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# Filling the Criminal Liability Gap for Private Military Contractors Abroad: U.S. v. Slough and the Civilian Extraterritorial Jurisdiction Act of 2010

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# **Filling the Criminal Liability Gap for Private Military Contractors Abroad: U.S. v. Slough and the Civilian Extraterritorial Jurisdiction Act of 2010**

**Melissa Brickell**

## **Introduction**

On September 16, 2007, private military contractors (PMCs) employed by Blackwater Worldwide allegedly shot and killed 14 unarmed Iraqi civilians and wounded 20 others in Nisoor Square, a crowded traffic intersection in downtown Baghdad.<sup>1</sup> On December 31, 2009, U.S. District Court Judge Ricardo Urbina dismissed the indictment charges brought by the U.S. government against five Blackwater contractors involved in the disputed incident,<sup>2</sup> and in the process unleashed a wave of Iraqi anger and disbelief over the failure to prosecute the deadly shooting that had already inflamed anti-American tensions.<sup>3</sup> While the U.S. government will appeal the dismissal to the U.S. Court of Appeals for the D.C. Circuit, prosecutors face a steep uphill climb to overturn U.S. District Judge Urbina's critical and detailed ruling.<sup>4</sup> How did the Department of Justice's investigation and criminal prosecution of these individuals fail, even before reaching trial? The answer lies in an ambiguous statute that creates a confusing legal framework as it applies to PMCs in Iraq and Afghanistan. As the law currently stands, Federal criminal jurisdiction for crimes committed abroad in war zones encompasses only those PMCs that are employed by the Armed Forces, Department of Defense (DOD), or by another Federal

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<sup>1</sup> U.S. v. Slough, No. 09-0360, 2009 WL 51173785, at \*2 (D.D.C. Dec. 31, 2009).

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

<sup>3</sup> See Anthony Shadid, *Biden Says U.S. Will Appeal Blackwater Case Dismissal*, N.Y. TIMES, Jan. 23, 2010, <http://www.nytimes.com/2010/01/24/world/middleeast/24iraq.html>.

<sup>4</sup> See *id.*; Del Quentin Wilber, *U.S. Appeals Ruling in Blackwater Case*, WASH. POST., Jan. 30, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/29/AR2010012903951.html>.

agency to the extent that their employment supports a DOD mission overseas.<sup>5</sup> The five accused Blackwater guards, however, worked on a contract to provide security for diplomats of the Department of State (DOS),<sup>6</sup> potentially escaping through a liability loophole. To ensure that all contractors who commit crimes in Iraq and Afghanistan can be prosecuted effectively in the United States, Congress must pass legislation to update Federal criminal law and fill the gaps that may leave certain types of contractors free from any criminal liability. The Civilian Extraterritorial Jurisdiction Act of 2010 (CEJA) attempts to do just that, and while it may deter some PMCs from participating in the U.S. military and security contracting market, the benefits of having a fully accountable U.S. legal system outweigh the drawbacks for individual contracting companies.

## **Background on the Increased Use of Private Military Contractors**

The use of PMCs (also known as mercenaries, or private security contractors) in time of war is not a new phenomenon, and the United States has used them prior to the wars in Iraq and Afghanistan. For example, the U.S. military hired private companies to build bases and handle non-combat tasks during the Vietnam War<sup>7</sup> and to train South Vietnamese troops.<sup>8</sup> Contracting was intended to be logistical in nature, as modern democratic governments found it difficult to handle supply, logistics, and manufacturing needs solely through the public sector.<sup>9</sup> When the Cold War ended in the 1990s, reducing military costs became a major U.S. government goal,<sup>10</sup>

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<sup>5</sup> 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>6</sup> SUZANNE SIMONS, *MASTER OF WAR* 179 (2009).

<sup>7</sup> *Id.* at 66.

<sup>8</sup> Scott M. Sullivan, *Private Force/Public Goods*, 42 CONN. L. REV. 853, 859 (2010).

<sup>9</sup> SIMONS, *supra* note 6, at 66.

