

# COMMENTS ON THE PRIVATE SECURITY CONTRACTOR DRAFT LAW

October 2008

## GENERAL COMMENTS

### I. Purpose of the Law

The Justifying Reasons for the Private Security Companies Law identify two overarching purposes: first, to create a new law under which private security companies may be granted business licenses, and second, to provide for criminal liability and other penalties for private security companies and their personnel. As presently drafted this law addresses the first purpose comprehensively, although with some shortcomings. The second purpose is hardly receives mention. The penalty provisions apply only when a business is operating without a license, but not for any other offense (i.e., a breach of Iraqi criminal law; impermissible use of force not amounting to self-defense). As a consequence, this Law consists of almost exclusively administrative, not criminal, provisions. Tougher licensing laws, as provided here, may not be sufficient to regulate the activities of private security companies sufficiently.

### II. Definitions

At its core, the definitions of major terms in Article 1 are not precise enough. The scope and type of operations that are encompassed within “security protection services” is not described at all. The Law places control over the licensing process with the Minister of the Interior and a delegated office, but does not provide for means for effective oversight of the Ministry’s operations in this area. Therefore the Law does not guarantee a transparent process, and with the frequent exchange of money (processing fees and renewal fees every year), the temptation of corruption is potentially high.

### III. Immunity

The extent of criminal and civil liability of private security companies and their personnel remains unclear in this new Law. There are no provisions that provide for redress for unjustified use of force against civilians and no recognition of the importance of holding companies liable for the actions of their personnel. The Law should be precise in ensuring that private security companies, and the Ministry that oversees them, will be accountable to the Iraqi government and the Iraqi people. To meet the threshold established by its Justifying Reasons, Parliament might include in the Law an effective civil or criminal remedy for Iraqi citizens, distinct from the administrative burdens imposed by the suspension of the license. Additionally, the Law should clearly state whether domestic or foreign law governs the conduct of these companies if a suit is filed or criminal charges brought.

### IV. Iraqi vs. Foreign companies

Although the title of the Law refers to non-Iraqi security companies, the draft repeatedly distinguishes between Iraqi and foreign companies. It is unclear what factors will determine the origin of a particular company. Further, where there are differences in the requirements between domestic and foreign companies, we recommend that the Law clearly explain the underlying rationale. Lastly, many of the requirements (e.g., for a security clearance) are framed to affect domestic and foreign companies differently; such requirements, however, are more appropriately distinguished by the citizenship of the personnel, not the company's origin.

#### Chapter First – The Validity and Goals:

- Article 1
  - COMMENTS: Define more clearly “those who work with them” (employees, third party contractors?). Define more clearly “Iraqi company” (does this mean incorporated in Iraq, paying taxes in Iraq, Iraq-based subsidiary of foreign company, Iraqi personnel, owned by Iraqis). Define “security protection services”. Does this Law cover security services that are brought in by outside companies? How do you identify what protection services are covered by the Law (i.e., interrogation services)? Who does “natural and legal persons” include?
  - SUGGESTIONS: This section may be more effective with expanded definitions, either as a separate section or within the Article. The scope of this Law is not exactly clear, and an ambiguous scope will only create room for companies to argue that they are exempt. Look to Afghanistan Law (Article 3) for a model of definitions.
  
- Article 2
  - COMMENTS: Explain more fully “in accordance to rules that are appropriate to the nature of the missions of these companies.” Are there certain kinds of missions in mind? Is this referring to laws already in existence, international or domestic rules of engagement, Status of Forces Agreements, or other laws?
  - SUGGESTIONS: The Article should be redrafted or collapsed into Article 1, since it covers substantially the same content.

#### Chapter Second – The Company License:

- Article 3
  - COMMENTS: How does the Law define “operate in Iraq?” Does the company require a contract to work in Iraq, or does the Law cover any informal security arrangement, including individuals providing informal security?
  - SUGGESTIONS: Look to Afghanistan Law (Article 3) for guidance on who the Law covers.

