

*Using the Threat of the International Criminal Court to Encourage Congress  
to Pass the Civilian Extraterritorial Jurisdiction Act*

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Introduction

From the outset of the Iraq and Afghanistan Wars, private military contractors have been a mainstay, providing security services in nations that had been torn apart by war. While their contribution has been largely positive and effective in terms of bringing peace and stability to the region, private military contractors in Iraq and Afghanistan have also been the subject of much controversy. In particular, Blackwater Worldwide has shouldered much of the discontent from the Iraq Government, the Iraqi people, the international community and even from some portions of the American public.

Much of the visceral dislike for Blackwater stems from a highly-publicized event that took place on September 16, 2007 at Nisur Square in downtown Baghdad where several employees of Blackwater – five of which were charged in United States Federal District Court in *U.S. v. Slough* – allegedly shot and killed fourteen Iraqi civilians and wounded an additional twenty Iraqis.<sup>1</sup> The defense in the case has claimed that these five employees were acting in self-defense in response to a roadside bomb that had detonated near the compound where Blackwater

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<sup>1</sup>677 F.Supp.2d 112,116 (D.D.C. 2009).

was providing a security detail for Department of State officials; they also claim that the subsequent gunfight that ensued was the result of insurgents who opened fire after the bomb went off.<sup>2</sup> In short, Blackwater and its employees maintain that they were not the aggressors, but were acting in self-defense.<sup>3</sup>

Before a ruling on the merits of the case could be obtained, Judge Ricardo Urbina of the U.S. District Court for the District of Columbia dismissed the indictment in the case. He dismissed the indictment because of prosecutorial error – that the Defendants’ statements were improperly compelled and therefore caused the evidence in the case to be substantially tainted. This left some important questions about the case unanswered – were these five Blackwater employees acting in self-defense, and did a United States federal court have jurisdiction to hear the case?<sup>4</sup>

During a preliminary hearing in *U.S. v. Slough*, the defense asserted that because the Blackwater contractors were providing security for diplomats associated with the State Department, the U.S. federal court system held no jurisdiction over them since they were not in the employ or in support of a Department of Defense mission.<sup>5</sup> While the Justice Department has vowed to appeal Judge Urbina’s decision to dismiss the case on grounds of an evidentiary taint,<sup>6</sup> there is still no guarantee that the United States Department of Justice will be able to exercise jurisdiction under the Military Extraterritorial Jurisdiction Act of 2000 (MEJA).<sup>7</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 113.

<sup>5</sup> *Id.*

<sup>6</sup> Jim Loney, U.S. to appeal dismissal of Blackwater charges: Biden, REUTERS, Jan. 23, 2010, <http://www.reuters.com/article/idUSTRE60M19B20100123>.

<sup>7</sup> Brickell, Missye, "Filling the Criminal Liability Gap for Private Military Contractors Abroad: U.S. v. Slough and the Civilian Extraterritorial Jurisdiction Act of 2010," *Legislation and Policy Brief*: Vol. 2: Iss. 2, Article 3 (2010) (citing *Slough*).

This paper will examine the current and proposed legislation that would enable the United States to assert jurisdiction over these crimes. Then, it will address whether the International Criminal Court could assert jurisdiction over the five Blackwater employees, and ultimately, whether the Court should assert jurisdiction. In the absence of a readily identifiable way to prosecute these alleged murders within U.S. territorial jurisdiction, it is necessary to look to Congress to adopt legislation that provides jurisdiction in the American court system for this type of alleged war crime; otherwise, the International Criminal Court would be justified in pursuing criminal charges in *U.S. v. Slough*.

#### Domestic Legal System: Application of the Military Extraterritorial Jurisdiction Act of 2000

Currently, the only law that governs war crimes committed by civilians abroad in war zones, MEJA, applies just to civilians, in this case the private military contractors working for Blackwater, who are employed by the Department of Defense or any other agency in support of the Department of Defense's mission in a combat zone.<sup>8</sup> The five Blackwater agents accused of murder at Nisur Square were supporting a non-military Department of State function, and therefore are arguably exempt from the jurisdiction conferred under MEJA.<sup>9</sup> In her article "Filling the Criminal Liability Gap for Private Military Contractors Abroad: *U.S. v. Slough* and the Civilian Extraterritorial Jurisdiction Act of 2010," author Missye Brickell effectively discusses the virtues of current legislation on this topic before the U.S. Congress.<sup>10</sup> This legislation pending before the U.S. Senate, the Civilian Extraterritorial Jurisdiction Act of 2010

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<sup>8</sup> *Id.* (citing Military Extraterritorial Jurisdiction Act, Pub. L. No. 106-523, 114 Stat. 2488 (2000) (codified as amended at 18 U.S.C. § 3261-7 (2004))).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

