

Essay

After Blackwater: A Mission-Focused Jurisdictional Regime for Private Military Contractors During Contingency Operations

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Introduction

On September 16, 2007, four gun-trucks operated by Blackwater USA entered a traffic circle in western Baghdad.¹ The trucks were on a mission to protect a convoy returning a State Department official to the Green Zone after the detonation of an improvised explosive device in another part of the city.² The events that followed, although

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¹ James Glanz & Alissa J. Rubin, *Blackwater Shootings 'Deliberate Murder,' Iraq Says*, N.Y. TIMES, Oct. 8, 2007, at A6 [hereinafter Glanz & Rubin, *Blackwater Shootings*]. This account of the September 16 incident involving Blackwater contractors at Nisour Square in Baghdad is based on an investigation conducted by the Iraqi government. See *id.*; Steven R. Hurst & Qassim Abdul-Zahra, *Iraqi Authorities Seek Blackwater Ouster*, WASH. POST, Oct. 9, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/08/AR2007100800832.html> [hereinafter Hurst & Abdul-Zahra, *Iraqi Authorities*].

² Steven R. Hurst & Qassim Abdul-Zahra, *Pieces Emerge in Blackwater Shooting*, WASH. POST, Oct. 8, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/08/AR2007100801155.html> [hereinafter Hurst & Abdul-Zahra, *Pieces Emerge*].

disputed by Blackwater, have been recounted in a consistent manner by eyewitnesses on the scene.³

Seemingly unprovoked, a Blackwater guard manning a mounted machine gun directed fire at an approaching car with two occupants, instantly killing the driver, an Iraqi medical student.⁴ As Iraqi traffic policemen ran towards the scene to assist the other passenger, Blackwater guards, apparently reacting to the vehicle's continued forward motion, unleashed a hail of bullets.⁵ The shots were effective at incapacitating their target, leaving nothing but a disabled vehicle and two charred corpses.⁶ In the chaos that followed, seventeen Iraqis were killed and twenty-seven were wounded⁷ as Blackwater operatives continued to fire on Nisour Square from vehicles and helicopters.⁸ Only after a U.S. military unit defused an armed standoff between Blackwater and Iraqi police did the Blackwater formation return to the Green Zone.⁹

In the days following the incident, amid calls from the Iraqi government for Blackwater's removal from Iraq,¹⁰ the State Department decided to assess its relationship with private security companies.¹¹ Among the questions posed by Patrick Kennedy, the State Department official leading the inquiry, was: "What is the ultimate method of discipline for P.S.C. individuals?"¹² In the weeks following the Nisour Square shootings, this question was a topic of considerable debate.¹³ Although several writers assert that private military contractors ("PMC")¹⁴ are unaccountable to the rule of law,¹⁵ the current legal

³ See James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES, Oct. 3, 2007, at A1.

⁴ Hurst & Abdul-Zahra, *Pieces Emerge*, *supra* note 2.

⁵ *Id.*

⁶ *Id.*

⁷ Glanz & Rubin, *Blackwater Shootings*, *supra* note 1.

⁸ Hurst & Abdul-Zahra, *Pieces Emerge*, *supra* note 2.

⁹ *Id.*

¹⁰ Hurst & Abdul-Zahra, *Iraqi Authorities*, *supra* note 1.

¹¹ Glanz & Rubin, *Blackwater Shootings*, *supra* note 1.

¹² *Id.* Mr. Kennedy posed this question at a meeting of representatives of private security companies in Iraq in the aftermath of the Nisour Square shootings.

¹³ See John M. Broder & James Risen, *Armed Guards in Iraq Occupy a Legal Limbo*, N.Y. TIMES, Sept. 20, 2007, at A1; Steve Fainaru, *Where Military Rules Don't Apply*, WASH. POST, Sept. 20, 2007, at A1; Associated Press, *Iraq Drafts Law on Security Companies*, N.Y. TIMES, Sept. 26, 2007, at A10; Editorial, *Accountability on the Battlefield*, N.Y. TIMES, Oct. 8, 2007, at A18; Alissa J. Rubin & Paul von Zielbauer, *The Judgment Gap: In a Case Like the Blackwater Shootings, There Are Many Laws but More Obstacles*, N.Y. TIMES, Oct. 11, 2007, at A1.

¹⁴ PMCs are employees of companies that are performing traditional military functions under a government contract in a combat zone. For more information on the structure of the

regime governing contractors is comprised of elements of American civilian extraterritorial jurisdiction and military law, host-nation law, and international law.¹⁶

Over the last decade, the growth of private security companies has been dramatic. Although the use of private security companies in contingency operations¹⁷ is analogous to uses of private forces throughout history,¹⁸ America's reliance on private contractors during the conflicts in Iraq and Afghanistan is unprecedented in modern times.¹⁹ Today in Iraq, over 180,000 contractors—20,000 to 30,000 of them armed²⁰—operate alongside approximately 165,000 military personnel.²¹ Blackwater's own rise to prominence is emblematic: with a total of \$204,000 in government contracts in 2000, Blackwater has since been awarded over \$1 billion to provide services to the U.S. government.²²

As public duties shift to private companies, what legal regime is best suited to retain administrative control? None of the options seems to be completely satisfactory. Although the rules of the U.S.

private military industry and various types of private military firms, see P. W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 88–100 (2003).

¹⁵ See *supra* note 13 and accompanying text.

¹⁶ Princeton Problem-Solving Workshop Series in Law and Security, *A New Legal Framework for Military Contractors?* 3–5 (June 8, 2007), http://lapa.princeton.edu/conferences/military07/MilCon_Workshop_Summary.pdf [hereinafter Princeton Workshop].

¹⁷ A contingency operation is “a military operation that . . . 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.” 10 U.S.C. § 101(a)(13)(A) (2006). Contingency operations lack a formal declaration of war from Congress. See U.S. CONST. art. I, § 8, cl. 11. Examples of recent contingency operations include military actions in Korea, Vietnam, Iraq, Somalia, Haiti, Bosnia, and Kosovo. See STEPHEN DAGGETT, CONG. RESEARCH SERV., *MILITARY OPERATIONS: PRECEDENTS FOR FUNDING CONTINGENCY OPERATIONS IN REGULAR OR IN SUPPLEMENTAL APPROPRIATIONS BILLS* CRS-2–6 (2006), available at <http://www.fas.org/sgp/crs/natsec/RS22455.pdf>.

