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JURISDICTION OVER AMERICAN PRIVATE MILITARY CONTRACTORS: THE ILLUSION OF A LOOPHOLE IN THE LAW AND THE REALITY OF NO OVERSIGHT

Ryan Larose

INTRODUCTION

On September 16, 2007, employees of Blackwater Worldwide ("Blackwater"), an American Private Military Contractor ("PMC") were involved in an incident that resulted in the death of seventeen Iraqi civilians in Nisour Square, Baghdad, Iraq. Suspension arose that the shootings were unjustified and violated the rules in effect for security contractors in Iraq. Although many parties began investigating the incident, complications arose when it came time to decide in which court potential charges could be brought: after all, Iraqi courts were barred from prosecuting contractors due to CPA Order 17; U.S. courts are undecided about the jurisdictional limitations of the Military Extraterritorial Jurisdiction Act ("MEJA"); and the United States refuses to recognize the jurisdiction of the International Criminal Court ("ICC"). Several international law experts have expressed that this case illustrates a major loophole in jurisdiction through which American PMCs are able to proceed without legal consequences for their actions. However, such concerns might be unwarranted: closer examination reveals that the size of this loophole is simply being overstated.

2 Id.
On January 1, 2009, American PMCs’ immunity from Iraqi law ceased to exist. But questions remain regarding whether the loophole would exist with States that sign similar agreements as the Order 17 Agreements Iraq had with PMCs. On the other hand, the MEJA extends Federal Court jurisdiction over American PMCs in most scenarios where American PMCs are used. In addition, the ICC may exert its jurisdiction over American PMCs in many scenarios. Consequently, the loophole is not as vast as previously described.

In this article I investigate the American PMC loophole described by legal scholars. In Part I, I provide a brief history of the use of mercenaries, including the recent increase in their use by the United States. Part II investigates a foreign nation’s ability to prosecute American PMCs for actions taken within their borders. In Part III, I analyze arguments for and against using the MEJA to prosecute Blackwater Employees for their actions in Nisour Square on September 16, 2007, and what the court’s determination means for future cases under the statute. In Part IV, I examine the ICC’s ability to prosecute American PMCs throughout the world. In Part V, I discuss those political problems associated with prosecuting American PMCs that increase the apparent size of the loophole. Finally, I conclude with an overview of the extremely small legal loophole, which illustrates a definitive, political loophole that the American PMCs will likely make use of in the future.

I. The Recent Rise in the Use of PMCs

The use of mercenaries is not a new phenomenon. Historians have traced the earliest official recorded use of outside military forces to King Shulgi of Ur’s reign from 2094 B.C. to 2047 B.C in modern day Iraq. The use of mercenaries continued throughout history, including the use of Swiss mercenaries to guard the Pope from 1502 to present day. However, there was a steady decline in the use of mercenaries as strong nation states began to develop. An international trend recognizing that “[r]eliance upon merce-
naries was no longer necessary and also came to be seen as suspect: a country whose men would not fight for that country lacked patriots; those individuals who would fight for reasons other than love of country lacked morals” started to develop.\textsuperscript{10} Mercenaries were limited in their use until the end of the Cold War.\textsuperscript{11} At the end of the Cold War, States began decreasing their militaries and there was an increase in small-scale conflicts.\textsuperscript{12} This created a vacuum and a demand for skilled military services that mercenaries began to fill.\textsuperscript{13}

Financial and political motivations led the U.S. government to begin hiring private military companies as well. By the 1980’s, President Ronald Reagan, along with British Prime Minister Margaret Thatcher, began to promote the privatization of certain military functions and other traditional government work in an attempt to decrease government spending.\textsuperscript{14} Since then, the privatization of government positions has steadily increased.\textsuperscript{15} In fact, in 2007, there were 180,000 civilians working in Iraq under U.S. contracts and only 160,000 soldiers stationed in Iraq.\textsuperscript{16}

The U.S. government rationalized the increased use of PMCs in several ways. First, it was believed that the use of private contractors would save the U.S. money.\textsuperscript{17} In theory, private companies are run more efficiently, and the competition between companies for government contracts would drive down the costs.\textsuperscript{18} Thus, the use of PMCs instead of government workers and troops would, in theory, be cheaper.\textsuperscript{19} According to the United States Government Accountability Office, in four out of five studies “the cost of using State Department employees would be greater than using contractors.”\textsuperscript{20} However, one study comparing costs for jobs requiring security


\textsuperscript{11} Id. at 332.

\textsuperscript{12} Id.

\textsuperscript{13} Id.


\textsuperscript{15} See Mlinarcik, supra note 7. at 132-34.


\textsuperscript{17} Williams, supra note 4, at 59.

\textsuperscript{18} Id.

\textsuperscript{19} Id.

clearance for workers found that it was actually more expensive to hire
government contractors. Therefore, although contractors are usually
cheaper, in some instances it still may make more financial sense for the
government to use federal employees.

Even though it may not be the best financial decision to use private
contractors in every situation, the use of private contractors always has a
strong political advantage. By increasing the use of contractors in Iraq, the
U.S. government was able to keep troop numbers lower and begin phasing
out American troops, a popular political move. In addition, the use of
contractors allows the American military to keep the number of troop casual-
ties lower because they do not have to report private contractor deaths as
American military deaths. Public opinion tends to show a far more nega-
tive reaction over military deaths than over an American contractor’s
death. Thus, public opinion will be more favorable with the use of more
contractors than military personnel. Consequently, with the reduction in
costs and the political advantages, politicians see the use of PMCs as “win-
win,” and will likely increase their use until a major public problem arises
that forces them to abandon this trend.