<sup>10</sup> Craig S. Jordan, *Who Will Guard the Guards? The Accountability of Private Military Contractors in Areas of Armed Conflict*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 309, 313 (2009).

and the Pentagon underwent significant cutbacks in standing troop levels.<sup>11</sup> These reductions resulted in the outsourcing of many non-core functions and services to private contractors that had previously been performed by the military.<sup>12</sup>

This U.S. trend in military and security privatization reached a high-water mark when President George W. Bush's Administration began military action in Iraq and Afghanistan, a decision which culminated in the largest deployment of private military firms abroad in U.S. history.<sup>13</sup> At a peak in September 2008, the total number of contractors in Iraq surpassed the total number of troops,<sup>14</sup> while in Afghanistan the total number of contractors has exceeded troop levels since 2007.<sup>15</sup> As recently as September 2009, the number of DOD contractors in Iraq totaled 114,000, compared with 130,000 troops on the ground.<sup>16</sup> In Afghanistan the ratio approached 2:1 at the same point, with 104,000 DOD contractors for the 64,000 troops.<sup>17</sup> These official totals do not distinguish between specific types of contractor duties such as base support or security services, and questions have been raised as to their reliability.<sup>18</sup> However, they do illustrate the breadth of private presence that exists in these two war zones. The numbers do not even include all those contracted by the other U.S. departments and agencies that employ PMCs in Iraq and Afghanistan, including DOS, U.S. Agency for International Development (USAID), and the Central Intelligence Agency (CIA).<sup>19</sup>

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<sup>11</sup> SIMONS, *supra* note 6, at 65.

<sup>12</sup> Jordan, *supra* note 10.

<sup>13</sup> Sullivan, *supra* note 8, at 855.

<sup>14</sup> MOSHE SCHWARTZ, THE DEPARTMENT OF DEFENSE'S USE OF PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN 1, 8 (Cong. Res. Serv. 2010).

<sup>15</sup> *Id.* at 11.

<sup>16</sup> MOSHE SCHWARTZ, DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN 1, 5 (Cong. Res. Serv. 2009).

<sup>17</sup> *Id.*

<sup>18</sup> SCHWARTZ, *supra* note 14, at 5.

<sup>19</sup> JENNIFER ELSEA, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: LEGAL ISSUES 1 (Cong. Res. Serv. 2010).

PMCs provide significant benefits to the U.S. government in that they can save money and they allow for increased flexibility. Contractors can be hired on short notice and deployed quickly and are not required to be rotated out of war zones like soldiers.<sup>20</sup> Employing them only as needed for the duration of a particular military or security need can be cheaper in the long run than maintaining a permanent internal force.<sup>21</sup> Personnel costs are some of the largest military expenses,<sup>22</sup> and providing veterans' benefits such as retirement payments or tuition assistance for contractors is not required. In addition, PMCs often possess important skill sets and expertise that are undercompensated in the public sector, and they can be drawn from local populations that more closely match indigenous culture than would the public force.<sup>23</sup> In September 2009, a surprising 74% of DOD contractors in Iraq and 91% in Afghanistan were local and third-country nationals.<sup>24</sup> By definition, PMCs can provide armed services like site, convoy, escort, or personal detail security, or they can provide unarmed security services such as operational coordination, intelligence analysis, hostage negotiations, or security training.<sup>25</sup> Contracting out basic unarmed services can also make military personnel available for essential combat operations.<sup>26</sup> Without the support of PMCs, departments including the DOD and DOS would not be able to execute their missions.<sup>27</sup>

When the U.S. military involvement in Iraq and Afghanistan escalated, U.S. government entities found themselves requiring protective security beyond their current capabilities. In particular, the DOS, whose traditional role was one of a diplomat and whose Diplomatic Security

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<sup>20</sup> Sullivan, *supra* note 8, at 888.

<sup>21</sup> SCHWARTZ, *supra* note 14, at 5.

<sup>22</sup> Interview with U.S. Senate military aide in Washington, D.C. (Mar. 23, 2010). He is an Iraq war veteran and holds a *Juris Doctor*.

<sup>23</sup> Sullivan, *supra* note 12, 889.

<sup>24</sup> SCHWARTZ, *supra* note 16, at 2.

<sup>25</sup> SCHWARTZ, *supra* note 14, at 2.

<sup>26</sup> SCHWARTZ, *supra* note 16, at 2.

<sup>27</sup> SCHWARTZ, *supra* note 14, at 5 (according to government officials).