¹⁸ For a history of privatized military entities, see SINGER, *supra* note 14, at 19–39.

¹⁹ See T. CHRISTIAN MILLER, *BLOOD MONEY: WASTED BILLIONS, LOST LIVES, AND CORPORATE GREED IN IRAQ* 163–64 (2006). Although the long-term decline in the use of private forces was reversed during the 1990s—when private security companies were used in clashes in Latin America, Africa, and Asia—private security companies have never “played such a crucial role on the world stage” as they do in Iraq. *Id.*

²⁰ Steve Fainaru, *Iraq Contractors Face Growing Parallel War*, WASH. POST, June 16, 2007, at A1.

²¹ Richard Lardner, *180,000 Private Contractors Flood Iraq*, WASH. POST, Sept. 19, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/19/AR2007091901836.html>.

²² *Hearing on Private Security Contracting in Iraq and Afghanistan Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. (2007) (opening statement of Henry A. Waxman, Chairman, House Comm. on Oversight and Government Reform), available at <http://oversight.house.gov/story.asp?ID=1511>.

military justice system are well-defined in the Uniform Code of Military Justice (“UCMJ”),²³ there are complications with trying civilians under the UCMJ.²⁴ Host-nation judicial systems may not be functional, at least in the early stages of contingency operations.²⁵ Moreover, trials in the United States present significant investigatory and evidentiary complications.²⁶ In response to these challenges, Congress has taken action. In 2006, Congress modified the UCMJ’s jurisdictional statute to include persons accompanying U.S. forces in time of “declared war or a contingency operation.”²⁷ More recently, Congress has entertained a proposal to extend the scope of jurisdiction under the Military Extraterritorial Jurisdiction Act of 2000 (“MEJA”)²⁸ to include all government contractors, regardless of agency affiliation, who work in or close to an area where the military is conducting a contingency operation.²⁹

This Essay argues that recent actions by Congress can form the foundation for a tiered legal regime that would employ elements of host-nation law, military law, and extraterritorial jurisdiction to provide administrative control of PMCs during contingency operations. To effectively support U.S. goals of transferring sovereignty and granting legitimacy to host-nation governments, however, Congress must place greater emphasis on prosecuting PMCs under host-nation law. Because of the critical importance of host-nation civilian support during contingency operations, this Essay advocates justice imposed by host-nation authorities rather than by American authorities acting either through military or extraterritorial jurisdiction. However, recognizing the need for effective command and control during the early stages of contingency operations, as well as the likelihood of an incapacitated judiciary during the initial stages of such operations, this Es-

²³ Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) (codified as amended in scattered sections of 10 U.S.C.).

²⁴ See *Reid v. Covert*, 354 U.S. 1, 39–40 (1957) (warning of “stealthy encroachments” on the rights of citizens).

²⁵ DEP’T OF THE ARMY, FM 3-24, COUNTERINSURGENCY D-9 (2006) (“In periods of extreme unrest and insurgency, [host-nation] legal structures—courts, prosecutors, defense assistance, and prisons—may cease to exist or function at any level.”) [hereinafter FM 3-24].

²⁶ For information on the difficulties encountered by the FBI in its investigation of the Nisour Square shootings, see David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1.

²⁷ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2007) (emphasis added).

²⁸ Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488 (codified as amended at 18 U.S.C. §§ 3261–3267 (2006)).

²⁹ See MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. § 2(a)(1) (2007).

say advocates relying on the UCMJ until sovereignty can be transferred to a functioning host-nation government. Because of the evidentiary problems, increased expense,³⁰ and difficulty of obtaining witnesses for a trial held far away from the scene of the alleged crime,³¹ this Essay argues that MEJA is the least preferred of the available options, and should serve only as a last resort when the host nation and military authorities are unwilling to prosecute.

To bring about this administrative regime over PMCs, this Essay recommends several changes to current U.S. law. First, the jurisdictional statute of the UCMJ should be amended to express a preference for host-nation law once the host-nation legal system has been certified as functional. Second, the jurisdictional statute of the UCMJ should be expanded to include all PMCs operating in the combat zone, regardless of the government agency with which their employers have contracted. Third, MEJA should be modified to require waiver of prosecution by military authorities prior to the exercise of extraterritorial jurisdiction by the Department of Justice ("DOJ").

Part I of this Essay gives a brief overview of recent changes to the legal regime governing PMCs in contingency operations, including analysis of Iraqi law as an example of host-nation law, U.S. military law under the UCMJ, and U.S. extraterritorial jurisdiction under MEJA. Part II presents the argument for a tiered system of jurisdiction for PMCs involved in contingency operations and outlines the practical steps needed to bring about such a system. Part III deals with criticisms of such an approach.

I. Current Law

A. Iraqi Law

Absent consent from the relevant "Sending State," Iraqi courts do not have jurisdiction over PMCs in Iraq.³² PMCs are immune from

³⁰ For recognition of the increased expense and evidentiary issues associated with prosecution under MEJA, see Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367, 373 (2006).

³¹ Due in part to the decision to conduct trials in the United States, "far from the scene of the killings and possible Iraqi witnesses," one of the most publicized cases of the Iraq conflict may result in no murder convictions. Paul von Zielbauer, *The Erosion of a Murder Case Against Marines in the Killing of 24 Iraqi Civilians*, N.Y. TIMES, Oct. 6, 2007, at A8.