II. Domestic Courts’ Authority over American PMCs
When a crime is committed within a nation’s borders, that nation is usually
the first responsible to prosecute that crime. Therefore, when looking for a
way to prosecute PMCs for their illegal actions within a country, we must
first look at that nation’s legal jurisdiction. Many states are increasing their
reliance on PMCs’ efforts in both times of conflict and peace. However,
most of these states lack the courts or enforcement mechanisms to prosecute
these PMCs for their actions either by way of special agreement or because
of political turmoil.

21 Id.
22 See R.M. Schneiderman, Mercenaries to Fill Void Left by U.S. Army, NEWS-
to-take-over-soldiers-jobs.html#.
23 See Public Attitudes Toward the War in Iraq: 2003-2008, PEW RESEARCH
org/pubs/770/iraq-war-five-year-anniversary.
24 Broder and Risen, supra note 1.
25 See ARMIN KRISHNAN, WAR AS BUSINESS: TECHNOLOGICAL
26 See SINGER, supra note 8, at 4-18 (discussing increasing use of private military
contractors on “every continent but Antarctica”).
27 See id.
The most notable example was Iraq’s agreement with American PMCs prior to 2009. The agreement stated that “contractors shall be immune from Iraqi Legal Process with respect to acts performed by them . . . pursuant to the terms and conditions of a contract . . . or . . . any sub-contract thereto.” Although this seems fairly all-encompassing, Iraq could still bring criminal charges against contractors if it could show the contractors were working outside of their contracts at the time of the alleged crime. However, due to the broad language of the contracts, this proved to be a fairly difficult task.

On the other hand, a potentially successful case could have been made for extending Iraqi Jurisdiction over the Blackwater Employees involved in the Nisour Square incident. First, interviews suggested that the military contractors were not escorting any officials during this time. In addition, a private investigation discovered that the Blackwater employees disregarded expressed directions from a tactical command center of Blackwater and State Department employees to remain within the secured area. Thus, their acts were not within their contract or the expressed immunity agreement with the Iraqi government and prosecution may have been possible. However, more than three years have passed without any attempt by the Iraqi Government to commence a case.

Since the incident in Nisour Square, Iraq has taken measures beyond prosecution to eliminate PMCs’ immunity. In 2008, the Iraqi Government ratified an agreement eliminating private contractors’ immunity from Iraqi law. In light of the passage of this resolution, the U.S. government made a new agreement with the Iraqi government that allowed Iraqi courts to exercise criminal jurisdiction over U.S. service members and other U.S.

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29 Id. at § 3(2).
30 See id. (providing immunity only for “official activities pursuant to the terms and conditions of a contract”).
33 Hackman, supra note 4, at 270.
citizens for "grave premeditated felonies."\textsuperscript{35} Under this new agreement, the Iraqi government arrested five Americans suspected of torturing and murdering an American citizen in the Iraq Green Zone.\textsuperscript{36} However, three suspects were released in one week for a lack of evidence\textsuperscript{37} and the other two were released a month later.\textsuperscript{38} To date there have not been any American convictions under this agreement. The agreement clarifies the Iraqi courts do have jurisdiction and could proceed with a case in the future.

Although Iraq has extended its jurisdiction over American citizens for serious crimes and thus ended the total immunity of American PMCs in that nation, American PMCs immunity or lack thereof under the domestic laws of other nations in which they serve remains ambiguous. However, since mercenaries are mostly used in nations where there is a lack of government legal enforcement due to either civil war or contracts, there is still a potential loophole in jurisdiction over American PMCs.\textsuperscript{39}

\section*{III. American Courts' Jurisdiction over American Citizens Involved in PMC's Around the World}

\subsection*{A. U.S. Military Court Martial of American PMCs}

Many experts have discussed the inability of American courts to extend jurisdiction over American PMCs.\textsuperscript{40} The first thought was to prosecute these American citizens through the use of a military court martial. However, the Supreme Court in \textit{Reid v. Covert} found that the Fifth and Sixth Amendment rights guaranteed to all American citizens who are not mem-


\textsuperscript{39} See \textit{Singer, supra} note 8, at 3-18 (describing political turmoil in many countries where PMCs were used).

\textsuperscript{40} See Williams, \textit{supra} note 4, at 46; see also Hackman, \textit{supra} note 4, at 255; Peñalver, \textit{supra} note 4, at 459.
bers of the military limited the jurisdiction of a military court martial to try civilians.\textsuperscript{41} Because a citizen is guaranteed a grand jury indictment—a procedural right not guaranteed in a court martial—the Court found that martialed an American civilian citizen violated that citizen’s constitutional rights.\textsuperscript{42} But, notably, the Court left open the possibility of prosecuting civilians if their actions closely resembled those of armed forces:

Even if it were possible, we need not attempt here to precisely define the boundary between ‘civilians’ and members of the ‘land and naval Forces.’ We recognize that there might be circumstances where a person could be ‘in’ the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.\textsuperscript{43}

However, the ruling was modified by the Court of Military Appeals in United States v. Averette. In Averette, the court held that Reid precluded the use of a court martial of a civilian contractor since he was not part of the armed forces and the events from which the charges arose took place without a declaration of war.\textsuperscript{44} This raises the question: if the events occurred during a declared war, could the civilian be court martialed for his or her actions? Since the last time the U.S. officially declared war was in 1941 in World War II\textsuperscript{45}, it is unlikely that a situation would arise in which American PMCs would fall under the jurisdiction of a military court anytime soon.