- Article 4
  - COMMENTS: Details about the Minister of Interior are limited. Does the license come from the Office or from the Minister himself? More broadly, is it better to concentrate the license-granting power more broadly to, e.g., a Board or Assembly composed of representatives from different Ministries? Is there any review of the Minister’s decision? Does this conflict with Article 6 or Article 36?
  - SUGGESTIONS: Provide contact information (name, address) for the Minister of Interior. Look to Afghanistan Law (Article 7) for a Board model of license-granting powers where the Minister of Interior exercises control, but in conjunction with other ministries.
- Article 5
  - COMMENTS: The tone of this Article suggests that foreign companies are not favored providers of security services. This position is difficult to reconcile with the remainder of the Law, which includes a number of provisions directly aimed at those foreign companies. Are foreign companies only permitted in cases of “top security necessit[y]”? What exactly does that mean? What factors will the Minister consider in deciding whether to make a proposal to the Prime Minister? Are those proposals reviewable and are reasons given for the decision also reviewable and available to the parliament and the public?
  - SUGGESTIONS: Reconcile the heightened standard for foreign companies with the remainder of the language in the Law. And if this heightened standard is intended, clearly separate the remainder of the Law into requirements and obligations of Iraqi and foreign owned companies (currently, those provisions are co-mingled).
- Article 6
  - COMMENTS: Is granting licenses the only function of this new Office? What exactly does “oversight of their affairs” mean? It appears that this is the only place in the Law where this Office is mentioned. How is the Officer appointed? Any specific qualifications required?
  - SUGGESTIONS: If oversight is meant to be synonymous with those responsibilities listed in Chapters Eight and Nine, refer to it here as well. Otherwise, provide specific explanations of the oversight here.
- Article 7
  - COMMENTS: Who does this money go to? Is there any safeguard to make sure that the money is not a bribe? Why 250,000 dinars? This seems like a low fee, is that the intention? Is the fee meant to be an entry-barrier? If so, it may be more appropriate to have a higher fee. Are all applicants meant

to pay the fee? The current language suggests that only those whose licenses are granted must pay the money, as opposed to all applicants.

- SUGGESTIONS: Add a provision to ensure that money is properly collected and deposited with the government, and not given to some individual for a fraudulent purpose. Please state specifically if both Iraqi and foreign-owned companies are subject to the fee.
- Article 8
  - COMMENTS: Section J is a bit broad; please expand or provide examples of what else the Minister may deem necessary.
  - SUGGESTIONS: While Iraqi companies are required to detail the work and programs the company will carry out, no corresponding requirement is made of foreign companies. This appears to be an unintended omission.
- Article 9
  - COMMENTS: This is the first mention of a security clearance. Who are the “competent bodies” responsible for reviewing requests for clearances? On what basis are clearance decisions made? Are they part of the licensing process? What does the company have to provide to request a security clearance (i.e., timeline, documents)? Is it really possible to obtain the positions of all of these organizations within 90 days?
  - SUGGESTIONS: Clarify if this applies to both Iraqi and foreign companies. Provide more information on the security clearance, and clearly indicate to whom (and how) it is meant to apply.
- Article 10: NO COMMENTS
- Article 11
  - COMMENTS: Can a license application only be rejected for failure to meet one of the procedural requirements? Or, can the Ministry reject an application without reason within its discretion? If rejected, does a company receive notification of why its application was rejected?
  - SUGGESTIONS: Provide more details on why a license can be refused.

#### Chapter Third – The License Renewal:

- Article 12: NO COMMENTS
- Article 13
  - COMMENTS: Does renewal of license for foreign companies again require proof of “security necessities” (see Article 5)? What are the details of the “request” that the company must make to the renewal? With respect to the

fee, the language here suggests that it is assessed for “processing” of the license; contrast this to Article 7, where it appears the fee is assessed for granting the license – which is it? As asked above, is the license granted merely if all the procedural elements are satisfied, or is there some review of what the company has previously done? Is the decision purely at the discretion of the Minister? Is there any review of the decision or appeals process, as a company can be significantly hurt if its current operations are denied a license renewal.

- SUGGESTIONS: Clarify the requirements for license renewal, with careful attention given to the fee assessment. Perhaps consider extending the license period, especially considering revocation provisions. One-year licenses will result in a number of frequent applications and more complications.