³² JENNIFER K. ELSEA & NINA M. SERAFINO, CONG. RESEARCH SERV., PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES CRS-11-12 (2007), available at <http://www.fas.org/sgp/crs/natsec/RL32419.pdf>; Coalition Provisional Auth. Order No. 17 (Revised), § 4(2)-(3) (June 27, 2004), available at <http://www.cpa-iraq.org/>

prosecution for acts committed pursuant to their contracts.³³ The determination as to whether contractors are acting within the scope of their contract is made by the Sending State, and Iraqi courts are obligated to accept this determination as a matter of fact in any legal proceeding.³⁴

The Iraqi government, however, retains some power. PMC immunity, for example, is not absolute. Because immunity is not intended for the benefit of the individual contractors, the Sending State may issue a waiver that would allow for prosecution in Iraqi courts.³⁵ Such a waiver “must be express and in writing to be effective.”³⁶

The Iraqi government also retains power to grant and revoke licensing for private security companies, at its discretion, through the Ministry of the Interior.³⁷ Without a proper license, private security companies operating in Iraq are “in breach of Iraqi law and subject to

regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf [hereinafter CPA Order No. 17]. The Coalition Provisional Authority (“CPA”) is the international body that governed Iraq from April 2003 to June 2004. COALITION PROVISIONAL AUTH., AN HISTORIC REVIEW OF CPA ACCOMPLISHMENTS 2 (2004), http://www.iraqcoalition.org/pressreleases/20040628_historic_review_cpa.doc. With respect to a contract with the CPA, or any successor agreement, the Sending State is “the state of nationality of the individual or entity concerned.” CPA Order No. 17, § 4(6). CPA orders “remain in effect unless and until rescinded or amended” by Iraqi law. LAW OF ADMIN. FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD art. 26(A) (2004), available at <http://www.cpa-iraq.org/government/TAL.html>. As of this writing, CPA Order No. 17 has not been rescinded or amended, although a bill that would accomplish this has been introduced in the Iraqi parliament in the wake of the Nisour Square shootings. See Associated Press, *Iraq Drafts Law on Security Companies*, N.Y. TIMES, Sept. 26, 2007, at A10.

³³ CPA Order No. 17, *supra* note 32, § 4(3).

³⁴ *Id.* § 4(5). It is unclear what the parameters of this fact determination include. For example, Blackwater seemingly acts within the scope of its contract when providing security for a State Department official. In the case of the Nisour Square shootings, however, because the convoy escorting the State Department official never passed through Nisour Square, and because there is little connection between the PMCs’ indiscriminate firing on Iraqi civilians and the security of the State Department official, one can argue that Blackwater’s actions represented such a radical departure from accepted practice that they were no longer within the scope of the contract.

³⁵ *Id.* § 5(1).

³⁶ *Id.* § 5(3). It is unclear if a blanket waiver is effective, or if a waiver must be secured on a case-by-case basis. In my research, I did not find any countries that have provided either a blanket waiver or a waiver in any specific instance of PMC misconduct. See, e.g., Human Rights Watch, Q&A: Private Military Contractors and the Law, <http://hrw.org/english/docs/2004/05/05/iraq8547.htm> (last visited May 17, 2008) (“Human Rights Watch is unaware of any home states having waived immunity.”).

³⁷ Coalition Provisional Auth. Memorandum No. 17, Registration Requirements for Private Security Companies (PSC) §§ 2(1), 4(2) (June 26, 2004), available at http://www.iraqcoalition.org/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf.

prosecution.”³⁸ An order issued by the Coalition Provisional Authority requires private security firms to be “licensed by the Ministry of the Interior to possess and use licensed Firearms and Military Weapons.”³⁹

B. Military Law

Until 2007, the jurisdictional statute of the UCMJ only covered those persons accompanying U.S. armed forces in “time of war.”⁴⁰ Recently, however, that provision was modified to include “contingency operations.”⁴¹ As a result, it is possible to prosecute contractors operating in Iraq and Afghanistan for their criminal acts.⁴²

There are potential barriers, however, to the exercise of such jurisdiction. Several decisions highlight the Supreme Court’s hesitation to allow civilians to be subject to military law.⁴³ Nonetheless, the evolution of private security companies into entities that engage in armed conflict on the battlefield presents a scenario the Court has yet to examine. Because the nature of private security companies so closely resembles that of armed combatants, this extension of jurisdiction likely “does not run afoul of the Fifth or Sixth Amendments.”⁴⁴ As a practical matter, the largest barrier preventing the prosecution of PMCs under the UCMJ may be the failure of the Department of Defense (“DoD”) to publish implementing regulations to provide guidance for Judge Advocates General.⁴⁵ Until the publication of such

³⁸ *Id.* § 2(1).

³⁹ Coalition Provisional Auth. Order No. 3 (Revised) (Amended), § 3(2) (Dec. 31, 2003), available at http://www.iraqcoalition.org/regulations/20031231_CPAORD3_REV__AMD_.pdf.

⁴⁰ 10 U.S.C. § 802(a)(10) (2006).

⁴¹ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2007).

⁴² See Memorandum from Gordon England, Deputy Sec’y of Def., to Secretaries of the Military Departments, et al. (Sept. 25, 2007), available at <http://www.aschq.army.mil/gc/files/Dep-SecDef%20Memo%20Mgt%20of%20Contractors%2025Sep07.pdf>.

⁴³ See *Reid v. Covert*, 354 U.S. 1, 39–40 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955); see also *United States v. Averette*, 19 C.M.A. 363, 364 (1970) (recognizing the Supreme Court’s disapproval of “the trial by courts-martial of persons not members of the armed forces” during “periods other than a time of declared war”).

⁴⁴ Peters, *supra* note 30, at 372, 405–11.

⁴⁵ See Rubin & von Zielbauer, *supra* note 13 (noting that “military lawyers have yet to determine how to [put] the new language into effect”). As a comparison, the DoD implementing regulations for MEJA were not published until 2005, five years after passage of the statute in Congress. See Dep’t of Def., Instruction No. 5525.11, Criminal Jurisdiction over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members 1 (2005), available at <http://www.dtic.mil/whs/directives/corres/pdf/552511p.pdf> [hereinafter DoD Instruction No. 5525.11]. In March 2008, the Secretary of Defense released a memorandum providing some additional guidance for commanders on the

guidance, the extent to which a PMC would be subject to certain regulations of the UCMJ remains unclear.⁴⁶

C. Extraterritorial Jurisdiction

MEJA expands U.S. criminal law to cover persons who commit felonies “while employed by or accompanying the Armed Forces outside the United States.”⁴⁷ U.S. authorities, however, are prohibited from prosecuting an individual under the statute “if a foreign government . . . has prosecuted or is prosecuting such person for the conduct constituting such offense.”⁴⁸ Furthermore, MEJA is not intended to interfere with court-martial jurisdiction over offenses that may be tried “by statute or by the law of war.”⁴⁹

MEJA failed to address several important jurisdictional issues. “[C]ivilian and contract employees of agencies engaged in their own operations overseas,” such as the Central Intelligence Agency or the State Department, apparently are not covered by the statute.⁵⁰ Simi-

exercise of their authority under the UCMJ. Memorandum from Robert Gates, Sec’y of Def., to Secretaries of the Military Departments, et al. (Mar. 10, 2008), available at <http://www.fas.org/sgp/othergov/dod/gates-ucmj.pdf>.

