 2006 revisions to the UCMJ were explicitly intended to bring private security contractors under military law (Human Rights First 29). Yet to date, there has not been a single American civilian charged under the UCMJ (Human Rights First 29). In fact, the first and only civilian criminal case brought forth under U.S. court-martial is the case of Alaa Mohammad Ali, a dual Canadian-Iraqi citizen contractor working in Iraq (Scahill

1). In contrast with the jurisdictional limitations placed on the Patriot Act and the MEJA, the UCMJ revisions have the potential to cast a far wider net of jurisdictional scope over civilian contractors and PSC employees working abroad. By applying the UCMJ to “persons serving with or accompanying an armed force in the field” (Fallon and Keene 2), this provision can be interpreted as placing any civilian, including U.S. diplomats and representatives, associated with the U.S. Armed Forces under the UCMJ (Lindemann 89). The implications of expanding military authority and legal jurisdiction over the hundreds of thousands of civilians supporting military operations overseas could have adverse legal impacts and raise many questions on constitutional grounds.

In 2008, a civilian criminal case was brought under U.S. court-martial jurisdiction through the application of the UCMJ to a civilian security contractor. The suspect brought to military court under the UCMJ was Alaa Mohammad Ali, a dual Canadian-Iraqi contractor working for the Titan Group in Iraq (UPI Energy 2). Ali was accused of stabbing another contractor in the chest with a knife and was sentenced to five months of confinement after consequently pleading guilty (Hammond 33). The Canadian and Iraqi governments, the nations of Ali’s citizenship, both declined to prosecute Ali, and the U.S. DoJ declined to review his case due to his status as a foreign national (Hammond 34). Ali’s case brings to light two essential questions regarding the applicability of the UCMJ to civilians accompanying the military: can the UCMJ constitutionally be applied to civilian contractors and should Congress extend the UCMJ’s reach to cover civilians in conflict zones?

The answer to the first question is debatable, but the fact that the DoJ and U.S. lawyers are reluctant to use the UCMJ to prosecute civilian contractors indicates that the constitutional grounds for applying the UCMJ to private security contractors may be questionable. The 1957 Supreme Court decision in *Reid v. Covert* draws attention to the applicability of the U.S. Constitution to citizens working with the military. The *Reid v. Covert* decision holds that it is unconstitutional to court-martial civilians for capital crimes committed in peacetime (Prystowsky 11). Thus, the courts need to first verify if security contractors situated in foreign countries are, in fact, “serving with or accompanying” the U.S. military “in the field”; simply being employed overseas under a PSC is not a sufficient threshold for court-martial jurisdiction (Fallon and Keene, 2001). Based upon prior case precedent, Congress has defined the phrase “serving with or accompanying” to mean that civilians must be “directly connected with or dependent upon, the activities of the

2. In this case, Aaron Langston, a KBR employee, was indicted for stabbing an Indian woman in the throat.

armed forces or their personnel” (U.S. v. Burney). Thus, contractors must be directly involved with the daily military operations carried out by the U.S. Armed Forces. As such, the UCMJ is essentially only applicable to security contractors who are inherently involved in hostile military operations and contracted to engage in combat. As a result, PSC employees working for consulting and supporting firms cannot be subject to court-martial jurisdiction because their work is inherently non-violent. It is generally agreed that the application of court-martial—even to contractors involved in conflict zones abroad—should be rare and highly limited (Human Rights First 29). Thus, the application of the UCMJ presents a dilemma for the DoJ: an expansive UCMJ jurisdictional scope could present a detrimental impact on due process rights for contractors serving abroad or the application of the UCMJ to contractors would be highly restricted resulting in few prosecutions being made against PSC misconduct.

Even if granted that the application of the UCMJ to civilian contractors is constitutional and legal, the question of whether or not military laws and regulations should be extended to civilians accompanying the military still remains. In order to answer this question, it is essential to compare the legal status and structure of security contractors and PSCs to the legal status and organization of servicemen and women in the Armed Forces. An area of legal concern is whether or not military rules apply to private contractors working closely with the U.S. army in hostile zones. Can civilian contractors be prosecuted for military crimes, “such as disrespect of an officer or failure to obey a lawful command” or deserting one’s station (Elsea, Schwartz, and Nakamura 30)?

