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"War Profiteering and Other Contractors Crimes Committed Overseas"
Hearing on June ,

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Chairman Scott, Ranking Member Forbes, and Members of the Subcommittee, thank you for inviting me to speak with you today about this important subject. My name is Scott Horton. I am an adjunct professor at Columbia Law School where I teach the law of armed conflict and commercial law courses. I also am the Chair of the Committee on International Law at the Association of the Bar of the City of New York ("Association"). Since February of this year, I have managed a project on the Accountability of Private Military Contractors at Human Rights First. Later this year Human Rights First will publish a detailed report on this subject.

I appear here this morning in support of H.R. , the Transparency and Accountability in Security Contracting Act, co-sponsored by Representatives Price, Schakowsky and 39 other Members, as well as H.R. , which pulls out the provisions of H.R. relevant to the Judiciary Committee. The focus of this bill is highly technical – expansion of the scope of the Military Extraterritorial Jurisdiction Act ("MEJA"). But it addresses a fundamental and pressing problem: lack of accountability of U.S. private military contractors to the "law of war" and the principles of the Geneva Conventions. By making MEJA applicable to all persons employed under a contract (or subcontract) written by any agency of the U.S. Government which is being performed outside of the United States and in connection with a contingency operation, H.R. would address an serious gap in the current system. Its passage would help to ensure that private security contractors understand and adhere to the laws of war which govern U.S. military actions around the world.

The United States has had an extremely honorable record with respect to the law of war, not just with respect to American initiative and authorship, but also in providing training, oversight and accountability under the law of war for those it deploys in combat abroad. The "war on terror" has, however, been undertaken in a different way from former conflicts, and that has raised questions about whether training, oversight and accountability for law of war rules have been changed to reflect this different approach..

In the Second World War and Korean War, contractors amounted to somewhere between three and five per cent of the total force deployed. In the Vietnam conflict that number cer-

tainly exceeded five per cent, but just barely. The first Gulf War saw the ratio change fairly dramatically, to roughly ten per cent. But in the current conflict, the number appears to be climbing steadily closer to parity. Before the commencement of the surge, for instance, the total community of contractors in Iraq was around , and the number of uniformed service personnel was around , .

This represents an extremely radical transformation in the force configuration. While the majority of these contractors are providing non-combat services like the provision of food and laundry services, a significant number of others are armed and involved directly in security operations. I cite these numbers not to criticize the reliance on contractors, but merely to highlight the fact that a very large part of the total force is not in uniform. Our training, oversight and accountability system has historically been geared to those in uniform. Yet despite the transformative expansion in the reliance on military contractors, that's still the case today.

There is good reason to ask whether the accountability system works with respect to government contractors and subcontractors. Since the invasion of Iraq, there have been more than four dozen courts-martial commenced with respect to law of war issues. This number is generally consistent with American historical performance in war time and suggests that the court-martial system, providing accountability for uniformed military personnel in war time, is functioning normally. But if we contrast this with enforcement action involving contract personnel, we get a different result. To date only one enforcement action has been brought to a conclusion – the Passaro prosecution in North Carolina. It is noteworthy that the Passaro case was brought under the Patriot Act, not under MEJA, and that case helps explain why the amendment is necessary. (The Patriot Act provision used in that case applies only to "crimes on U.S. facilities," so it would not work for most of the cases we have examined, which are usually not on U.S. installations; conversely, the current MEJA language, limiting jurisdiction to contractors "in support of Department of Defense missions" might not work for Passaro, who was a CIA contractor.) The available data so far – which are still incomplete – suggest that contractors are certainly not less prone to infractions than uniformed soldiers are. If anything, the absence of military training and discipline would suggest that security contractors are more likely to commit violations of the laws of war when they become involved in difficult security operations.

Just a few days ago, I participated in a workshop sponsored by the Law and Public Affairs Program at Princeton University concerning the accountability of private military contractors. There were roughly three dozen bipartisan participants drawn from corporate executives from private military contractors firms, Government policy makers from the Department of Defense, intelligence community and other agencies, academics, Congressional staffers and think-tank analysts. The sponsors asked us at one point to define the current problem. There was an almost immediate consensus on a great number of issues: that the roles of military contractors had not been well-defined and that there was a lack of clarity about limitations on the use of contractors in military operations, for instance. After that,

there was general agreement that the law for prosecuting misconduct among contractors required careful review in light of the very troubling lack of follow-up in prosecutions that had been investigated in the field and referred for prosecution. Why exactly were criminal investigations not occurring? Why were there no prosecutions, even in cases in which the military had conducted criminal investigations?