⁴⁶ For example, it is unclear to what extent a PMC would “be subject to disciplinary offenses, such as the failure to report, the use of alcohol, dereliction of duty, etc.” Princeton Workshop, *supra* note 16, at 10.

⁴⁷ 18 U.S.C. § 3261(a) (2006); see David A. Melson, *Military Jurisdiction over Civilian Contractors: A Historical Overview*, 52 NAVAL L. REV. 277, 313–16 (2005); 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, 82 (2001).

⁴⁸ 18 U.S.C. § 3261(b) (2006). This provision is a product of Congress’s original concern when drafting MEJA: the failure of local authorities to prosecute U.S. nationals who commit crimes on U.S. military bases abroad. This inaction, coupled with the military’s inability to prosecute civilians under the UCMJ, created a so-called “jurisdictional gap,” and the purpose of MEJA was to close this gap. See Melson, *supra* note 47, at 313–16; Schmitt, *supra* note 47, at 56; see generally *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000) (holding that a district court lacked jurisdiction over a civilian who sexually abused his daughter on a military base in Germany).

⁴⁹ 18 U.S.C. § 3261(c) (2006). “This provision was included in the Act to preserve the use, however rare, of forums other than Article III courts to prosecute defendants—military or civilian—who violate American law.” Schmitt, *supra* note 47, at 116.

⁵⁰ ELSEA & SERAFINO, *supra* note 32, at 19. This interpretation of the statute would leave PMCs involved in the Nisour Square shootings outside the scope of MEJA. See Schmitt, *supra* note 47, at 133–34. Recently, Congress has begun steps to address this issue. On October 4, 2007, the House of Representatives passed H.R. 2740, the MEJA Expansion and Enforcement Act of 2007, by a vote of 389–30. 153 CONG. REC. H11261–67 (daily ed. Oct. 4, 2007). The act expands MEJA to apply to any person “employed under a contract . . . awarded by any department or agency of the United States, where the work under such contract is carried out in an area, or in close proximity to an area (as designated by the Department of Defense), where the

larly, “nationals of or persons ordinarily residing in the host nation” are not covered.⁵¹ Although DoD has issued implementing regulations to govern cooperation with federal authorities in cases involving MEJA jurisdiction,⁵² there has been only one successful prosecution of a contractor under the statute.⁵³

II. A Tiered Jurisdictional System for PMCs on Contingency Operations

A tiered jurisdictional regime is best suited to regulate conduct of PMCs during contingency operations. Such a system most effectively supports military operations when it prioritizes host-nation jurisdiction over military jurisdiction under the UCMJ, and UCMJ jurisdiction over American-civilian jurisdiction under MEJA.⁵⁴ Because of the likely incapacitation of the host-nation judicial system during the initial stages of a contingency operation, the host-nation tier of the tiered legal regime should not take effect until the senior military commander within the theater (“Senior Commander”) certifies that the host-nation judicial system is functional.⁵⁵

A tiered system is preferable because it is the only system equipped to accommodate the divergent enforcement interests of host-nation authorities, the U.S. military, and U.S. civilian authorities while preserving host-nation sovereignty. Although many commenta-

Armed Forces is conducting a contingency operation.” MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. § 2(a)(1) (2007).

⁵¹ ELSEA & SERAFINO, *supra* note 32, at 19. The status of third-country nationals working for private security companies under American contract is unclear. See Schmitt, *supra* note 47, at 131–32 (discussing the applicability of MEJA to third-country nationals accompanying the U.S. Armed Forces, but saying nothing about third-country nationals accompanying employees of other U.S. agencies).

⁵² DoD Instruction No. 5525.11, *supra* note 45.

⁵³ ELSEA & SERAFINO, *supra* note 32, at 19. The only known case of contractor prosecution involved a contractor in Iraq who was sentenced in May 2007 under MEJA for possessing child pornography. See Press Release, United States Attorney’s Office, Eastern District of Virginia, Military Contractor Sentenced for Possession of Child Pornography in Baghdad (May 25, 2007), available at <http://www.usdoj.gov/usao/vae/Pressreleases/05-MayPDFArchive/07/20070525khanr.html>. A LexisNexis search of federal cases for “Military Extraterritorial Jurisdiction Act” reveals only one other prosecution under the statute that was successful in the trial court. See *United States v. Arnt*, 474 F.3d 1159, 1161, 1165 (9th Cir. 2007) (vacating the conviction for voluntary manslaughter of a woman who fatally stabbed her husband, a servicemember, on a U.S. Air Force Base in Incirlik, Turkey, because “the district court erred in refusing to give an involuntary manslaughter instruction”).

⁵⁴ For a full discussion on the preferability of UCMJ jurisdiction over MEJA jurisdiction, see Peters, *supra* note 30, at 412–13.

⁵⁵ In addition to his Judge Advocate General, the Senior Commander should coordinate with experts from the Department of State and the Department of Justice to aid in this decision.

tors, contractors, and U.S. government officials support jurisdiction over PMCs in the form of the UCMJ or MEJA,⁵⁶ so far there has been little consideration given to subjecting PMCs to the law of the country in which they operate.⁵⁷

Subjecting PMCs to host-nation law would help accomplish U.S. strategic objectives during contingency operations, where the goal is to establish a legitimate, stable, sovereign, democratic host-nation government.⁵⁸ Recognizing sovereignty necessitates allowing a state to exercise judicial authority over civilians who commit crimes in the state's territory, against the state's citizens.⁵⁹ This would enhance U.S. objectives by demonstrating to the civilian population that U.S. forces are a temporary measure designed to provide short-term stability with a goal of establishing long-term sovereignty.⁶⁰

This principle holds even during counterinsurgency campaigns. A key element of U.S. counterinsurgency strategy is "[e]stablishing the rule of law"⁶¹ and supporting a legitimate host-nation government.⁶² To achieve this, the host-nation population must regard the legal system "as fair, just, and transparent,"⁶³ and the host-nation government must be able to provide security for its people.⁶⁴ Insurgents attempt to "mobilize popular support" and undermine the government's legiti-

⁵⁶ See generally Peters, *supra* note 30 (supporting UCMJ jurisdiction); Schmitt, *supra* note 47 (supporting MEJA jurisdiction).