\section*{B. MEJA’s Jurisdictional Reach over PMCs}

Since military courts cannot prosecute American PMCs unless their actions fall under a Congressionally-declared war, we must examine the jurisdiction of U.S. federal district courts. “As a basic principle of statutory construction, criminal laws are presumed to have only territorial application unless there is a clear indication that Congress meant for them to apply extraterritorially.”\textsuperscript{46} As a result, many laws that were passed by Congress have expressed extraterritorial jurisdiction or have been applied extraterrito-

\begin{thebibliography}{9}
\bibitem{41} Reid v. Covert, 354 U.S. 1, 19-20 (1957).
\bibitem{42} Id.
\bibitem{43} Id. at 22-23.
\bibitem{44} United States v. Averette, 41 C.M.R. 363, 364 (C.M.A. 1970).
\bibitem{45} The Power to Declare War, President Obama Ordered the U.S. military to attack Libya without Congressional Approval. Was this Legal?, The Week, April 15, 2011, http://theweek.com/article/index/214232/the-power-to-declare-war.
\end{thebibliography}
rially through treaties with other states.\textsuperscript{47} The power to extend U.S. courts’ jurisdiction over the conduct of citizens outside their territorial borders of the U.S. stems from the nationality principle of the obligation of citizenship—citizens are expected to follow the rules of their nation wherever they may be in the world.\textsuperscript{48} Consequently, to apply American laws abroad, there must be an express document allowing the court to extend its jurisdiction abroad.

This issue was highlighted in \textit{United States v. Gatlin}. In \textit{Gatlin}, the conviction of an American for sexual abuse of his stepdaughter was overturned because the Second Circuit held that the accused fell outside of the criminal jurisdiction of the United States since he was living in Germany at the time of the offense.\textsuperscript{49} In response, Congress passed the Military Extra-territorial Jurisdiction Act in 2000. The MEJA statute extends jurisdiction over an individual who:

\begin{quote}
engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within special maritime and territorial jurisdiction of the United States while employed by or accompanying the Armed Forces outside the United states shall be punished as provided for that offense.\textsuperscript{50}
\end{quote}

The aim of this bill was to extend U.S. courts’ jurisdiction over civilians and contractors living and working overseas.\textsuperscript{51} However, this definition proved to be problematic. In 2004, a dilemma arose in the prosecution of individuals for the Abu Ghraib prison scandal.\textsuperscript{52} Civilian contractors who took part in the activities in the Abu Ghraib scandal fell outside the criminal jurisdiction of the United States, and thus they were never brought in front of a court.\textsuperscript{53} Congress reacted by passing an amendment to the MEJA establishing definitions for the terms of the original MEJA of 2000.\textsuperscript{54}

\begin{footnotes}
\item[49] \textit{United States v. Gatlin}, 216 F.3d 207, 223 (2d Cir. 2000).
\item[53] \textit{Id}.
\item[54] MEJA, \textit{supra} note 50, at 18 U.S.C.A. § 3267(1).
\end{footnotes}
It defined the term "a civilian employee" as a person employed with "(I) the Department of Defense (including a nonappropriated fund instrumentality of the Department); or (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense Overseas." It defined a "contractor" as a person employed with "(I) the Department of Defense; or (II) any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense Overseas." Lastly, it defined "an employee of a contractor" as a person employed with a company that's employed with "the Department of Defense; or (II) any other Federal agency, or any provisional authority to the extent such employment relates to supporting the mission of the Department of Defense overseas." Thus, the bill aimed to cover private contractors who had connections to the Department of Defense. It was argued that this amendment still left a loophole for contractors who established contracts with other departments, such as the Department on State, and this was ultimately the main issue raised when federal prosecutors attempted to apply U.S. jurisdiction over Blackwater employees involved in the Nisour Square incident.

C. Nisour Square Incident

Due to mistakes made by the Prosecution, the case concerning American PMCs in the Nisour Square incident was ultimately dismissed, and the jurisdictional issue with the MEJA was never raised in an appeal. In fact, the entire investigation was handled poorly by the State Department. First, they initially planned to have Blackwater provide investigators, security, and transportation outside the green zone, an obvious conflict of interest. But they succumbed to political pressure, eventually contracting with another security company for purpose of the investigation. In addition, Prosecutors were unable to prove that they had sufficient evidence against the suspects; much of the evidence was tainted because they were compelled

59 See id.
The use of such compelled statements ultimately lead to the case being dismissed because of Kastigar violations.

Regardless of the outcome of the case, the focus of this paper is primarily on the ability of the U.S. Courts to extend jurisdiction over American PMCs in future incidents. In the Nisour Square case, both the Prosecution and the Defense illustrated the main arguments for and against the reach of the statute. Their arguments may help determine if future attempts to extend jurisdiction over American PMCs will be successful. Because both sides agreed that the MEJA is unambiguous—though both found it so for different reasons—the determination rested on their arguments and interpretation of the plain meaning of the statute.

1. The Defense’s Argument Against Extending Jurisdiction over PMCs in the Nisour Square Incident

The Defense argued that since the Defendants were working exclusively through the State Department, they were not subject to the MEJA. The main point of the Defense’s argument was that because “The Defendants’ Contract Employment Supported State, Not Defense. MEJA Therefore Does Not Apply.” Defendants involvement in Iraq stemmed from a contract with the Department of State, not the Department of Justice. The agreement with the Independent Subcontractors (“the individuals”) and Blackwater was both specific and limited. The Defense based its arguments on contractual language, stating that each Defendant’s sole function and exclusive contractual obligation under his IC Service Agreement was to support Task Order 6 of the WPPS II Contract—i.e., to provide personal protective services to State Department civilians in the Baghdad area of operations under the control of the Chief of Missions and the Regional Security Officer, U.S. Embassy-Baghdad.