(CEJA), was put forward by Senator Patrick Leahy (D-VT) to close the loopholes that potentially exist in MEJA by codifying federal criminal jurisdiction in the U.S. Code and prosecution for certain crimes for anyone “. . . employed by or accompanying any department or agency of the United States other than the Armed Forces.”<sup>11</sup>

Brickell’s article, which was published in the spring of 2010, posits that this legislation stands a strong chance of passage because the current majority in Congress supports it;<sup>12</sup> however, the legislation still has not passed into law. If MEJA truly does not cover private military contractors, like Blackwater, when they are accused of serious felony crimes such as those alleged in *U.S. v. Slough* and CEJA fails to pass into law, threat of prosecution by the International Criminal Court (ICC) might provide the impetus for Congress to adopt CEJA or similar legislation.

#### International Legal System: The International Criminal Court’s Ability to Try Private Military Contractors

In looking at whether the ICC should take jurisdiction, it must first be determined whether they would be able to assert jurisdiction. With respect to the alleged crime of murder against the fourteen Iraqis at Nisur Square, it would appear that the act of murder is covered by the Rome Statute under Article 5, which states:

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

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<sup>11</sup> *Id* at 14, (citing the Civilian Extraterritorial Jurisdiction Act of 2010, S. 2979, 111th Cong. (2010)).

<sup>12</sup> *Id* at 16.

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.<sup>13</sup>

While it is obvious that these killings do not qualify as genocide or crimes against humanity, there is a reasonable argument to be made that the killings at Nisur Square would fall under either (c) war crimes or (d) the crime of aggression of Article 5. While a crime of aggression is not specifically defined in the Rome Statute, Article 8 of the Rome Statute defines war crimes as “grave breaches of the Geneva Convention of August 12, 1949” such as:

- (a) (i) Willful killing;... (iii) Willfully causing great suffering, or serious injury to body or health;... (b) (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;... (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;... ”<sup>14</sup>

Under a reasonable view of the evidence that is most favorable to the Government, there is a sound argument that these five Blackwater employees are guilty of all of the above sections and

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<sup>13</sup> The Rome Statute of the International Criminal Court, Article 5, Section 1 at page 9. A/CONF.183/9 of July 17, 1998, enacted July 1, 2002.

<sup>14</sup> *Id.*, Art. 8, Section 2 at 11-12.

subsections of Article 8 as they allegedly killed fourteen civilians, wounding an additional twenty and causing untold damage to the property in the neighborhood around Nisur Square.

With the crimes alleged to have been committed by Blackwater's employees falling within the statutory definition of the Rome Statute, the question becomes whether the International Criminal Court has jurisdiction over Blackwater's employees. Article 12 Section 1 of the Rome Statute, which addresses one jurisdictional element of the Court, states that, "A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5."<sup>15</sup> The United States signed the Rome Statute on December 31, 2000, which was the last day that countries could become a party to the treaty without ratifying it; the U.S. never ratified the treaty, and later under the George W. Bush Administration, withdrew its signature.<sup>16</sup> Because the United States is not a Party to the Rome Treaty, Article 12 Section 1 does not confer jurisdiction on the ICC for the U.S. or U.S.-based corporation Blackwater.

Article 12 Section 2 would grant jurisdiction to the Court if "the State on the territory of which the conduct in question occurred" was a Party to the Rome Statute;<sup>17</sup> however, while Afghanistan is a party to the statute, Iraq is not.<sup>18</sup> Therefore, it is necessary to look elsewhere in order to determine if the ICC can extend jurisdiction to the five Blackwater employees.

Article 12 Section 3 contains perhaps the most controversial language in the entire Rome Statute, and that controversial language may be the only gateway for the International Criminal Court to try the Blackwater contractors who are aiding in non-military operations abroad. This

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<sup>15</sup> *Id.*, Art. 12, Section 1 at 17.

<sup>16</sup> Brett D. Schaefer (9 January 2001). *Overturing Clinton's Midnight Action on the International Criminal Court*. The Heritage Foundation; John R Bolton (6 May 2002). *International Criminal Court: Letter to UN Secretary Kofi Annan*. US Department of State.

<sup>17</sup> The Rome Statute of the International Criminal Court, Art. 12, Section 2(a) at 17.

<sup>18</sup> The International Criminal Court – State Parties to the Rome Statute. <http://www.icc-cpi.int/Menus/ASP/states+parties/>.

potentially contentious portion of Section 3 states that, “If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.”<sup>19</sup> This would essentially give the ICC *ad hoc* jurisdiction if the Iraqi government requested that the Court take jurisdiction of the case with the *caveat* that the U.S. would need to have declined to prosecute cases involving private military contractors.