⁵⁷ See Marc Lindemann, *Civilian Contractors Under Military Law*, 37 *PARAMETERS: U.S. ARMY WAR C.Q.* 83, 88 (2007); *War Profiteering and Other Contractor Crimes Committed Overseas: Hearing on H.R. 369 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 4 (2007) (statement of Scott Horton, Adjunct Professor, Columbia Law School), available at <http://judiciary.house.gov/media/pdfs/Horton070619.pdf>.

⁵⁸ The Army's counterinsurgency field manual describes "legitimacy"—which generally means that a government rules "with the consent of the governed"—as the "main objective" of any counterinsurgency operation. FM 3-24, *supra* note 25, at 1-21.

⁵⁹ See *Wilson v. Gerard*, 354 U.S. 524, 529 (1957) (noting the right of a sovereign nation to "punish offenses against its laws committed within its borders"); DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 184-85 (2d ed. 2006) ("One of the fundamental tenets of State sovereignty is the idea that a nation may exercise jurisdiction over persons, transactions and events occurring within its territory.").

⁶⁰ The Army's counterinsurgency manual explains the risks attributable to sustained periods of foreign occupation. See FM 3-24, *supra* note 25, at 6-2.

⁶¹ *Id.* at D-8 ("Establishing the rule of law is a key goal and end state in [counterinsurgency].").

⁶² *Id.* at 1-21.

⁶³ *Id.* at D-8.

⁶⁴ *Id.* at 1-21 ("[P]ossible indicators of legitimacy that can be used to analyze threats to stability include the . . . ability to provide security for the populace.").

macy by exploiting “[r]eaction to abuses.”⁶⁵ Host-nation control over PMCs in sovereign territory would allow the government to punish abuses by PMCs against host-nation civilians, reinforcing government legitimacy and blunting the ability of insurgents to gather support by exploiting nonexistent or failed prosecutions by U.S. officials.

A tiered jurisdictional regime would also allow commanders to take action in cases where the host-nation government would not be interested in prosecuting: for example, a situation in which a PMC discharged his weapon, killing a U.S. soldier. MEJA, acting as the bottom jurisdictional tier, could be implemented in cases that may not have enough of a direct effect on military operations to justify a commander’s attention: for example, a situation in which a PMC assaults another contractor during off-duty hours. Part II of this Essay outlines three steps necessary to effect a tiered system of jurisdiction: (A) modifying the UCMJ to express a preference for host-nation law, (B) expanding UCMJ jurisdiction to cover non-DoD contractors, and (C) modifying MEJA to express a preference for UCMJ jurisdiction.

A. UCMJ Provision Expressing Preference for Host-Nation Law

Congress should amend the jurisdictional statute of the UCMJ to require waiver by the host-nation government before prosecution of PMCs under military authority. MEJA already requires U.S. civilian authorities to refrain from prosecution if the host nation “has prosecuted or is prosecuting such person.”⁶⁶ By similarly amending the UCMJ, Congress would ensure that prosecutions that are vital to host-nation sovereignty are tried in host-nation courts.

In MEJA, waiver by the host nation is implied if the host nation has not prosecuted or is not prosecuting.⁶⁷ This provision is based on the assumption that host-nation governments will make prompt decisions regarding prosecution.⁶⁸ Absent a prompt decision, this implied waiver leaves several unanswered questions: How much time should U.S. authorities wait to ascertain whether the host-nation government will prosecute the case? If the U.S. does not wait, what happens if the host-nation government begins its own legal proceeding after the U.S.

⁶⁵ *Id.* at 1-8.

⁶⁶ 18 U.S.C. § 3261(b) (2006). An exception is provided based “upon the approval of the Attorney General or the Deputy Attorney General.” *Id.* The flexibility of providing officials with such discretion is important in dealing with the highly complicated factual situations that can arise during contingency operations. As such, a similar authority should be reserved for the Senior Commander in the proposed amendment to the UCMJ.

⁶⁷ *See id.*

⁶⁸ Schmitt, *supra* note 47, at 126.

has commenced action? In that case, should a U.S. citizen or national ever be returned to the host nation for prosecution?⁶⁹

Rather than replicating these ambiguities within the UCMJ jurisdictional statute, the amendment should require an explicit waiver from host-nation authorities. Such a waiver should come from the host nation's Ministry of Justice. Using the example of the PMC who commits an offense against a U.S. soldier, U.S. authorities would submit a description of the incident and other vital details to the host nation's Ministry of Justice.⁷⁰ The Ministry would then be responsible for responding to the application in a reasonable period of time.⁷¹ If the Ministry chooses to pursue the case, prosecution can proceed in host-nation courts. The host-nation government, however, would likely have little interest in a case where no host-nation citizens are involved.⁷² If the Ministry declines to prosecute, or fails to reply in a reasonable period of time, then the military will be free to prosecute the alleged wrongdoer under the UCMJ.

B. UCMJ Jurisdiction over Non-DoD Contractors

In its current form, it is unclear if UCMJ jurisdiction applies to PMCs who are under contract with agencies other than DoD, such as the State Department.⁷³ In some contingency operations, the number of PMCs working for other agencies can be substantial.⁷⁴ For the purpose of maintaining control over their area of operations, commanders must have the power to ensure that abuses by PMCs are prosecuted.

⁶⁹ See *id.* at 126–27.

⁷⁰ The type of information that should be passed to host-nation authorities is a matter to be clarified by DoD implementing regulations. There is strong support for substantial discretion being given to the Senior Commander. Nevertheless, the nationalities of persons involved, the location and timing of the incident, and whether the misconduct occurred within the scope of the PMC's duties are examples of the types of information necessary for host-nation authorities to make an informed decision regarding prosecution.

⁷¹ A determination of a reasonable period of time is best left to the implementing regulations published by DoD. These regulations should probably leave considerable room for the Senior Commander's discretion. A reasonable period of time may vary significantly based on the environment in the host nation. Factors such as cultural differences and the legal system will impact the appropriate time that should be given. In a federalist system, the Ministry may have to coordinate with provincial authorities, which may require more time.