61 Id. at 165-66.
62 See Memorandum in Support of Defendants’ Motion to Dismiss for Lack of Jurisdiction at 2 n.4, United States v. Slough, 2009 WL 192243 (D.D.C. 2010) [hereinafter “Slough, Defs.’ Mot.”]
63 Id. at Table of Contents.
64 Id.
65 Id. at 2.
66 Id. at 7.
67 Id.
After establishing that the individuals were working solely with the State Department and not the Department of Defense, the Defense went on to distinguish between the two agencies by highlighting their mission statements. The Department of State’s mission is to:

> [a]dvance freedom for the benefit of the American people and the international community by helping to build and sustain a more democratic, secure, and prosperous world composed of well-governed states that respond to the needs of their people, reduce widespread poverty, and act responsibly within the international system.\(^{68}\)

This is in contrast with the Department of Defense’s “bottom line” mission: to “provide the military forces needed to deter war and to protect the security of the United States.”\(^{69}\) As an arm of the Department of State, the Defense argued that the contractors were there for the sole purpose of providing diplomatic security.\(^{70}\) In other words, the individuals were there to support diplomatic relations—they were not present in a military function.

After establishing their connection to the State Department and highlighting the different missions of the State Department and the Department of Defense, the Defense stressed the loophole in the MEJA statute, which the Defendants they argue, fell into. The Defense asserted the MEJA states that in order to extend jurisdiction over American citizens abroad, their employment must “relate to supporting the mission of the Department of Defense overseas.”\(^{71}\) To support their interpretation of the statute, the Defense stated “the nonpartisan Congressional Budget Office [“CBO”] concluded that the Act’s explicit coverage of contractors supporting the mission of the Department of Defense would not reach security contractors working for the Department of State.”\(^{72}\)

Further, the Defense pointed to a blue-ribbon panel assembled by then Secretary of State Condoleezza Rice that concluded the panel was “unaware of any basis for holding non-Department of Defense contractors ac-

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\(^{70}\) Slough, Defs.’ Mot., supra note 62, at 7.

\(^{71}\) Id. at 16 (quoting 18 U.S.C.A. § 3267(1)).

\(^{72}\) Id. at 3 (citing CONG. BUDGET OFFICI, CONTRACTORS’ SUPPORT OF U.S. OPERATIONS IN IRAQ 24 (Aug. 2008)).
countable under US law." Lastly, they cited evidence that President Barack Obama, as a Senator, sponsored an amendment to MEJA that, had it passed, would have extended the U.S. criminal laws to any federal contractors performing work in Iraq. The Defense argued that this illustrates that the current MEJA bill does not cover all federal contractors performing work in Iraq.

Combined, close examination of contracts with Blackwater’s independent contractors, Blackwater’s contract with the Department of State, the different missions of the Department of State and the Department of Defense, the loophole in MEJA’s jurisdictional reach over contractors not connected to the Department of Defense, Condoleezza Rice’s blue ribbon panel, and Obama’s own sponsored amendment, suggested that courts did not have jurisdiction over the defendants.

2. The Prosecution’s Argument for Extension of the Jurisdiction of the U.S. District Courts in Regards of the MEJA

The Prosecution began their argument by stating the jurisdictional issue is a factual argument for the jury to decide. However, the Prosecution did not support their argument with any case law, and in their Reply Memorandum the Defense cited Criminal Procedure Rule 12(b) to successfully argue that the jurisdictional matter can be challenged by a pretrial motion to dismiss.

The Prosecution then went on to refute and dismiss the Defense’s arguments in turn. First, the Prosecution established that the goals of the Department of Defense and the Department of State are not as separate as the Defense argued. The Prosecution stated that the Department of State and the Department of Defense in Iraq, “in contrast to [their] autonomous functions... in other nations [the Department of State and the Department of Defense have] mutually supporting responsibilities and work hand-in-hand to achieve that single common objective[.]” to win the war against

73 Id. at 3 (citing Dep’t. of State, Report of the Secretary of State’s Panel on Personal Protective Services in Iraq 5, 7 (2007)).
74 See id. at 31-32 (citing S. Amend. 2084, 110th Cong. (July 11, 2007)).
75 Id. at 3.
76 Gov’t’s Opposition to Defendants’ Motion to Dismiss for Lack of Jurisdiction at 1, United States v. Slough, 2009 WL 5453718 (D.D.C. 2010) [hereinafter Slough, Gov’t. Opp’n. Mot.].
78 Id. at 2.
opposition forces and bring stability to that country.\textsuperscript{79} In fact, both departments assisted each other in Iraq by "the sharing of personnel, joint participation in reconstruction efforts, providing budgetary funds, and assigning personal security assets to one another."\textsuperscript{80} Lastly, the Prosecution argued that "[i]n the absence of the personal security function undertaken by Blackwater in fulfillment of Task Order 6, those responsibilities in Iraq would necessarily be undertaken by Department of Defense personnel."\textsuperscript{81} In essence, the Prosecution minimized the separation between the two departments, making the contractual issue raised by the Defense seem irrelevant.

The Prosecution then discussed the plain meaning of the statute. They, like the Defense, believed the statute to be unambiguous.\textsuperscript{82} However, in contrast, the Prosecution asserted that the phrase "any other Federal agency . . . to the extent that such employment relates to supporting the mission of the Department of Defense overseas"\textsuperscript{83} found in 18 U.S.C. § 3267(A)(i)(II), 18 U.S.C. § 3267 (A)(ii)(II), and 18 U.S.C. § 3267 (A)(iii)(III), should be interpreted more broadly to give the Department of Justice authority to prosecute civilian contractors employed not only by the Department of Defense but by any Federal agency that is supporting the American military mission overseas.\textsuperscript{84}

The Prosecution went on to support this interpretation of the statute by referencing congressional hearings about the passage of the MEJA and statements by MEJA’s sponsors.\textsuperscript{85} The Defense’s interpretation is supported less substantially: they cited support from an agency that only controls budgetary investment in Congress and had no connection with the development of the bill or its amendments.\textsuperscript{86} And then-Senator Obama’s sponsoring of a new bill to alter the meaning of the statute had no interpretational influence on the Court because “the interpretation given by one Congress to an earlier statute is of little assistance in discerning the meaning of that

\textsuperscript{79} Slough, Gov’t. Opp’n. Mot., \textit{supra} note 76, at 2.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.} at 3.
\textsuperscript{82} \textit{Id.} at 23.
\textsuperscript{85} \textit{Id.}; see also H.R. Rep. No. 106-778(1), at 24 (2000).
\textsuperscript{86} Slough, Defs.’ Mot., \textit{supra} note 62, at 31 (quoting \textit{CONG. BUDGET OFFICE, CONTRACTORS’ SUPPORT OF U.S. OPERATIONS IN IRAQ} 24 (Aug. 2008)).
Moreover, as a member of the executive branch, Condoleezza Rice’s interpretation lacked authority and could not provide insight into the congressional intent of the bill.