H.R. addresses what the conference participants identified as a major priority, namely insuring that a clear statutory basis exists for criminal justice action back in the United States. The original text of MEJA is in this context limited to persons "accompanying the Armed Forces." It included contractors under the term "employed by the Armed Forces outside of the United States" provided they are contractors of the Department of Defense or "any other Federal agency… to the extent such employment relates to supporting the mission of the Department of Defense overseas." H.R. would expand this to include U.S. Government contractors or subcontractors who are outside of the United States in a region in which the United States is conducting a contingency operation, i.e, 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.

This change would update the law to better reflect the current situation in Iraq and Afghanistan in which a large number of contractors are present, with contracts written by a variety of different government agencies, including the Departments of Interior and State. It is unclear whether the majority of contractors operating in these places are doing so puruant to a contract with the Department of Defense, or even whether their contract "supports the mission of the Department of Defense overseas." In some cases personnel are working with the Department of Defense, for instance, in connection with contracts written by the Department of the Interior. And indeed, a large part of the security contractors – the specific subgroup that presents the most cause for concern – have contracts and subcontracts written by the Department of State under the rubric of "diplomatic security." Clearly, the specific contracting agency should be irrelevant for the purpose of ensuring that all contractors adhere to the laws of war. What counts is that the United States Government funds them, directly or indirectly, and brought them into the theater of combat. The United States assertion of criminal law jurisdiction over such personnel should not be viewed as something hostile. To the contrary, it is an essentially protective position. H.R. makes this essential change.

The fact pattern of violations by contractors in the cases I have studied so far is consistent. An incident occurs, frequently involving homicide or assault. The contractor generally conducts a preliminary investigation, prepares a report and, if the initial concerns are borne out, employment of the personnel in question is terminated and they are put on a plane to America within a matter of a couple of days. However, in some cases, contractors have failed to conduct an investigation but have transferred the personnel involved out of the theater of operations, sometimes resulting in a redeployment from Iraq to Afghanistan, Kuwait or Jordan, for instance. But that's been the end of the story. If we were talking about a uniformed

service person, the Criminal Investigative Division would come in, a criminal investigation would ensue, and if sufficient evidence were present, there would be a court-martial or a nonjudicial punishment for a lesser offense. With contractors, however, no hand off to investigators and prosecutors appears to occur. This is a severe problem.

I am attaching as an appendix to this report a number of incidents reported in the press which reflect criminal activity involving contractors. We are in the process of independently investigating some of these incidents. I draw your attention to these reports not in order to comment on the guilt or innocence of persons named in them. Rather I note that each presents a case that should, in the ordinary course, have been the subject of a criminal investigation and potential law enforcement action. Yet no action appears to have occurred in any of these cases.

If these alleged offenses were to occur inside the United States, of course, it would be up to the FBI and federal prosecutors or state and local law enforcement officials depending on the circumstances of the offense to investigate and prosecute them. But in Iraq, contractors are beyond the reach of the local Iraqi law enforcement agencies. Without U.S. government oversight, investigation and prosecutorial authority, contractors have criminal law immunity.

This immunity was granted under Order No. issued by Lewis Paul Bremer as head of the Coalition Provisional Authority for Iraq. It was issued on June , , the day Mr. Bremer left Iraq when authority was transferred from the CPA to the Government of Iraq,. The Government of Iraq was required to accept and maintain Order No. as a condition of the transfer of authority to it. However, since the interim government transferred authority to the new government, the Minister of Justice and other officials have consistently challenged the legality and validity of Order No. .

The theory underlying Order No. parallels various Status of Forces Agreements ("SoFA") negotiated by the United States around the world – such as that in effect with Germany, Japan and Korea. But there is one significant difference. Most SoFAs do not provide immunity; rather they grant a *first right to prosecute* American personnel to American authorities. In the event of a failure to exercise this right, the host nation would have the power to bring charges if it chooses to do so. For a number of reasons, including the difficulty of dealing in a foreign language with persons operating in a foreign culture and environment, host nations would generally prefer not to take the lead on such prosecutions. Rather, they would prefer that the United States do so. The United States likewise would generally prefer to exercise this criminal law authority for a simple reason: in a conflict or military environment, the exercise of law enforcement enhances or bolsters the position of the command authority. The introduction of a foreign law enforcement authority confuses or has the potential of undermining that authority. However, when the United States has failed to act, as it has in recent incidents in Okinawa and Korea, this has had a chilling effect on relations with the host country. The Okinawa and Korea incidents – as well as a recent homicide case at Ganci Air Force Base in the Kyrgyz Republic – provide good examples of how U.S. failure to investigate or prosecute can severely damage relations with the host nation. The far better U.S.

track record in Germany provides a good example of how criminal investigation and prosecution can help maintain excellent host nation relations.