Service was never meant to be a war zone security force, needed additional personnel to protect Ambassadors Paul Bremer and Patrick Kennedy who ran the Coalition Provisional Authority (the transitional government that followed the invasion of Iraq).<sup>28</sup> This urgent need resulted in a slew of government contracts awarded on a non-competitive basis to the few companies who were able to fulfill them at the time. The company Blackwater Worldwide was one of those few companies, rising from a small security consulting business founded by former Navy SEAL Erik Prince to a billion dollar government contractor meeting the needs of the DOS and of other departments. Other companies that eventually contracted in Iraq and Afghanistan include Triple Canopy, Kellogg, Brown and Root, DynCorp International, and Military Professional Resources, Inc.<sup>29</sup>

In 2008, the Congressional Budget Office estimated that, since the start of the war, U.S. agencies had awarded private contracts totaling \$85 billion in Iraq and neighboring regions and \$10 billion in Afghanistan.<sup>30</sup> With such a massive PMC influx and presence in war zones, it is surprising that an extra arm of the U.S. military could operate with potential immunity from any criminal laws.

### ***United States v. Slough and its Fallout***

One of the most negatively publicized incidents during the war in Iraq was a disputed Baghdad shooting in September 2007, which involved a convoy of U.S. PMCs. These PMCs, part of the Blackwater Tactical Support Team, were contracted by the DOS to provide back-up

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<sup>28</sup> SIMONS, *supra* note 6, at 70.

<sup>29</sup> Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 5, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/04/AR2006120401311.html>.

<sup>30</sup> SIMONS, *supra* note 6, at 255.

fire support to other Blackwater personal security details in Baghdad.<sup>31</sup> On September 16, the convoy took up positions at a traffic circle in Nisoor Square to secure an evacuation route for American and Iraqi officials after a vehicle-borne improvised explosive device detonated near the compound at which they were meeting.<sup>32</sup> Soon after, a shooting incident occurred, which the PMCs claimed was a self-defense response to an insurgent attack. The U.S. government, however, maintained after its investigation that the violence was unprovoked and that the victims were unarmed. Prosecution by the Department of Justice (DOJ) ultimately culminated in indictments for voluntary manslaughter and firearms violations, but the indictments were dismissed in December 2009 in the closely watched case *U.S. v. Slough* because of evidentiary taint from prosecutorial case mismanagement.<sup>33</sup>

Much of the intense Iraqi outrage over the shooting stemmed from the fact that Iraq had no legal recourse against the Blackwater contractors because they were immune from Iraq law. News of a U.S. District Court's dismissal of criminal charges further fueled Iraqi anger.<sup>34</sup> In the immediate aftermath of Nisoor Square, Iraq's Interior Ministry claimed that the Blackwater PMCs had perpetrated a savage massacre, and the Iraqi government demanded millions in compensation for the victims' families.<sup>35</sup> Iraq subsequently revoked the company's license to operate in the country, so the DOS was unable to renew any of its security contracts with Blackwater in Iraq. Blackwater received such bad press following the incident that it ultimately changed the company name to Xe Services, and its founder and CEO Erik Prince stepped down

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<sup>31</sup> *U.S. v. Slough*, No. 09-0360, 2009 WL 51173785, at \*2 (D.D.C. Dec. 31, 2009).

<sup>32</sup> *Id.*

<sup>33</sup> *See id.* (holding that the defendants' statements were compelled, and that the government failed to demonstrate both that the immunized statements did not influence its evidence and that their use was harmless error).

<sup>34</sup> Timothy Williams, *Iraqis Angered as Blackwater Charges are Dropped*, N.Y. TIMES, Jan. 1, 2010, <http://www.nytimes.com/2010/01/02/us/02blackwater.html?scp=5&sq=iraq%20reaction%20blackwater%20shooting%20decision&st=cse>.

<sup>35</sup> SIMONS, *supra* note 6, at 181.

from day-to-day operations of the company in 2009.<sup>36</sup> After the U.S. District Court's dismissal of criminal charges, Iraq officials called the outcome unacceptable,<sup>37</sup> and the Interior Minister even ordered 250 private security guards out of the country solely because they had worked for Blackwater at the time of the Nisoor Square shooting.<sup>38</sup> The dismissal further strained U.S.-Iraq relations.