⁷² Lack of action by host-nation authorities was the initial impetus for MEJA's passage. Host-nation governments were not prosecuting crimes committed by Americans against American victims. See *United States v. Arnt*, 474 F.3d 1159, 1161 (9th Cir. 2007); Schmitt, *supra* note 47, at 55–56.

⁷³ Princeton Workshop, *supra* note 16, at 11–12.

⁷⁴ In Iraq, the State Department alone employs “over 2,500” PMCs for security purposes. ELSEA & SERAFINO, *supra* note 32, at 3.

Absent an expansion of the UCMJ to cover non-DoD contractors, only DOJ could prosecute if host-nation authorities refused the case. The military, an important element of the tiered jurisdictional system, would be unable to prosecute. Additionally, failure to modify the UCMJ would leave in place a bizarre jurisdictional scheme in which a PMC accused of murdering an American soldier could be tried under the UCMJ if he happened to be under contract to guard the convoy of a senior Pentagon official, but not if he guarded the convoy of the U.S. Ambassador.

C. MEJA Provision Expressing Preference for UCMJ Action

The language of MEJA specifies that nothing in the provision “may be construed to deprive a court-martial . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial.”⁷⁵ The intention of this language is simply to “preserve the use” of the military justice system.⁷⁶ However, in a tiered system during contingency operations, the military justice system must be preferred, not just preserved.

As such, prosecution under MEJA should require, in addition to the existent waiver by host-nation authorities, a waiver by military authorities. In contrast to the waiver provision in the UCMJ,⁷⁷ the MEJA waiver would generally be triggered by the waiving authority—in this case, the military. Using the previous scenario of PMC assault against another PMC, the military may decline to prosecute in favor of passing the case to DOJ.⁷⁸ As part of the notice process to DOJ, the military could include a clause that expresses its intent not to prosecute under military law. Having ensured that the host nation has no interest in the case, as is required by the current law, DOJ would then be free to prosecute.

III. Criticisms

A tiered jurisdictional regime for the administration of PMCs during contingency operations is subject to criticism. One concern is

⁷⁵ 18 U.S.C. § 3261(c) (2006).

⁷⁶ Schmitt, *supra* note 47, at 116 (“This provision was included in the Act to preserve the use, however rare, of forums other than Article III courts to prosecute defendants—military or civilian—who violate American law.”).

⁷⁷ As discussed above, under the UCMJ, a host nation’s waiver of jurisdiction would usually be in response to an application submitted to the host nation’s Ministry of Justice by U.S. authorities. See *supra* text accompanying notes 70–71.

⁷⁸ For details on coordination between DOJ and military authorities in cases under MEJA jurisdiction, see generally DoD Instruction No. 5525.11, *supra* note 45.

the ability of PMCs to receive a fair trial in the host nation. Another concern questions the likelihood that host-nation authority would ever be exercised, given the requirement for certification by the Senior Commander. Additionally, it is possible that PMCs would be unwilling to accept contracts that would subject them to the host-nation legal regime. Part III of this Essay responds to these criticisms and explains why they should not deter the implementation of a tiered jurisdictional regime.

A. *PMCs Will Not Get a Fair Trial Under Host-Nation Law*

Critics of allowing PMCs to be tried under host-nation law question the feasibility of blending contingency operations with “emerging legal systems.”⁷⁹ At least part of this concern seems to be based on the notion that a PMC may not get a fair trial because of host-nation bias against foreigners.⁸⁰ Although this criticism has some validity, in the sense that all judicial systems struggle with the problem of bias,⁸¹ it is overstated.⁸²

⁷⁹ See Lindemann, *supra* note 57, at 88.

⁸⁰ See Sharon Behn, *Blackwater Nixes Iraq Arrests: Chairman Won't Risk "Faulty Justice,"* WASH. TIMES, Oct. 17, 2007, at A1 (quoting the chairman of Blackwater, who explained that there is not “a valid Iraqi court system where Westerners could get a fair trial”). There is also concern about the fairness of subjecting Americans to any foreign legal system, even a “valid” one. Provided, however, that PMCs are aware of potential host-nation jurisdiction, there is no reason to question the fairness of a system that is based on voluntary contracts and at-will employment. Fairness should be no more of an issue here than it would be if a U.S. citizen conducted business travel to a foreign country and thereby subjected himself to that country's laws. See *Neely v. Henkel*, 180 U.S. 109, 123 (1901) (“When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people . . .”); *The Murder of R. W. Hardy: What the State Department Will Do and What It Cannot Do*, N.Y. TIMES, Aug. 17, 1885, at 1 (quoting Secretary of State Thomas F. Bayard: “Citizens leaving one country and going into another can only be protected in the same measure as the country's own citizens. They must live under the same laws. The United States Government will see they get that protection, but it cannot insist that they be tried or defended according to the United States laws.”), available at <http://query.nytimes.com/mem/archive-free/pdf?res=9F0DE5DD153FE533A25754C1A96E9C94649FD7CF>.

⁸¹ See generally Regina Graycar, *The Gender of Judgments: Some Reflections on “Bias,”* 32 U. BRIT. COLUM. L. REV. 1 (1998) (exploring gender bias in the judiciary in Canada and Australia); David Jaros, Essay, *The Lessons of People v. Moscat: Confronting Judicial Bias in Domestic Violence Cases Interpreting Crawford v. Washington*, 42 AM. CRIM. L. REV. 995 (2005) (discussing an institutional bias against criminal defendants in domestic abuse cases); *Study Probes Racial Bias by Juries*, ALASKA B. RAG, Nov.–Dec. 1998, at 5 (documenting racial bias by juries).