In addition, the Prosecution demonstrated several examples of Blackwater positioning itself as an arm of the Department of Defense. First, in a report submitted by Blackwater to the United States Congress in October 2007, the company stated that:

Blackwater, and the veterans who work for Blackwater, have taken a difficult burden off the shoulders of the American Armed Forces. To Date, Blackwater has lost 27 of its own personnel in Iraq, it has not lost any of the men or women that it has been charged with protecting. Due to the status of the individuals Blackwater protects in Iraq, they are a constant target of attacks. The American military cannot wage war without the help of private contractors to fill in the shortfalls in its current structure. Clearly recognizing the importance of contractors, the 2006 Quadrennial Defense Review included contractors (along with active duty military, reserves, and civilian employees) as one of the four components of the Department of Defense’s Total Force.

The report went on to conclude that Blackwater and other similar military contractors “fill vital gaps in the all-volunteer force.” This evidence was quite damaging to Blackwater’s argument that their actions in Iraq are not connected to the Department of Defense. In fact, it showed that immediately following the incident they believed themselves to be an essential participant to the Department of Defense in Iraq, thus involved in employment relating to the support of the mission of the Department of Defense.

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90 Id. at 10.
3. Defense’s Reply Memorandum to the Prosecution’s Memorandum

The Defense’s response was limited. It focused on what they argued was the main issue of the case: whether the American PMCs on trial “employment in Iraq related to supporting the mission of the Department of Defense.” The Defense again cited several people who believed the MEJA did not provide a basis for jurisdiction over these PMCs.

The Defense stated that “the number two official in the Defense Department, responding to congressional inquiries regarding the Nisour Square Incident, stated that ‘these private security contractors were not engaged in employment supporting the Department of Defense mission overseas and, therefore, are not subject to Federal criminal prosecution under the [MEJA].’” The Defense also stated that “a blue-ribbon panel of the State Department has already determined the MEJA does not provide a basis for Prosecution here.” Although this was unfavorable evidence to the Prosecution, since it illustrated contradictory opinions within their agency—similar to their use of Blackwater’s statements to Congress—it did little to damage the Prosecution’s arguments.

First, the interpretations of the statute by either the Department of State or the Department of Defense had little or no controlling authority on the interpretations of a statute by a court, and thus those stated interpretations could only serve as an advisory to the court. Second, the Defense attempted to limit the scope of the connection between Blackwater employees and the Department of Defense by focusing on this individual group of employees. Thus, the Defense interpreted the statute to refer to employment relations based on the single incident in question and not on their entire employment relationship to the Department of Defense in Iraq. Under this limited interpretation, if a PMC contracted with the Department of Defense directly but took action to protect Department of State employees rather than action in furtherance of the Department of Defense’s mission in Iraq, it would be outside the scope of the statute and thus would be outside the jurisdiction of U.S. courts. Although it took an extremely limited view of MEJA, the Defense makes a valid argument that the Prosecution’s interpre-

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91 Slough, Defs.’ Reply Mem., supra note 77, at 1.

92 Id.


94 Slough, Defs.’ Reply Mem., supra note 77, at 1.

95 See id. at 14-15 (The Defense states that even when the military provides diplomatic security, it is performing a diplomatic function, not a military function).
tation may be too vast. In light of these two extremes, it is likely that a court’s interpretation of MEJA will fall somewhere in the middle of these two approaches.

4. Future of MEJA in the U.S.

In the hearing to decide the jurisdictional issue, Judge Urbina ultimately sided with the Prosecution. Although the District Court found in favor of the Prosecution, Judge Urbina stated that the Defense’s arguments were “rather strong.” Consequently, it may be argued that this decision cannot be expected to be the same in future cases the State Department brings against American PMCs.

But the Prosecution was able to overcome every argument the Defense proposed in favor of declining jurisdiction, and the judge did side with the Prosecution. Unfortunately, the stronger argument does not always prevail. Public policy and different judges’ interpretations may vary from court to court. It is likely that the scope of MEJA falls somewhere in between the two arguments posed before the D.C. District Court.

However, we do not have an appellate court decision on the matter. Even if we did, it is likely that an appellate court would not set a bright line test, but rather would set a standard to be determined on a case-by-case basis, thus creating confusion about the jurisdictional reach of MEJA. Consequently, we cannot be sure that MEJA will extend jurisdiction over American PMCs in Iraq and other nations until more cases are brought and more courts make rulings on the issue. Moreover, Iraq provides a very unique situation where the Department of Defense and the Department of State have a very close relationship in which Blackwater itself was unable to separate its presence from the Department of Defense’s missions. In other nations in the future, where the Department of Defense is not as prevalent, American PMCs may take actions which are not subjected to the MEJA, and they will find themselves outside the American courts’ jurisdiction, leaving a potential loophole in justice in these nations. Accordingly, further examination of legal orders over these situations must be examined until MEJA is extended to cover all potential incidents.