However, the notion of immunity introduced in Order No. is far more sweeping than the prior SoFA practice. It contains a blanket bar to criminal justice action in Iraq. This is particularly strange because there is no alternative arrangement made for a prosecution by U.S. authorities on Iraqi soil (such as exists, for instance, in the U.S.-Korea SoFA). It creates a situation in which removal to the United States and prosecution in the United States is the sole alternative. Yet no such prosecution has yet occurred with respect to contractor crimes in Iraq. This is certain to be cited by the Iraqi authorities as an argument in support of stripping contractor immunity in their country.

General Petraeus and others in the chain of command have noted that the future U.S. role with respect to Iraq is likely to proceed on the "Korean model," which is to say a scenario in which a substantial military contingent is deployed in Iraq for a very lengthy period. Considering the current deployment model, then, we should anticipate a long-term presence of substantial numbers of U.S. government contractors and subcontractors in Iraq for the next generation. If the United States wishes to retain the power to address criminal justice issues for these contractors and avoid having them dealt with by the Iraqi criminal justice authority, it must provide a clear basis for criminal justice accountability in the United States with respect to wrongdoing in the Iraqi theater of operations. H.R. will help achieve that goal.

It's not enough simply to provide a clear jurisdictional footing. Resources also need to be allocated for enforcement. H.R. starts the process by providing for an FBI investigative unit and providing for an Inspector General's report on the quantum of cases.

As this Committee considers legislative solutions to the pressing problem of contractor accountnability, I want to suggest one final point. Some have argued that Congress should either expand and develop MEJA as an accountability mechanism to be administered by the Department of Justice, or leave the issue in the hands of the Department of Defense drawing on long-standing but recently clarified provisions of the Uniform Code of Military Justice ("UCMJ") that would allow military justice to apply to military contractors overseas during contingency operations. I reject this perspective. As Senator Lindsey Graham has argued, I believe it is essential that command authority in a war zone and in times of war retain the authority to wield military justice as a disciplinary tool with respect to contractors. I believe that this tool would and should be sparingly used, reserved for cases where there has been a direct conflict with command authority involving security contractors. But in most cases, the preference of command authority has and will continue to be to immediately evacuate the offender to U.S. territory, and in this circumstance that would mean to the authority of the Department of Justice.

Both mechanisms are important. As I see it, the approach taken by H.R. , and the recently enacted amendment of the UCMJ sponsored by Senator Graham are mutually supportive and not in conflict.

When we talk about the "Geneva Conventions" and the "law of war," we frequently loose sight of the fact that this entire body of international law is a distinctively American contribution. The core of this law was laid down by Abraham Lincoln on April , , when he promulgated the Lieber Code, and over the next seventy years international humanitarian law developed on the basis of American advocacy – insuring, as Theodore Roosevelt's Secretary of State, Elihu Root, stated, that the vision of America's greatest president would emerge as the law not only of the United States, but of the entire world community. The Hague Conventions on Land Warfare and several successive versions of the Geneva Conventions emerged during this process, and over time international law did in fact come progressively closer and closer to Lincoln's vision.

These efforts were primarily the work of the Republican Party, which pursued it as a memorial to their greatest president. It was and is a fitting memorial.

President Lincoln's law of war advisor, Francis Lieber, wrote in that by zealously enforcing the rules of war, we maintain the good discipline and morale of America's armed forces and uphold our nation's reputation. Once we stop enforcing the rules, the system will break down and it will be very difficult to restore it. He wrote, "And such a state of things results speedily, too; for all growth, progress, and rearing, moral or material, are slow; all destruction, relapse, and degeneracy fearfully rapid. It requires the power of the Almighty and a whole century to grow an oak tree; but only a pair of arms, an ax, and an hour or two to cut it down." Lincoln's doctrine of war has grown into a mighty oak which surely has not fallen, but it is badly in need of care and attention from this Congress. H.R. provides some essential maintenance.

Thank you for your attention.

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Washington, D.C.
June ,

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Scott Horton is an adjunct professor at Columbia Law School where he teaches law of armed conflict and commercial law courses. He is also chair of the Committee on International Law at the Association of the Bar of the City of New York ("Association"). Since February of this year he has managed the Project on Accountability of Private Military Contractors at Human Rights First. Human Rights First will publish a detailed report on this subject later this year. This testimony is based on information gathered in connection with that report.