⁸² Even in Iraq, a country in which sixty-one percent of the population believes attacks on U.S. forces are justified, contractor immunity has been upheld in court under CPA Order No. 17. See WORLDPUBLICOPINION.ORG, POLL, THE IRAQI PUBLIC ON THE US PRESENCE AND THE FUTURE OF IRAQ 8 (2006) (finding in September 2006 that sixty-one percent of Iraqis supported attacks against U.S.-led forces), available at <http://www.worldpublicopinion.org/pipa/pdf/sep06/>

Moreover, the potential for an unfair trial does not outweigh the importance of U.S. forces accomplishing their mission,⁸³ of which a key component is establishing a stable, democratic host-nation government.⁸⁴ Nor does it create an individual right to exemption from host-nation prosecution.⁸⁵ A tiered jurisdictional system, however, would allow U.S. forces to react to the possibility of a deficient legal regime by using the UCMJ as the primary enforcement mechanism until the host-nation court system has been certified as functional.⁸⁶

In addition, if there are miscarriages of justice in individual cases, U.S. authorities retain diplomatic options for resolving such issues.⁸⁷ The State Department may consult with the host nation and formally protest if Americans are not treated in accordance with the applicable host-nation law.⁸⁸ Undoubtedly, the presence of large numbers of U.S. military personnel operating in the host nation will only enhance the power of these diplomatic tools.

B. The Certification Requirement Will Be Used as a Pretext to Block Host-Nation Legal Authority

A potential objection to allowing the Senior Commander to exercise discretion in his certification of the host-nation judicial system is

Iraq_Sep06_rpt.pdf; Steve Fainaru, *How Blackwater Sniper Fire Felled 3 Iraqi Guards*, WASH. POST, Nov. 8, 2007, at A1 [hereinafter Fainaru, *Blackwater Sniper*] (discussing a petition against Blackwater guards involved in a fatal shooting that was dismissed by an Iraqi judge because contractors have “immunity from the Iraqi legal process”).

⁸³ This principle has been taken to an arguably extreme conclusion in instances where Coalition forces refused to alter their tactical mission in order to assist PMCs in life-threatening situations. See Peter Warren Singer, *Warriors for Hire in Iraq*, SALON.COM, Apr. 15, 2004, <http://dir.salon.com/story/news/feature/2004/04/15/warriors/index.html> (describing a group of PMCs abandoned by Coalition forces in the midst of a battle, forcing the PMCs to leave one of their colleagues dead on a rooftop).

⁸⁴ See FM 3-24, *supra* note 25, at 1-21.

⁸⁵ Even the expansive immunity granted in CPA Order No. 17 recognizes that immunity from host-nation prosecution is not an individual right based on the inherent unfairness of the host-nation judicial process. See CPA Order No. 17, *supra* note 32, § 5(1). Rather, CPA Order No. 17 empowers the Sending State to waive immunity at its discretion. See *id.* § 5(3). Presumably, this could occur anytime the Sending State decides it is in its diplomatic interest to allow prosecution to go forward in the host nation, regardless of what types of protections are available for the individual.

⁸⁶ See *supra* Part II.

⁸⁷ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 355 (6th ed. 2003) (identifying the consul’s role as protecting “the interests of the sending state and its nationals”).

⁸⁸ See U.S. Department of State, Assistance to U.S. Citizens Arrested Abroad, http://www.travel.state.gov/travel/tips/emergencies/emergencies_1199.html (last visited May 17, 2008) (explaining that the State Department works with officials in foreign prisons “to ensure that Americans are afforded due process under local laws”).

that this decision could be used as a pretext to avoid relinquishing any judicial oversight to the host-nation government. For the tiered jurisdictional regime to be effective, an unbiased assessment of the host-nation judicial system is ideal. Given the political complexities of contingency operations, however, other considerations will almost certainly influence the decision of the Senior Commander.

Nonetheless, the balance of outside factors relevant to the certification suggests the Senior Commander will make his determination within an appropriate band of objectivity. While there is potential for abuse from a commander who miscalculates the impact of the continued primacy of military jurisdiction of PMCs on the host-nation population, this scenario is unlikely to play out in practice. At first glance, it seems plausible for the Senior Commander to reject the complexity of the tiered system and retain control of all contractors under the UCMJ. However, commanders understand the potential detriment to mission accomplishment of excluding the host-nation judicial system from PMC oversight.⁸⁹ Additionally, relinquishing the administrative burden of providing judicial oversight for all PMCs involved in the contingency operation counsels against prolonged delay in granting certification.⁹⁰

Looming over this decision will be the potential of acquittal of a culpable PMC by an American court, thus inflaming local sentiment.⁹¹ While acquittals in high-profile cases where host-nation civilians have been killed would presumably cause a backlash wherever the trial were held, the response would be compounded if it occurred in an American court.⁹² The result would likely be charges of favoritism and an increased perception that the lives of host-nation civilians are not valued.⁹³ This reaction could potentially be exploited by insurgent or antigovernment forces.⁹⁴

⁸⁹ See *supra* text accompanying notes 58–65.

⁹⁰ Military authorities in Iraq would be responsible for the judicial administration of over 180,000 contractors. See Lardner, *supra* note 21.

⁹¹ See Fainaru, *Blackwater Sniper*, *supra* note 82 (quoting an Iraqi: “When someone loses one of his relatives, or one of his friends who gets killed by an American and that American is protected—untouchable—because of a law that was set by an American, this definitely will create new enemies for the United States.”).

⁹² In 2002, a court martial’s acquittal of two U.S. soldiers whose vehicle hit and killed two South Korean girls sparked protests and attacks against other U.S. soldiers. See *US Soldier Attacked in South Korea*, BBC NEWS, Dec. 16, 2002, <http://news.bbc.co.uk/2/hi/asia-pacific/2578655.stm>.

⁹³ See *id.*

⁹⁴ See FM 3-24, *supra* note 25, at 1-8–9.

Furthermore, certain features of the U.S. legal system create substantial risk of acquittal of a culpable individual. The strict evidentiary requirements and liberal use of the exclusionary rule in the U.S. system raise the risk of key evidence being excluded from use at trial.⁹⁵ In the same sense that it is difficult for Americans to understand why suppression of evidence, and the potential resulting acquittal of a culpable defendant, is necessary to preserve rights in later cases,⁹⁶ such an acquittal could inflame host-nation civilians, causing greater animosity towards U.S. forces.⁹⁷ Thus, any unnecessary delay of the certification by the Senior Commander would tend to undermine mission accomplishment—a consequence no commander would take lightly.