96 See id. at 11-12.
98 Id.
IV. The International Criminal Court’s Jurisdiction over American PMCs

If a State has an immunity agreement with American PMCs, and there is no connection between the U.S. Department of Defense and the operations of the American PMC in that State, then only the international community can extend jurisdiction over the PMCs actions. The criminal court that could most likely extend its jurisdiction in these matters is the International Criminal Court. Although special temporary courts do exist and can prosecute such crimes, such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, such courts are rarely enacted unless there are widespread violations of international law in a distinct region. Establishing an entire court can be quite expensive.¹⁰⁰

Violations by American PMCs tend to go unnoticed and are not as widespread as the illegal activities that occurred where other tribunals have been previously established. Consequently, for situations that occur which are similar in nature to the Nisour Square incident, the only international court that could prosecute is the ICC.

A. Personal Jurisdiction

To prosecute, the ICC must have both personal and subject matter jurisdiction. The personal jurisdiction of the ICC is quite complicated. According to the Vienna Conventions, a State is only bound by a treaty if it consents by signature, the exchange of instruments, ratification, acceptance, approval or accession, or by any other means if so agreed.¹⁰¹ In addition, Article 12 of the Rome Statute of the International Criminal Court ("Rome Statute") states:

1. 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.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
   - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed

on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.  

Neither the United States nor Iraq have ratified the Rome Statute of the International Criminal Court. Therefore, neither State has recognized the ICC’s jurisdiction to date. Consequently, under the normal traditional law of treaties, American PMCs actions in Iraq or any other State not party to the Rome Statute would not fall under the ICC’s jurisdiction.

However, there is a clause in the Rome Statute that may extend jurisdiction of the ICC over individuals acting in a State that has not ratified the Rome Statute. According to Article 12, Section 3 of the Rome Statute, “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.” Such jurisdiction may be applied retroactively according to Article 11, Section 2, “if a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.” Consequently, the Iraqi government could request that the ICC exercise its jurisdiction over crimes committed by American PMCs within its territory if it is admissible in accordance of Article 17 of the Rome Statute. However, the court may, in turn, determine a case to be inadmissible if:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted


104 See Vienna Conventions, supra note 101, at art. 11 (ratification is necessary to be bound).

105 Rome Statute, supra note 102, at art. 12(3).

106 Id. at art. 11(2).
from the unwillingness or inability of the State genuinely to prosecute:

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court. 107

This article illustrates the reason the ICC was created: to be a complementary court that is only to be used if other courts abused their prosecutorial duties, or if other courts lacked the jurisdiction over a crime. 108 As long as a country fully investigates a case, the case will not be admissible to the ICC. Consequently, since the case U.S. v. Slough was dismissed for prosecutorial misconduct, and not for lack of jurisdiction, the ICC would likely find the case to be inadmissible to their courts under Article 17 of the Rome Statute. However, if the U.S. courts determined that a case is outside the jurisdiction of the U.S. court system, and the State cannot try the suspects of a crime in their State, then the State where the acts took place could invite the ICC to have ad-hoc jurisdiction over the actions in question.

In addition to non-State parties to the Rome Statute being able to extend jurisdiction over individuals, many states where American PMCs are present have become parties to the Rome Statute, thus recognizing ICC jurisdiction. 109 Thus, if admissible, the ICC’s prosecutor can move to investigate matters in “[t]he State or the territory of which the conduct in question occurred.” 110 Therefore, American PMCs in States that have ratified the treaty, such as Afghanistan, may be subjected to the jurisdiction of the ICC.

1. U.S. Attempts to Limit the Jurisdiction of the ICC over American Citizens

The U.S. has attempted to limit the jurisdiction of the ICC in several ways. First, George W. Bush publically unsigned the Rome Statute two years after Bill Clinton had signed it in 2000. 111 In addition, Congress passed the

107 Id. at art. 17(1)(a)-(d).
108 Rome Statute. supra note 102, at Preamble.
109 State Parties. supra note 103 (State Parties includes Afghanistan, South Africa, Uganda, and Sierra Leone. But, States with PMC’s that have not ratified the Rome Statute include Angola, the United States, Zimbabwe, and Israel).
110 Rome Statute, supra note 102, at art. 12(2)(a).
American Servicemembers Protection Act of 2002 ("ASPA"), which opposed the ICC.\textsuperscript{112} Although these actions had no real legal effect on the jurisdiction of the ICC, because the United States never ratified the Rome Statue,\textsuperscript{113} it does illustrate the intentions of the United States to impede any jurisdiction the ICC may have over the American citizens.

The U.S. then attempted to take legal measures to stop ICC jurisdiction over American citizens. They pressured several states to sign Article 98 Agreements with the United States.\textsuperscript{114} Article 98 agreements are bilateral agreements that require a State to gain American consent before an American citizen can be surrendered to the ICC.\textsuperscript{115} Article 98 refers to the Rome Statute article that states:

\begin{enumerate}
\item The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
\item The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.\textsuperscript{116}
\end{enumerate}

\begin{flushright}
\textsuperscript{112} See id. at 1041-42.
\textsuperscript{113} See Vienna Conventions, supra note 101, art. 18 (without ratifying a treaty, a State is not bound by that treaty).
\textsuperscript{116} Rome Statute, supra note 102, at art. 98(1)-(2).
\end{flushright}
Under the United States’ theory, by having an Article 98 Agreement with a nation, that nation would have to receive U.S. consent to turn American citizens over to the ICC. However, it has been noted, even by those who oppose the ICC, that “[t]hese safeguards are not a guarantee of protection from the illegitimate claims of ICC jurisdiction, but U.S. officials and service members are much more protected than they would be without them.”