Prof. Horton is the son of an Air Force colonel who spent half of his life growing up on U.S. military installations overseas. He has worked for over twenty years on international humanitarian law matters, and previously served as a monitor in conflicts in the Caucasus, Central Asia and West Africa. He has also been active in human rights matters, serving as counsel to Andrei Sakharov, Elena Bonner and other leaders of the Russian human rights and democracy movements. He is a founder and trustee of the American University in Central Asia, a former officer and director of the American Branch of the International Law Association, a member of the Council on Foreign Relations, chair of the advisory board of the EurasiaGroup and a member of the advisory board of the National Institute of Military Justice. In , he organized and led an Association study and report on interrogation techniques in use in the war on terror. In , he managed an Association study and report on the practice of extraordinary renditions. In , he was admitted to the Iraqi Bar Association as a corresponding member and he managed a case before the Central Criminal Court of Iraq in Baghdad that spring. He is the author of more than a hundred publications dealing with issues of international public and private law, including law of war questions, and he is currently working on a book on legal policy issues relating to private military contractors.

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Triple Canopy suit brought in Fairfax County

"In a suit brought in Fairfax County, former employees of Triple Canopy - Shane B. Schmidt, a former Marine Corps sniper, and Charles L. Sheppard, III, a former Army Ranger - claim that they witnessed their supervisor deliberately shoot at Iraqi vehicles and civilians this summer, and that the company fired them for reporting the incidents.

"The allegations say Triple Canopy, one of the largest private military contractors to work with the United States in Iraq, retaliated against the men for reporting that their supervisor had committed violent felonies, and perhaps murder, on the job."[1]

"In the lawsuit the men say that their shift leader, who was scheduled to leave Iraq the next day, was determined to kill before he left Baghdad. The first incident, their shift leader abruptly announced that he was 'going to kill someone today,' stepped from his vehicle and fired several shots from his M4 assault rifle into the windshield of a stopped white truck. Later in the day the shift leader said, 'I've never shot anyone with my pistol before,' and then opened the vehicle door and fired seven or eight shots into the windshield of a taxi. Neither the truck nor the taxi posed any threat." [2]

"Both men said that the shift leader had told them that if they reported the shootings they would be fired, and that they feared that the shift leader, whom they regarded as unstable, was dangerous to them. However, the day after the shift leader left Iraq, the two men reported the shootings to Triple Canopy's senior supervisors in the country. Immediately after making the report, both men were pulled from duty and suspended. Within a week the plaintiffs were terminated as a result of having reported the Shift Leader's unlawful conduct."[3]

"Both men had been paid $500 a day by Triple Canopy for their work in Iraq. The suit claims that "Triple Canopy's management blacklisted the men in the private military contracting industry, rendering them unemployable in the lucrative trade of providing private security in Iraq."[4]

"Both Schmidt and Sheppard say that they have not been properly interviewed about the alleged incidents, and neither Triple Canopy nor the governments of the United States or Iraq have investigated their claims."[5]

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[1] Chivers, C.J . "Contractor's Boss in Iraq Shot at Civilians, Workers' Suit Says." *New York Times*. Nov. 17, 2006.
[2] Fainaru, Steve. "Hired Guns are Wild Cards in Iraq War." *Chicago Tribune.* April 16, 2007
[3] Fainaru, Steve. "Four Hired Guns in an Armored Truck, Bullets Flying, and a Pickup and a Taxi Brought to a Halt. Who did the Shooting and Why?: A Chaotic Day on Baghdad's Airport Road." *Washington Post.* April 15, 2007.
[4] Chivers. *New York Times*. November 17, 2006.
[5] *Id.*

Shooting of a Young Iraqi

"Yas Ali Mohammed Yassiri was a -year-old Iraqi when he boarded a taxi on his street in the Masbah neighborhood in Baghdad. Around the same time, Robert J. Callahan, wrapping up his tour as spokesman for the U.S. Embassy in Iraq, was returning to his offices in the U.S.-controlled Green Zone when his convoy turned onto a broad thoroughfare running through Baghdad's Masbah neighborhood. The mercenaries guarding the US embassy spokesman in Baghdad drove around the corner, so Ali's taxi slowed down - but the convoy opened fire anyway, to clear their path. The taxi driver was struck in the shoulder, and Ali was hit in the throat and died immediately."[6]

"The taxi driver, Mohammed Nouri Hattab, said it was the third time since the U.S. invasion in 2003 that he had been fired on by Americans. On the first two occasions, U.S. troops who had mistakenly fired at him later apologized."