C. Contractors Will Be Unwilling to Accept Contracts if Subject to the Host-Nation Legal Regime

Another critique of subjecting PMCs to host-nation law is that potential contractors will be unwilling to work in the host nation. Given the large number of private security companies in operation,⁹⁸ however, it seems unlikely that subjection to host-nation prosecution would significantly deter competition for the sizeable contracts at stake in contingency operations.⁹⁹ Similarly, PMC positions, because

⁹⁵ The exclusionary rule bars the consideration of evidence gathered in violation of the Constitution. See *Weeks v. United States*, 232 U.S. 383, 398 (1914), *overruled on other grounds* by *Mapp v. Ohio*, 367 U.S. 643 (1961). Many countries do not have an exclusionary rule, while those that do generally do not have one as rigid as that employed in the United States. See Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 451 (1992) (discussing how the use of the exclusionary rule suggests a lesser importance placed on “accurate fact-finding” in the U.S. legal system).

⁹⁶ See Randy E. Barnett, *Pursuing Justice in a Free Society: Part Two—Crime Prevention and the Legal Order*, CRIM. JUST. ETHICS, Winter–Spring 1986, at 30, 50 n.24 (commenting on how the exclusionary rule forces “a choice between procedural rights and personal security, seriously [undermining] popular support for the former”).

⁹⁷ See *Korean Protests at US Military Base*, BBC NEWS, Nov. 25, 2002, <http://news.bbc.co.uk/2/hi/asia-pacific/2510477.stm> (documenting violent anti-American protests in South Korea after the acquittal of two U.S. soldiers charged with negligent homicide in the deaths of two South Korean girls).

⁹⁸ See DEBORAH D. AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* 10 tbl.1.1 (2005) (naming dozens of U.S. military and security companies that were operational between 1990 and 2004).

⁹⁹ See *id.* at 8 (stating that over \$300 billion in DoD contracts were awarded to private security companies between 1994 and 2002).

of their lucrative tax-free salaries¹⁰⁰ and unique nature,¹⁰¹ are highly sought after by marketplace participants.¹⁰²

A variant of this criticism is that military contracts may become prohibitively expensive if PMCs demand higher salaries to account for the risk of host-nation prosecution, and private security companies, in response to the higher labor costs, increase bids they submit to the military. This criticism, however, also falls short. First, in this highly competitive marketplace it is unclear how much prices would increase to account for the risk.¹⁰³ Second, it is unclear to what level prices would have to rise to make the cost prohibitive.¹⁰⁴ Third, the importance of keeping government outlays for contracting services from increasing fades dramatically when weighed against the animus from the host-nation population that would result from exempting PMCs from host-nation prosecution.¹⁰⁵ The cost of the animus can be measured in greater intensity of insurgent action, prolonged duration of contingency operations, and even greater loss of life.¹⁰⁶

¹⁰⁰ See Dana Priest & Mary Pat Flaherty, *Slain Contractors Were in Iraq Working Security Detail*, WASH. POST, Apr. 2, 2004, at A16 (reporting that “armed commandos earn an average of about \$1,000 a day” in Iraq). In addition to earning a high salary, a PMC working abroad will likely be able to exclude up to \$87,600 in salary for taxable years beginning in 2008 under the Foreign Earned Income Tax Exclusion. I.R.C. § 911(a), (b)(2)(D)(i) (2006); Rev. Proc. 2007-66 § 3.30, 2007-45 I.R.B. 970, 976, available at <http://www.irs.gov/pub/irs-irbs/irb07-45.pdf>.

¹⁰¹ Many former members of elite military forces view working for a private security company as a means of continuing their service, at higher pay, in one of the few professions where their prior skills are directly applicable. See JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY* 76, 82–85 (2007).

¹⁰² When Parsons Corporation sought recruits for positions in Iraq, it reported receiving 27,000 applications for 300 positions. MILLER, *supra* note 19, at 157.

¹⁰³ Given the large number of firms in the industry and the competitive nature of the bidding process, it is unlikely that firms would be able to demand dramatic price increases. For more information on the bidding process, see generally GEN. SERVS. ADMIN., DEP’T OF DEF. & NAT’L AERONAUTICS & SPACE ADMIN., *FEDERAL ACQUISITION REGULATION* (2005), <http://www.arinet.gov/far/current/pdf/FAR.pdf>.

¹⁰⁴ “Since September 2001, the Congress has appropriated \$602 billion for military operations and other activities related to Iraq, Afghanistan, and the war on terrorism.” *Estimated Costs of U.S. Operations in Iraq and Afghanistan and of Other Activities Related to the War on Terrorism: Hearing Before the H. Comm. on the Budget*, 110th Cong. (2007) (statement of Robert A. Sunshine, Assistant Director for Budget Analysis, Congressional Budget Office), available at http://www.cbo.gov/ftpdocs/84xx/doc8497/07-30-WarCosts_Testimony.pdf.

¹⁰⁵ See *supra* notes 91–94 and accompanying text. Even conceding increased contracting costs in the short term, one of the probable benefits of a tiered jurisdictional regime is that of a force multiplier that will result in either a shorter presence for U.S. forces, a reduction in the number of forces on the ground, or both. In the long term, the tiered jurisdictional regime could thus result in significant cost savings. See *supra* notes 58–65 and accompanying text.

¹⁰⁶ Subjection to host-nation prosecution may better develop the market for PMCs. It may be that the threat of host-nation prosecution will have a greater impact on aggressive PMCs who are most likely to break the law. Meanwhile, cautious PMCs, those who are most judicious in

Conclusion

Recent efforts by Congress to create overlapping jurisdictions for PMCs on contingency operations are welcome. Congress, however, should develop a tiered jurisdictional regime that favors host-nation law over UCMJ and MEJA jurisdiction. A tiered system is best suited to support the mission of U.S. forces during contingency operations—establishing a stable, democratic, host-nation government seen as legitimate by its people. To protect against the potential for incapacity of the host-nation judiciary during the initial stages of operations, PMCs should operate primarily under UCMJ jurisdiction until the host-nation judiciary is certified as functional.

their use of force, will likely have less of a concern with host-nation jurisdiction. As a result, “aggressive” PMCs will demand higher compensation relative to “cautious” PMCs to adjust for an increased risk of prosecution. The “aggressive” PMCs will have a greater chance of being priced out of the market for services, leaving the “cautious” PMCs, who are more likely to contribute positively to any U.S. mission, in their place.