With Iraqi outrage over the incidents like that at Nisur Square and mounting political pressure on Iraqi officials to hold the U.S. accountable for these types of incidents,<sup>20</sup> it is not unforeseeable that Iraq could turn to the ICC for jurisdiction for the Blackwater case if political pressure from within the country became untenable. Admittedly, given the financial benefits that Iraq receives from the United States at the present time, this seems very unlikely, but the possibility nonetheless exists for *ad hoc* jurisdiction to be asserted by the ICC. The *ad hoc* jurisdiction conferred by Article 12 Section 3 provides countries like Iraq with the capability to choose what cases and crimes could be heard by the Court without being a party to the treaty or having to fear that the Court will assert jurisdiction over its own citizenry.

As mentioned above, the availability of the *ad hoc* jurisdictional element in Article 12 does not definitively give the ICC jurisdiction even if the Iraqi government were to cede control of a criminal case to the Court. The Preamble of the Rome Statute and Article 1 specifically discuss that the ICC “shall be complementary to national criminal jurisdictions.”<sup>21</sup> Furthermore, Article 17 definitively concludes that, “the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it,

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<sup>19</sup> The Rome Statute of the International Criminal Court, Art. 12, Section 3 at 17.

<sup>20</sup> Guy Adams, Iraq Outrage as Blackwater Case is Dropped, *The Independent*, Jan. 2, 2010, <http://www.independent.co.uk/news/world/middle-east/iraq-outraged-as-blackwater-case-is-dropped-1855401.html>.

<sup>21</sup> The Rome Statute of the International Criminal Court, The Preamble at 7, and reaffirmed in Article 1 at page 8.

unless the State is unwilling or unable genuinely to carry out the investigation or prosecution...”<sup>22</sup> As long as these five Blackwater employees are held accountable for the crimes that they committed at Nisur Square through the MEJA or pending CEJA legislation, the ICC in accordance with its bylaws would have to defer to the American court system for prosecution of this misconduct.

Accordingly, the ICC could not intervene in accordance with Article 17 of the Rome Statute as long as the Justice Department is genuinely carrying out the investigation or prosecution.<sup>23</sup> In the short term, this does not pose a problem as long as the Justice Department appeals the decision of the district court as they have said they would. If the appellate court fails to overturn Judge Urbina’s ruling dismissing the indictment, then the Justice Department would need to find another way to bring the case to trial absent the evidentiary taint that Justice Urbina found was pervasive throughout the Government’s case. It is not clear from the language of the Rome Statute whether a “good faith effort” to try the case – especially one that does not result in an actual trial on the merits – is enough to satisfy the requirement of Article 17 of the Rome Statute.

Given that Judge Urbina found that the Government used the defendants’ ill-gotten statements in their charging decisions, in formulating the theory of their case, and in developing investigatory leads,<sup>24</sup> it seems highly unlikely that the Government will be able to bring the case again if they are unable to win their appeal. Therefore, it appears as though the ICC would still be able to assert jurisdiction in the case as long as Iraq was willing to refer the case to the ICC.<sup>25</sup>

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<sup>22</sup> *Id.* Art. 17 at 18.

<sup>23</sup> *Id.*

<sup>24</sup> *Slough*, 677 F.Supp. 2d at 112-14.

<sup>25</sup> This assumes that double jeopardy has not attached in *U.S. v. Slough*. Under the Rome Statute, double jeopardy is a concept that prevents a second trial on a criminal matter assuming that, “The person concerned has already been tried for conduct which is the subject of the complaint...” The Rome Statute of the International Criminal Court, The Preamble at Art. 17 (1) (c).



Another aspect of criminal cases like the instant one that would make it in the United States' best interest to adopt legislation like the CEJA is that it is conceivable that the Blackwater contractors could be tried as state agents.<sup>26</sup> The International Criminal Tribunal for the former Yugoslavia has set this precedent in the dicta of its opinion in the prosecution of Bosnian war criminal, Duško Tadić: "...If, in an armed conflict, paramilitary units 'belong' to a State other than the one against which they are fighting, the conflict is international and therefore serious violations of the Geneva Conventions may be classified as 'grave breaches.'"<sup>27</sup> In defining what constitutes belonging to a party of the conflict, the Court determined that:

"States have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces. In order for irregulars to qualify as lawful combatants, it appears that international rules and State practice therefore require control over them by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance of these irregulars *vis-à-vis* that Party to the conflict. These then may be regarded as the ingredients of the term 'belonging to a Party to the conflict'."

As mentioned previously, the Department of State was involved in negotiations in Baghdad and they contracted out their security coverage to Blackwater. That would certainly appear to make these Blackwater employees agents of the government.