By closely examining the differing structures that govern what actions are permissible for private security contractors and members of the U.S. Armed Forces, it becomes evident that the laws and disciplinary actions applied to servicemen and women cannot be applied to civilian contractors. The discerning difference between contractors and military officials is the authoritative power of the PSC contract in contrast to the military’s chain of command. PSC employees are bound to the terms of their contracts with “the duties of contractor personnel... set out in a fixed written contract” (Frisk and Trunkey 20). In fact, military commanders have very limited authority over the actions of security contractors and have no authority over the terms of a PSC contract (Frisk and Trunkey 20). As a result, contractors and PSC employees are not subject to the same laws and regulations by which members of the Armed Forces are bound.

### *The Nisoor Square Incident: Issues of Legal Accountability and Oversight*

The aforementioned case studies reflect the inadequate nature of current PSC laws in the U.S. and the lack of legal accountability and congressional oversight over contractor actions abroad. The Nisoor Square incident in Iraq further demonstrates the limited legal options for contractor prosecution under current PSC laws. Although Blackwater employees were implicated for the Nisoor Square shootings, the Patriot Act, the MEJA, and the UCMJ all failed to provide effective accountability measures to convict security contractors involved in the shootings.

On September 16, 2007, Blackwater employees killed 17 Iraqi civilians and injured at least 24 more during a shootout in Nisoor Square, Baghdad (Rubin, 2007). Blackwater employees were escorting a convoy of U.S. State Department vehicles through Baghdad when the shooting incident occurred (BBC, 2008). According to FBI investigations, 14 of the killings were “unjustified and violated deadly-force rules in effect for security contractors in Iraq,” while only three shootings were justified as using force under imminent threat (Broder and Johnston 1).

A closer examination of the Nisoor Square incident gives insight into the failures of the three laws applicable to PSCs—the Patriot Act, the MEJA, and the UCMJ. First, the Patriot Act was not applicable to this case because the crimes were committed outside of the jurisdictional scope of the SMTJ and the Patriot Act. The nature of a convoy—a moving escort—implies that hostile action taken during the escort of an official cannot be covered by territorial limitations outlined in the Patriot Act. Marcia Coyle writes that the SMTJ was “written before the wars in Iraq and Afghanistan and envisioned contractors in different roles and places”; namely, contractors were presumed to be situated in military bases performing non-hostile tasks (Coyle 2007). The SMTJ and the Patriot Act can only account for crimes committed in territories that are already subject to high transparency and governmental oversight (i.e. military bases and consulates), dismissing the main problem of prosecuting contractors in areas where the use of force is prevalent whether it is justified or not. The Blackwater employees implicated in the Nisoor Square shootings are also potentially able to escape the jurisdictional reach of the MEJA due to legal loopholes in the legislation. In spite of revisions made to the MEJA after the Abu Ghraib prison scandal, the MEJA still does not fully cover every U.S.-contracted employee who works overseas. The legal loophole resides in the phrase “to the extent such employment relates to supporting the mission of the Department of Defense

overseas” (U.S.A. Patriot Act). In the case of Nisoor Square, prosecutors could argue that Blackwater’s employees were escorting a State Department convoy, not acting in support of any DoD operation (Coyle, 2007). Blackwater, Triple Canopy, and many other PSCs offer distinct escort services or personal security for public officials that are inherently not in support of DoD-related military operations. The Nisoor incident highlights the MEJA’s failure to cover all contractors due to the differing services and tasks that security contracts call for.

Finally, the Nisoor Square incident reflects the hesitancy that prosecutors have in applying the UCMJ and court martial jurisdiction to civilian contractors. The legal questions that the UCMJ raise on constitutional grounds have hampered the DoJ’s willingness to apply such laws to civilian criminal cases. Although the phenomena of the private security industry and the unique position of civilian contractors overseas have created special legal circumstances and situations, a lack of proper legal tests and case precedents leave an inadequate assessment of these special circumstances; in turn, restraining the DoJ from taking any further legal action against contractor misconduct. Although the UCMJ seems most applicable in this case, the absence of concrete eyewitness accounts and conclusive evidence suggests that military courts would not be able to make the fairest decision.