"State Department officials did not respond to requests for comment on the incident. But a U.S. official with knowledge of the case said that embassy officials had reviewed the shooting and determined that employees of the security company involved, North Carolina-based Blackwater USA, had not followed proper procedures."[7]

"Although the US embassy now admits the convoy 'opened fire prematurely,' the mercenaries were merely sent home; they are free, happy men."[8]

Blackwater Gun Battle in Najaf

"In April 2004, mercenaries working for Blackwater were guarding US occupation headquarters in Najaf when a protest by Shia Iraqi civilians began to stir outside.

"According to the Washington Post, the Blackwater contractors opened fire on the protesters, unleashing so many rounds so rapidly they had to pause every 15 minutes to allow their gun barrels to cool down."[9]

"Blackwater mercenaries proceeded to engaged in a day-long firefight with the Mahdi Army without any authority from U.S. military forces.

The Post story said Blackwater "sent in its own helicopter amid an intense firefight to ferry in more ammunition and ferry out a wounded marine during this battle." The day after the attack, the spent shell casings in the Blackwater bunkers were "calf-deep."

"A video of this attack made it on to the Web, where a mercenary can be seen describing the Iraqis they are gunning down as 'f*ckin' n*s.'"[10]

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[6] Hari, Johann. "Iraq's Mercenaries—With a Licence to Kill." *The Independent*. June 4, 207.
[7] Miller, Chirstian. "Iraq: Private Security Guards Operate with Little Supervision." *The Lost Angeles Times*. December 4, 2005.
[8] Hari. *The Independent*. June 4, 2007.
[9] Priest, Dana. "Militia Attack Repelled by Private Security Firm." *Washington Post*. April 6, 2004.
[10]Id. http://www.youtube.com/watch?v=C_JRVFMsi2Q&mode=related&search=

Disappearance of American Contractor

"On Oct. 9, 2003, Kirk von Ackermann, 37, was driving alone in northern Iraq when he pulled off the road with a flat tire and phoned the Kirkuk office of his employer—Ultra Services, based in Winters, Calif.—for help. A colleague arrived later to find the car but not Von Ackermann."[11]

"Two months later, north of Baghdad, gunmen in an SUV shot and killed Ryan Manelick, 31, another Ultra Services employee, and an Iraqi traveling with him by car.

"Manelick's father claims that his son had e-mailed him saying he suspected that colleagues at Ultra Services—whose website says it has done $14 million worth of business with the Pentagon—were involved in fraudulent activities with U.S. Army contracting officers. The Army's Criminal Investigation Command has confirmed that Manelick met with its investigators in Iraq but won't say what was discussed."[12]

"Suspecting that Von Ackermann and Manelick weren't the victims of random violence, the investigative command turned the cases over to its Major Procurement Fraud Unit. Spokesman Chris Grey says the probe has been slowed because of the "complexities of this case" and the difficulties of collecting evidence in a war zone."

Contractors Create "Trophy Video" of Civilian Shooting

"In late 2005, a video appeared on a website run by employees of London-based military contractor Aegis Defense Services that depicted security contractors shooting civilian vehicles on the Iraqi highway connecting Baghdad International Airport with the city of Baghdad itself.

"The video, seemingly taken from the rear of a sport-utility vehicle, showed following Iraqi cars being shot with small arms fire. One bullet-pocked car crashes into a taxi, while a different car slows to a stop under withering fire. Different versions of the video have included audio of the laughter and shouting of several passengers in the sport-utility vehicle, or alternately the Elvis Presley song "Mystery Train."[13]

"At the time, Aegis Defense held the largest known security contract from the United States, worth $293 million. Aegis Founder and CEO Tim Spicer, a former British Army officer, is known as the former leader of several now-defunct private military companies."[14]

"Concerns about contractor accountability followed media coverage of the so-called "trophy video." Several investigations examined the incident; however, the Army's Criminal Investigative Division

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[11] Hari. *The Independent.* June 4, 207.
[12] Waller, Douglas. "Foul Play in Iraq?" *Time Magazine.* February 13, 2005.
[13] Finer, Jonathan. "Contractors Cleared in Videotaped Attacks: Army Fails to Find 'Probable Cause' In Machine-Gunning of Cars in Iraq." *Washington Post.* June 11, 2006.
[14] Aegis Website. http://www.aegisworld.com/management.html

decided in June 2006 that it could not charge any contractors with a crime due to lack of probable cause."[15]

No further criminal action has been taken against any of the involved contractors.

[15] Finer. *Washington Post*. June 11, 2006.