#### Chapter Fourth – The Personnel Appointment:

- Article 14
  - COMMENTS: Are these requirements for all persons employed by either an Iraqi or foreign security company, or just the personnel carrying arms and providing security? What constitutes “knowledge of human rights principles?” What is the “medical committee” and when/how are they making decisions on these people? What does “good reputation conducts” mean (e.g., references)? “Moral turpitude?” Generally, what is the logic behind these limitations? Are there any requirements of who qualifies as a “sponsor?” Can it be someone from the company? Is the money intended to indemnify the company against the actions of the employee?
  - SUGGESTIONS: The “primary school” requirement might include language indicating what the equivalent qualifications would be in other countries, as some of the personnel will be foreign-educated. The Afghanistan Law requires all personnel to be 25 years of age or older – is 18 too young? Look to the Afghanistan Law (Article 16) for guidance on personnel requirements. Be more specific on “human rights principles” by reference to either domestic or international human rights law. The reality is that many of these qualifications will be difficult to assess for foreigners who are working for these companies.
- Article 15
  - COMMENTS: How feasible is it to take into consideration the positions of these government bodies? And for each employee of a foreign company (even Iraqis working for foreign companies)? See Comment to Article 9. Is this approval by the Minister, or by the newly-created Office? Is this on an individual basis, or part of the determination of whether the company is granted a license? With respect to Part Third, what does “pledge” mean

(i.e., is it enforceable legally)? Who are the “competent authorities?” Does “jointly responsible” suggest that the employer is liable for all actions of the employee; is there any limitation on this duty?

- SUGGESTIONS: In the current draft, the Law differentiates between Iraqi and foreign security companies; but not for Iraqis working for those companies. Why impose such strict limitations for Iraqis working for foreign security companies? If the spirit of the Law is to treat Iraqi and foreign companies differently (as it seems deliberately to do), it might also consider treating Iraqi and foreign citizens differently (i.e., different procedural requirements). Clarify the reporting requirements under Part Third and the joint responsibility language.

#### Chapter Fifth – Company Records:

- Article 16
  - COMMENTS: Are these reporting requirements included with the expectation that someone will demand to look at (or have responsibility for reviewing) the records? What types of correspondence? Is there a time period for the requirement here? Is there a standard form in which these documents should be submitted (otherwise, the documents will be submitted in company-specific form, which may vary between companies and be difficult to follow)? How specific does the “daily mobility of the weapons” need to be (i.e., every movement)? Is the “Vehicles Record” meant to include all vehicle movements, or storage? What is meant by “other specifications” of the wireless devices? Is it implicit in the weapons record provision to require the recording of all discharges of weapons (should that be made explicit)?
  - SUGGESTIONS: Mention the purposes of these requirements (i.e., auditing under Chapter Eighth). Include language that limits the time frame of the requirements. In general, these requirements should be made more specific. Keeping the purpose of these requirements in mind – if it is only auditing, say so – the requirements should be specifically tailored for that purpose. These requirements may be potentially burdensome for the companies, especially since none of this information is required for the license application. Requiring the recording of all weapons discharges would help facilitate investigation into incidents. Furthermore, the record-keeping requirements are inadequate for demonstrating compliance with obligations of the PSC under Article 20 of this Law.
  
- Article 17
  - COMMENT: The scope of these requirements is unclear.
  - SUGGESTION: Especially if there is a notarization requirement, please insert a time limit on the number of years for which the company must maintain its files.

## Chapter Sixth – The Company Bylaws:

- Articles 18 and 19: NO COMMENTS

## Chapter Seventh – The Company Obligations:

- Article 20
  - COMMENTS: It is unclear if the PSC is required to report crimes observed by personnel in which the PSC did not take part. Is there a subjective element to the reporting requirement? The requirement and content for training programs is vague. What are the objectives with the trainings?
  - SUGGESTIONS: The obligation of PSCs to report any “crimes” unnecessarily injects an element of subjectivity. This type of self-regulating provision may discourage diligent and accurate reporting. Thought should be given to mandatory reporting requirements of all incidents of weapons discharges and other incidents of violence to avoid lax reporting by PSCs. Current law covering reporting by PSCs has proven inadequate because reporting is not mandatory. *See Human Rights First, Private Security Contractors at War*, page 11. The requirement for personnel training should prescribe specific training programs that meet a clearly stated standard. *See Montreaux Document on Pertinent Legal Obligations and Good Practices* (states in which PSCs operate obligated to see that personnel are trained in specific areas). If monitoring such training is difficult and costly, the internal operations and procedures of the company should be considered to see that the company abides by adequate training standards.
- Article 21
  - COMMENTS: How does the endorsement of the contract by the Ministry of the Interior occur?
  - SUGGESTIONS: Considering the specificity of the provisions covering the granting and renewal of licenses, this provision neglects to specify a procedure by which the Ministry of the Interior endorses a contract.
- Article 22
  - COMMENTS: No destination for the records is specified. This article does not match up with the record-keeping requirements in Chapter Fifth.
  - SUGGESTIONS: The records required for auditing should accord with the record-keeping provisions in Chapter Fifth. If the two do not match, the record-keeping provisions would appear to be voluntary rather than mandatory or even prescribed best-practices. The article should specify where and when these records are submitted.
- Article 23