Even though the Nisoor Square incident uncovers many of the inadequacies and legal loopholes in current U.S. PSC law, the Nisoor case can also be seen as a small turning point for the U.S. government’s response to contractors’ abusing the use of force abroad (Human Rights First 18). Accordingly, after the Nisoor Square shooting was globally publicized and criticized as a display of U.S. indifference, the U.S. attorney’s office and the Justice Department’s National Security Division took the responsibility of leading the investigation against Blackwater. As a result, five Blackwater employees were given target letters and indicted for their involvement in the Nisoor Square shootings, and another contractor plead guilty to charges (DeYoung and Wilber 1). Even though significant legislative changes and revisions to PSC laws were not made, the aftermath of the Nisoor incident demonstrated the need for the U.S. to recognize the flaws in domestic PSC legislation and address them accordingly.

## The Future of PSC Legal Accountability

### *Possible Solutions for Creating an Effective Legal Framework of Accountability*

In light of the unique legal circumstances and concerns the emergence of the private security industry raises, the question of what can be done to address these issues of legal accountability still remains. Recently, Congress has held hearings in response to the multitude of cases involving contractor misconduct abroad, with a particular focus on Blackwater’s unsanctioned use of force (Human Rights First 33). Despite congressional efforts to address the problems of contractor accountability, collaborative efforts between the executive and judicial branches are needed to make fundamental changes to current PSC laws.

First, it has been suggested that Congress should amend the MEJA to extend its jurisdiction over all security contractors and PSC employees working abroad, regardless of their duties or which department they work for (Human Rights First 33). By expanding the MEJA’s jurisdictional reach to cover all civilian contractors, contractors cannot escape prosecution through various loopholes and a universal legal standard can be applied to contractors working overseas. In the case of foreign nationals working for U.S.-based PSCs, the U.S. government could make agreements with third-party countries to keep their own citizens legally accountable and encourage foreign countries to make laws that can apply extraterritorially. Congressional oversight is a mandatory measure for ensuring that contractors are kept accountable under U.S. federal law, particularly in military operations abroad where transparency is easily lost. Increasing “the number of regulators and [performing] earlier screening[s] of PMC personnel” before they are deployed overseas can increase the efficiency and effectiveness of foreign oversight (Isenberg 92).

Second, the executive branch could establish more effective methods for maintaining transparency and governmental oversight over PSC activities abroad. A stricter standard of regulation on the use of force abroad is needed to prevent civilian contractors from escaping legal repercussions. In general, communication “between the military and the legislative bodies tends to be both less frequent and designed to allow for one-way questioning (such as Congressional hearings)” (Chesterman and Lehnardt 55). Yet in contrast with Congress’ limited oversight over PSCs, the executive branch’s close contact with PSCs and its supervision of contractor activities abroad can serve as important tools for maintaining a tighter regulation of PSC laws. The executive

branch is the primary branch involved in making military contracts with PSCs with its additional “primacy in deciding on the use of force” (Chesterman and Lehnardt 55). Due to the vast number of PSCs that work for the DoD and the necessary cooperation between contractors and servicemen, the executive branch maintains the closest link to PSCs even when they are functioning abroad. Thus, the executive branch should attempt to maintain a greater link with the day-to-day tasks that occur in overseas operations.

In particular, the DoD could implement the DoD Instruction 3020.41 “Contractor Personnel Authorized to Accompany the Armed Forces” (Isenberg 89). This Pentagon-issued instruction lays out provisions that clarify the legal status of civilians hired by the military and explains when the use of force is permitted (Isenberg 89). The DoD should also enable “combatant commanders to delegate contractor oversight to officers close to the contractors’ areas of operation” (Donnelly 262). By enabling military officials to oversee contractor activities, they can dismiss PSC employees or report any violations of PSC regulations to the DoJ. The executive’s involvement in PSC operations can increase the transparency of contractor conduct in the field, making it easier for the DoJ to prosecute contractor crimes in court with sufficient evidence. Although the role of the executive is necessary for coordination and governmental oversight, the executive branch needs to cooperate with Congress and the DoJ in order to maintain contractor accountability.