If Blackwater had provided security for its own independent operation, then it certainly would not be viewed as a state actor; however, that is not what happened at Nisur Square on

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<sup>26</sup> *Prosecutor v. Tadić*, International Criminal Tribunal for the former Yugoslavia, IT-94-1-A, Judgment. July 15, 1999. Paragraph 91.

<sup>27</sup> *Id.* at para. 92. Interestingly, this theory only appears in the dicta of this opinion. There has not yet been occasion for the Court to try a case that would take a paramilitary group member and try that member as a state agent.

September 16, 2007. Here, the United States government had a “dependence” on private military contractors and required their “allegiance” in support of the State Department’s operation.

The theory behind the International Criminal Court holding this type of private military contractor responsible as a state actor is one of deterrence of potential war crimes. Presumably, the nation involved in the conflict is in a position of power to reign in illegal violations of the law war by a private military company.<sup>28</sup> Therefore, the court in *Tadić* ruled that, “...The State incurs responsibility on account of its specific request to the private individual or individuals to discharge a task on its behalf...,”<sup>29</sup> because “...Otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility.”<sup>30</sup>

It seems extremely unlikely that the International Criminal Court would attempt to bring the United States before the tribunal on charges that the five Blackwater employees were state actors. For one thing, in a very aggressive foreign policy decision, Congress and former President Bush passed the American Service Members Protection Act of 2002, which brazenly announced that the United States would invade The Hague if any American Soldiers were put on trial by the ICC for alleged war crimes committed in Iraq or Afghanistan.<sup>31</sup>

Having exhausted the various ways that the International Criminal Court could assert jurisdiction if the United States declined to prosecute *U.S. v. Slough*, it is important to briefly discuss the civil liability the United States could potentially face if Blackwater and its employees were found to be acting as state agents. As an original member of the International Court of Justice (ICJ), the United States would be susceptible to the jurisdictional requirements of the ICJ

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<sup>28</sup> *Id.* at para. 96.

<sup>29</sup> *Id.* at para. 119.

<sup>30</sup> *Id.* at para 123.

<sup>31</sup> Robert Marquand, Dutch Still Wincing at Bush-era “Invasion of The Hague Act”, *The Christian Science Monitor*, Feb. 13, 2009, <http://www.csmonitor.com/World/Europe/2009/0213/p05s01-woeu.html>.

for tortuous wrongs committed in the member states of Afghanistan or Iraq, as both countries are also member states of the ICJ.<sup>32</sup> While the ICJ is an available option for the Iraq government, Iraqi Prime Minister Nuri al-Maliki has stated that his country will pursue financial compensation in the civil court system of both Iraq and the United States;<sup>33</sup> however, for the citizenry of Iraq, financial reparations and civil liability do not appear to be nearly as important as criminal convictions for these five Blackwater employees.<sup>34</sup>

### Conclusion

In the coming years, as the war in Iraq winds to a close, the relationship that the United States forges as peacetime partners with the Iraqi government and its people is of critical importance to maintaining an ally in the region. The decisions the American government makes now will serve to either foster a supportive, collegial relationship between the two nations or create divisive feelings of mistreatment on the part of America's potential ally in the Middle East.

As of this point in time, the CEJA still has not passed the Senate, and if the legislation fails to pass into law during the current session of Congress, it will not be the first time that a similar bill has sat before Congress and has not passed.<sup>35</sup> The United States is a nation of laws that went to war with Iraq with the goal of promoting the rule of law in place where none existed.

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<sup>32</sup>International Court of Justice – States entitled to Appear before the Court. <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&sp3=a>.

<sup>33</sup>Abeer Mohammed, *The Institute for War and Peace, In Baghdad, Victims of Blackwater's Nisour Square Bloodbath Want Justice, Not Money*, AlterNet.org, Jan. 8, 2010, [http://www.alternet.org/world/145028/in\\_baghdad\\_victims\\_of\\_blackwater's\\_nisour\\_square\\_bloodbath\\_want\\_justice\\_not\\_money/](http://www.alternet.org/world/145028/in_baghdad_victims_of_blackwater's_nisour_square_bloodbath_want_justice_not_money/).

<sup>34</sup>*Id.*

<sup>35</sup>Brickell, *supra* note 7, at 14(citing the Civilian Extraterritorial Jurisdiction Act of 2010, S. 2979, 111th Cong. (2010)).

If Congress is unable to create a bill that holds this type of criminal malfeasance accountable, then the ICC should be ceded jurisdiction over this type of serious criminal misconduct – an option that no reasonable American would prefer over trial by the American jurisprudential system. The actions by Blackwater at Nisur Square as well several other instances of alleged abuses and war crimes by private military contractors endanger the lives of American service members, other contractors, and ultimately threaten to destabilize the peace that so many have lost their lives to create; these actions must be held accountable in a court of law.