- COMMENT: Many of these provisions lack specificity.
- SUGGESTIONS: The prohibited activities should be more clearly defined. Provisions proscribing specific activities would provide more clarity and help companies self-regulate so that they are diligent in avoiding engagement in such activities. Some helpful prohibitions would be on providing funds for candidates in elections; hiring based on tribal, ethnic, or religious affiliation; use of uniforms similar to those of the police or army. This Article should cross-reference Article 8 (First) (D), which requires the company to delineate the work and programs the company will undertake.

#### Chapter Eighth – Auditing and Inspection:

- Article 24
  - COMMENTS: The Article is not specific about who will perform audits and inspections. Are these audits initiated randomly or at regular intervals?
  - SUGGESTIONS: This article should cross-reference Article 22 to specify that that the company must present the records specified there.

#### Chapter Ninth – Penalty Provisions:

- Article 25
  - COMMENT: This is the only provision that designates fines against the company for violations of the Law.
  - SUGGESTIONS: Given Chapter Seventh’s many obligations, it seems odd to specify a provision for penalizing the company only in the instance that the company operates without a license. The state should consider itself obligated to provide for effective redress of criminal or other wrongs committed by personnel.
- Article 26
  - COMMENTS: Are these conditions for withdrawing or suspending a license comprehensive? Does this allow for revocation of the license even before the one year license has expired based merely on the company’s failure to initiate renewal?
- Articles 27-31: NO COMMENTS

#### Chapter Tenth – General and Final Provisions:

- Article 32
  - COMMENTS: Is this intended to be a registration system for firearms? Can the company appeal the decision of the Ministry?

- SUGGESTIONS: A company's need for weapons may change over the course of the year. The Law does not seem to provide for a company to ask for the right to adjust its needs for weapons.
- Articles 33-34: NO COMMENTS
- Article 35
  - COMMENTS: Are companies licensed under the CPA provision guaranteed the right to adjust status and continue operations?
  - SUGGESTIONS: The Article should specify whether the Minister will consider prior operations under the CPA provision in deciding whether or not to issue a license.
- Article 36
  - COMMENTS: What will be the procedure governing the appeal of the Minister's decision to deny a license under Article 11? Is there a statute of limitations on the time by which the company can bring an appeal?
  - SUGGESTIONS: This Article should be more specific to clarify the questions above. The Article should state whether the Administrative Judicial Court will reconsider the company's application, or merely approve or disapprove of the Minister's reason for denial.
- Articles 37-38: NO COMMENTS
- Article 39
  - COMMENTS: This Article does not specifically reference the immunity granted to PSCs under the CPA provision.
  - SUGGESTIONS: Because ending immunity for PSCs is a central purpose of this Law, it would be important to be explicit about this purpose here to avoid any contrary reading or potential confusion. Alternatively, this could be accomplished in a catch-all provision which would say that this Law should not be taken to be subordinate to any other law or agreement, such as the Status of Forces Agreement.

## ANNOTATED BIBLIOGRAPHY

### Academic Articles and NGO Reports

James Cockayne, *Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study*, Int'l. Peace Academy (March 2006), available at: [http://www.ipacademy.org/pdfs/COMMERCIAL\\_SECURITY\\_FINAL.pdf](http://www.ipacademy.org/pdfs/COMMERCIAL_SECURITY_FINAL.pdf)

Human Rights First, *Private Security Contractors at War: Ending the Culture of Impunity* (2008), available at <http://www.humanrightsfirst.info/pdf/08115-usls-psc-final.pdf>

Particularly useful for analysis of shortcomings of self-reporting requirements for PSCs beginning on p. 19.