Finally, the DoJ should use its judicial authority to prosecute contractors and apply the necessary legal tools to hold civilian contractors accountable. The DoJ is responsible for bringing PSC cases to federal courts. As such, the DoJ could establish an office dedicated to prosecuting contractor crimes (Human Rights First 33–34). In coordination with Congress, the DoJ could use the MEJA to prosecute civilian contractors unless other PSC laws provide better grounds for prosecution. In light of the 2009 U.S.-Iraqi Status of Forces Agreement (SOFA), the DoJ should also make efforts to help the Iraqi government establish an adequate legal system. A developed Iraqi court system could be an effective mechanism for establishing legal accountability abroad, as evidence in crimes could be accessed immediately without transfer to the U.S. The DoJ should also exercise greater legal restrictions over security contractors who are involved in “core” military operations that permit a lowered threshold for the use of force by civilian contractors (Avant 17). It is essential for the DoJ to apply the PSC laws that are available and try contractors in U.S. courts until effective legal systems can be established in foreign countries.

### *Potential Impediments to Successful Legal Accountability*

Despite efforts to secure PSC legal accountability, a host of pragmatic and political impediments may hinder successful accountability measures. One of the biggest barriers is the DoJ’s unwillingness to prosecute security contractors in federal courts. Due to a lack of sufficient resources and a hesitant team of prosecutors, the DoJ has remained relatively passive in prosecuting security contractors (Human Rights First 30). Prosecutors are also reluctant to deal with crimes that are committed overseas and often cite “insufficient precedent on which to rely” as reason for neglecting PSC cases (Isenberg 92). The need to transfer evidence from foreign countries to the U.S. often turns lawyers away. As a result, despite the persistent number of contractor crimes, very few cases have been brought to trial. Unless the DoJ starts prosecuting individual contractors, case precedents may never be established in U.S. courts (Isenberg 92). The private security industry has a limited number of legal mechanisms available to maintain legal accountability for security contractors; thus, the DoJ needs to use current laws to prosecute contractor crimes. A failure to address the unique legal status of PSC contractors will continue to hinder the development of an effective legal framework for the private security industry.

Another major barrier to effective PSC accountability is the private security industry’s significant effect on U.S. foreign policy. The privatization of military and security services “enhances the power of the executive over the legislative branch and opens new avenues for PSCs to affect foreign policy regulatory standards” (Avant 176). Although the close coordination between PSCs and the U.S. government can create avenues to regulate the flow of force and carry out U.S. interests, this relationship also “creates opportunities for PSCs to influence foreign policy” (Avant 176). In turn, PSCs can potentially carry out their own interests as well—usually monetarily based—while working under U.S. foreign policy directives and operations. Since the private security industry can be seen as an extension or integral part of U.S. foreign policy, regulation of the PSC market becomes passive and overlooked in light of fulfilling U.S. interests abroad. PSCs’ close ties with the military, the DoD, and the State Department also give the executive branch a greater reach over the political control of force resulting in Congress having less information about foreign policy incentives and a lower transparency of U.S. goals abroad (Avant 154). Additionally, PSCs and military professionals have an increasing influence over how U.S. foreign policy goals are shaped and carried out, in turn, changing relation-

ships between the public, the military, and the government (Avant 157).

Given the unique features and fluid nature of the private security industry, challenges to legal accountability for security contractors working abroad will persist. The three main laws addressing contractor misconduct in the field—the SMTJ/Patriot Act, the Military Extraterritorial Jurisdiction Act, and the Uniform Code of Military Justice—can be effective tools in creating a legal framework of accountability. Yet a host of legal loopholes, constitutional questions, and the U.S. government's unwillingness to prosecute individuals highlight the various hurdles that block effective regulation of the private security industry. Although viable solutions to establish regulatory mechanisms do exist, it is up to the U.S. government to adopt these solutions in order to have more adequate control over the use of force. Since the use of private security has become a crucial part of U.S. military operations overseas, the issue of legal accountability will persist until effective measures for liability can be established. Just as the U.S. Armed Forces has the UCMJ and military courts to keep soldiers accountable, the private security industry must also create a legal system of accountability unique to the military services provided by PSCs and the people—namely civilians—who work for multinational security corporations. The booming private security market has responded well to the demand for security services that the state cannot provide on its own, yet the market has failed to establish regulatory standards for the actions of its employees (Avant 30–31). The Triple Canopy Case, the Abu Ghraib prison scandal, and the Nisoor Square incident emphasize the inherent flaws in current U.S. PSC laws and the need for an effective regulatory framework of legal accountability.

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