Article 98 agreements create an issue of treaty conflict because parties to the Rome Statute make commitments with the United States that are inconsistent with its obligations under the previous treaty. Parties to the Rome Statute are obligated to surrender suspects to the ICC pursuant to a valid request; however, Article 98 seems to create an exception. On the other hand, most texts about the ICC give Article 98(2) minimal importance because it is only meant to apply to Status of Forces Agreements (“SOFA”s). This is a much narrower interpretation of Article 98 than the U.S.’s interpretation. Consequently, it can be successfully argued that the agreements the U.S. is pressuring nations to sign run counter to the language of article 86, 87, 89, and 90 of the Rome Statute. In fact, Article 98 agreements run counter to the object and purpose of the Rome Statute in which “the most serious crimes of concern to the international community as a whole must not go unpunished.” Although it can be argued that the mere signing of the treaty does not violate a country’s obligations under the Rome Statute, if a country follows the terms of that treaty and refuses to turn over individuals according to the obligations of the Rome Statute, their actions will be inconsistent with a prior treaty’s obligations. Therefore, despite America’s efforts, the Article 98 treaties offer no real legal protection to American citizens.


See Rome Statute, supra note 102, at art. 89(1).

Id. at art. 98.


See Tallman, supra note 111, at 1046.

Id.

Rome Statute, supra note 102, at Preamble.

See Tallman, supra note 111, at 1049-50.

See id. at 1053.
B. Subject Matter Jurisdiction

Not only must the ICC have personal jurisdiction over suspects, but it must also establish subject matter jurisdiction. The ICC has jurisdiction with respect to "(a) the crime of genocide, (b) crimes against humanity, (c) war crimes, and (d) crimes of aggression." However, the only categories that likely could be applied to American PMCs are either crimes against humanity or war crimes. The crime of genocide has a very difficult element to prove, that being the element of "intent to destroy, in whole or in part, a national, ethnical, racial or religious group." To be convicted of the crime of genocide, a person must: (1) intend to target a person because of his nationality, ethnicity, race, or religion; and (2) must intend to destroy the entire group. It is always difficult to prove such a specific intent because you cannot access the thoughts of an individual. In addition, proving the intent of a PMC is especially difficult because you must overcome the assumption that PMCs motivations are always associated with financial gain. Further, there has yet to be an agreement to the definition for a "crime of aggression," and there may never be. Therefore, American PMCs are likely not in danger of being prosecuted for either crimes of aggression or genocide.

1. Crime against Humanity

Crimes against humanity can occur during times of war or peace. A person does not need to be a member of a State or organization that is involved in the crime. Anyone who supported the policy of the State or the organiza-

127 Rome Statute, supra note 102, at art. 5(1)(a)-(d).
128 Id. at art. 6.
tion in committing the crimes can be prosecuted. The Rome Statute defines crimes against humanity in the following manner:

["Crimes against humanity"] means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

First, the Prosecution must overcome the standard that the acts must be part of a widespread or systematic attack directed against a civilian population. This means that the perpetrator of the crimes must commit multiple acts from the above-mentioned list "pursuant to or in furtherance of a

\[\text{Gerhard, Werle, Principles of International Criminal Law, 295-96 (2005); see also Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, § 667 (May 7, 1997).}\]

\[\text{Id., at art. 7(2)(a).}\]
State or organizational policy to commit such attacks." The term widespread means the incident must have both a broad nature and a large number of victims; while the term systematic refers to the organizational nature of the acts of violence. Thus, it cannot be one simple mistake, such as the one found in Nisour Square, but must be more deliberate and widespread.

However, if there was an incident that rises to the level needed to qualify as a crime against humanity, almost any commitment, encouragement, or assistance could render a member of an American PMC susceptible to prosecution in the ICC. This includes the possibility for being prosecuted for the training and advising of State armies, a popular activity for almost all PMCs. But the prosecutor must prove a mens rea element that the conduct of the PMCs was for the purpose of assisting in the commission of crimes against humanity and not simply to make a profit, a rather difficult hurdle.

2. War Crimes

To be prosecuted for war crimes, the PMC must fit within the definition of a military force. Since PMCs are technically civilians, this may prove to be a difficult task. However, according to the ICTR:

The duties and responsibilities of the Geneva Conventions and the Additional Protocols . . . will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfill the war efforts.

This would only apply to PMCs hired to fight the war and does not include "PMC personnel who are not hired to fight a war, and as a consequence are civilians, and who are neither instructed to commit the crime, nor sufficiently controlled by the hiring state, nor carry out services invol-

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136 Id.
137 Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1A, Judgment, ¶ 94 (June 12, 2002).
138 Lehnardt, supra note 6, at 1023.
139 Id.
140 Rome Statute, supra note 102, at art. 25(3)(c)-(d).
ing the exercise of 'public authority.' "142 But the issue of whether individuals can be held responsible for violations of International Humanitarian Law is still uncertain, and a case-by-case analysis is needed to determine whether they fall under the law.143 If PMCs are hired by a party to the conflict and have a substantially close link to the party in the conflict, they are more likely to be subjected to prosecution.144 However, if the PMCs are not employed by a party to the conflict, the Prosecutor will have to prove that "private military personnel guarding detainees and military objectives, and perhaps PMC employees providing security to diplomats, can, in principle, commit war crimes."145

The subject matter jurisdiction of the ICC is rather limited when it comes to its ability to prosecute American PMCs for their actions. There are very difficult elements to prove, and the prosecutor must overcome the assumption that the PMC worked primarily for financial gain. Some flexibility might be possible, though, in a case in which the PMC is connected to grave breaches of international law by the government or organization they are working for. Although it may be difficult to prosecute for war crimes or crimes against humanity, a prosecutor still has the ability to bring charges and bring American PMCs in front of the court to try them.

V. Political Considerations

The legal loophole for American PMCs is greatly limited. First, a State that they are present in must either have an agreement to provide immunity to American PMCs for their actions or have an inability to prosecute them.146 Second, the extent of the American PMCs employment must not support any mission of the Department of Defense overseas.147 Even if they fall within this loophole, they could still be subjected to prosecution in front of the ICC if they commit any war crimes or are connected to any crimes against humanity.148 Thus, the legal loophole is very small.