Canadian Consortium on Human Security, *Security Privatization: Challenges and Opportunities*, Human Security Bulletin Vol. 6, Issue 3 (March 2008), available at: <http://www.humansecurity.info/#/vol63editorsmessage/4527827073>

Does not distinguish between PSCs and PMCs, but outlines big picture approaches to oversight.

Caroline Holmqvist, *Private Security Companies: The Case for Regulation*, Stockholm Intl'l Peace Research Inst. (January 2005), available at: <http://books.sipri.org/files/PP/SIPRI09.pdf>  
Points to the lack of effective legislation and oversight of PSCs under international law and the law in which a PSC is incorporated.

### Foreign and International Sources

*Montreaux Document on Pertinent Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, Swiss Initiative, in Cooperation with the International Committee of the Red Cross on Private Military and Security Companies, (Sept. 17, 2008). Available at: [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/\\$FILE/Montreux-Documents.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/$FILE/Montreux-Documents.pdf)

See Pp. 15-21 (articulating good practices for states hosting PSCs on their territory).

Org. for Security and Co-Operation in Eur., *Astana Declaration of the OSCE Parliamentary Assembly and Resolutions Adopted at the 17th Annual Session*, (July 3, 2008), available at: [http://www.oscepa.org/oscepa\\_content/documents/Astana/Declaration/2008-AS-Final/Declaration ENG.pdf](http://www.oscepa.org/oscepa_content/documents/Astana/Declaration/2008-AS-Final/Declaration%20ENG.pdf).

Regulations for Organizing Private Security Companies Activities, Afghanistan Law 2008, available at: <http://www.afghanistantranslation.com>

*Private Military Companies: Options for Regulation*, HC 577 (Stationery Office: London, Feb. 2002), available at: <http://www.fco.gov.uk/Files/KFile/mercenaries,0.pdf>

## **U.S. Government Sources**

Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. 3261-7 (2004), available at: [http://www4.law.cornell.edu/uscode/html/uscode18/usc\\_sec\\_18\\_00003267----000-.html](http://www4.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00003267----000-.html)

*See* Sec. 3267 (1)(A) (definitions of contractors and civilians)

U.S. Congress. House. *Transparency and Accountability in Security Contracting Act of 2007*. HR 369. 110th Congress, 1st session, available at:

[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:h369ih.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h369ih.txt.pdf)

*See* Sec. 4(a)(2), 7 (definitions of private security companies)  
Sec. 2(a)(4), 2(c) (accounting requirements);  
Sec. 2(a)(5), 3(c) (oversight mechanisms);  
Sec. 2(a)(1), 3(b) (hiring requirements for all personnel);  
Sec. 3(a) (rules of engagement for companies);  
Sec. 4(b) (penalties and prosecutions).

U.S. Congress. House. *MEJA Expansion Act of 2007*. HR 2740. 100th Congress, 1st session, available at:

[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:h2740eh.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2740eh.txt.pdf)

*See* Sec. 2(a)(2), 4 (definitions of private security companies)  
Sec. 3 (reporting requirements)

United States Department of Defense. Department of the Army. *Contractors on the Battlefield*. FM 3-100-21, January 3, 2003, available at [http://www.osc.army.mil/gc/files/fm3\\_100x21.pdf](http://www.osc.army.mil/gc/files/fm3_100x21.pdf)

*See* Pp. 1-2 – 1-3, 1-11 (definitions)

United States Department of Defense. *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*. Department of Defense Instruction 3020.41, October 3, 2005, available at:

<http://www.dtic.mil/whs/directives/corres/html/302041.htm>

*See* Pp. 6-8 (obligations and legal status of companies)  
Pp. 12-14 (licensing and other requirements (e.g., clothing))  
Pp. 24-27 (definitions)

United States Central Command (USCENTCOM). Rules for the Use of Force by Contracted Security in Iraq. Rev. 4, September 25, 2005. See Appendix II in

<http://ipoaonline.org/en/gov/ipoa-shays.pdf>

*See* Pp. 2-3 (obligations)  
P. 3 (international legal controls)  
Pp. 4-5 (training and employees)  
Pp. 5-7 (oversight and accountability)  
Pp. 8-10 (rules on the use of force)