However, the political loophole which American PMCs operate in may be substantially wider. Prosecutors in foreign sovereigns, the U.S., and

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142 Lehnardt, supra note 6, at 1017-18.
143 See id. at 1019.
144 Id.
145 Id.
146 Vienna Convention, supra note 101, at art. 11 (personal jurisdiction); Vienna Convention, supra note 101, at art. 5(1)(a)-(d) (limited cases of subject matter jurisdiction); Rome Statute, supra note 102, at art. 98(1)-(2) (Article 98 require consent to be persecuted).
147 Lehnardt, supra note 6, at 1017-18.
148 Rome Statute, supra note 102, at art. 5(1)(b)-(c).
the ICC may be fairly reluctant to pursue criminal charges against American PMCs. Foreign national courts are always reluctant to prosecute American citizens for crimes they may have committed within their territory. America is one of the most powerful nations in the world, and provides economic aid and financial support throughout the world. In addition, America is one of the largest consumer markets in the world. As a result, prosecutors in other states have a lot of political pressure from their government to avoid prosecuting Americans for crimes they may have committed because those political leaders fear a retaliation from the American government in the form of limiting aid and investment, or from the American markets which could limit the purchasing of their goods and limit travel to their nation (and thus reducing tourism in the future).

American prosecutors also face political pressures not to prosecute American PMCs. As discussed earlier, the use of PMCs is a very popular trend because of its political advantages. Several statements have been made by political leaders that were upset over the charges brought against the individuals involved in the Nisour Square incident. Any case brought against American PMCs will undeniably shine a negative light on their use. In addition, PMCs will be more reluctant to work with the U.S. government if they know they will be prosecuted for crimes they commit and thus they may demand higher financial compensation for the increased risk of prosecutions, thus driving up the costs. In addition, the cost of prosecuting American PMCs abroad is substantial, and without a court system or a permanent investigatory unit with the State Department. Due to the difficulty bringing these cases, the cost associated, and the political pressures, only 12 cases have been brought by the Department of Justice under MEJA between 2000 and 2008.

The Prosecutor of the ICC faces the greatest political pressure not to prosecute American PMCs. Former ICC Chief Prosecutor Luis Moreno Ocampo attempted to counter public perception in responding to a question about the ICC only investigating smaller nation’s citizens:

150 Williams, supra note 4, at 59 (financial advantage); Schneiderman, supra note 22 (troop draw-downs).
152 See Williams, supra note 4, at 72, 77-78.
153 Id. at 62.
You are suggesting that we are a court only for the Third World. I prosecute whoever is in my jurisdiction. I cannot allow that we are a court just for the Third World. If the First World commits crimes, they have to investigate, if they don’t, I shall investigate. That’s the rule and we have one rule for everyone.\textsuperscript{154}

Such sentiments lead Chief Prosecutor Campo to investigate actions taken by NATO forces in Afghanistan.\textsuperscript{155} However, as yet, no charges have been brought. In addition, in an interview, Chief Prosecutor Campo avoided directly stating that he was investigating Americans for potential crimes for fear of the political backlash.\textsuperscript{156} Although there is some evidence that sentiments may be changing,\textsuperscript{157} America has been a vehement opponent to the ICC’s jurisdiction over American citizens and would likely use its influence to obstruct any attempt the ICC takes to bring American PMCs in front of their court. This point is illustrated by the ICC’s inability to bring Sudan’s President Omar al-Bashir in front of the court.\textsuperscript{158} That illustration helps to show that the ICC lacks any enforcement mechanism and is unable to influence states to fulfill their obligations to the Rome Statute regardless of political ties. Consequently, although the Article 98 agreements have no legal enforcement, any of the 100 States that have Article 98 agreements with the U.S. will likely succumb to the political pressures of America, which is much greater than those of Sudan, not to turn over American PMCs to the ICC. The only hope for the ICC to overcome these political pressures and to be able to prosecute American PMCs is for the U.S. government to begin taking a pro-ICC stance or to ratify the Rome Statute, a seemingly impossible task with the current composition of Congress.


\textsuperscript{155} Id.

\textsuperscript{156} Id.


\textsuperscript{158} See Kenya President Ratifies New Constitution, BBC News, August 27, 2010, http://www.bbc.co.uk/news/world-africa-11106558 (this demonstrates the inability of the ICC to assert the obligations of the Rome Statute over states. Sudanese President Omar al-Bashir, who is wanted by the ICC for War Crimes, was allowed to be present at a Kenyan political event. This clearly violates Kenya’s obligations as a ratifying member of the Rome Statute).
CONCLUSION

Although the legal loophole may be small, the political pressures substantially enlarge the real world loophole within which American PMCs operate. America has always been and always will be suspicious of a non-U.S. court trying American citizens. Therefore, the greatest opportunity to overcome this loophole can only be accomplished through the American court system. Currently, there is not enough political pressure to force Congress to pass a well-defined, broader MEJA amendment. To accomplish this, actions must be taken by the State Department to bring charges against an American PMC as soon as possible. In bringing this case, this Prosecutor cannot make the same mistakes made in Slough and must successfully convict a person under MEJA. Then, the appeal process will be allowed to begin, and in the best scenario, the jurisdictional issue will be appealed up to the Supreme Court and they will grant certorari. The Supreme Court will either find a broad definition of the MEJA’s terms, positioning all American PMCs under MEJA, or they will take a more limited definition.

If it is a limited definition, the attention of the nation will, once again, be brought to the issue of the loophole. Similar to the situation that brought about the creation of MEJA in 2000, and its amendment in 2004, public pressure could motivate Congress to pass a bill to alter MEJA again; thus creating a bill that places all American PMCs under U.S. jurisdiction. However, if no case is successfully prosecuted, the bill will remain the same, prosecutors will be reluctant to bring cases under it, and American PMCs will continue to operate without oversight.