In general, abuses by security forces and the associated social upheaval they cause can be a major factor in escalating insurgencies.<sup>39</sup> For example, another deadly Blackwater shooting in May 2009 in Afghanistan turned the entire local neighborhood against the U.S. presence there and prompted one civilian witness to state "...if they keep killing civilians, I'm sure some Afghans will decide to become insurgents."<sup>40</sup> This disconcerting threat and the Iraqi government actions following alleged Blackwater abuses illustrate the significant consequences of PMC abuses abroad and highlight the importance of ensuring that the rule of law brings wrongdoers to justice when those abuses occur. The local backlash affects not only Blackwater but also the PMC industry as a whole and the U.S. government's ability to execute its mission effectively.

As the dismissal of *Slough* shows, prosecuting the alleged criminal acts of PMCs under the existing legal authorities is problematic and potentially impossible in certain cases. After a three week "*Kastigar* hearing,"<sup>41</sup> U.S. District Judge Urbina found that the government's case had been tainted by the use of compelled statements afforded Fifth Amendment immunity under

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<sup>36</sup> Mike Baker, *Erik Prince, Blackwater Founder, Cutting Ties with Company*, HUFFINGTON POST, Dec. 2, 2009, [http://www.huffingtonpost.com/2009/12/02/erik-prince-blackwater-fo\\_n\\_376880.html](http://www.huffingtonpost.com/2009/12/02/erik-prince-blackwater-fo_n_376880.html)

<sup>37</sup> *Iraq: U.S. Blackwater Case Dismissal "Unacceptable,"* REUTERS, Jan. 1, 2010, <http://www.reuters.com/article/idUSTRE6000EP20100101>

<sup>38</sup> *Iraq Orders Blackwater Guards Out*, THE SIASAT DAILY, Feb. 12, 2010, <http://www.siasat.com/english/news/iraq-orders-blackwater-guards-out>

<sup>39</sup> U.S. DEP'T OF DEFENSE, FM 3-24, COUNTERINSURGENCY (2006).

<sup>40</sup> David Zucchini, *Deadly Contractor Incident Sours Afghans*, CHI. TRIB., Aug. 13, 2009, <http://www.chicagotribune.com/news/nationworld/la-fg-afghan-contractors13-2009aug13,0,7816228.story?page=1>

<sup>41</sup> *Kastigar v. United States*, 406 U.S. 441 (1972) (setting binding precedent requiring the government to prove that it made no use of immunized statements or that any such use was harmless beyond a reasonable doubt).



*Garrity v. New Jersey*.<sup>42</sup> The Blackwater defendants' statements on the shooting were taken during interviews by their employers, the State Department Diplomatic Security Service (DSS), in accordance with reporting procedures outlined in a memorandum.<sup>43</sup> Their sworn statements provided that “. . . disciplinary action, including dismissal from the Department's Worldwide Personnel Protective Services contract, may be undertaken if I refuse to provide this statement or fail to do so fully and truthfully.”<sup>44</sup> This language effectively ensured that the statements were compelled under threat of job loss. The form also provided the language: “. . . neither my statements nor any information or evidence gained by reason of my statements can be used against me in a criminal proceeding.”<sup>45</sup> This prohibition ultimately thwarted the prosecution, as they could not avoid the influence of the incriminating statements that the defendants gave. As the Judge summarized,

In their zeal to bring charges against defendants in this case, the prosecutors and investigators aggressively sought out statements the defendants had been compelled to make to government investigators in the immediate aftermath of the shooting and in the subsequent investigation. The government used the defendants' compelled statements to guide its charging decisions, to formulate its theory of the case, to develop investigatory leads and, ultimately, to obtain the indictment in this case.<sup>46</sup>

While at first blush this decision seems a result of prosecutorial mismanagement or incompetence, the reality is that prosecutors were hampered by the legal framework in their ability to make a case. At the time of the incident, arrest authority was uncertain, and no formalized criminal investigative procedures existed. None of the defendants were arrested. DOS agents merely interviewed the Blackwater convoy members for a “Memorandum Report of

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<sup>42</sup> U.S. v. Slough, No. 09-0360, 2009 WL 51173785 (D.D.C. Dec. 31, 2009) (citing *Garrity v. New Jersey*, 385 U.S. 493 (1967) (holding that prosecutors may not use statements compelled under threat of removal from office or use any information derived from those statements)).

<sup>43</sup> *Id.* at 4.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1.

Interviews<sup>47</sup> and conducted an incident scene investigation in furtherance of the administrative inquiry.<sup>48</sup> Two Army Colonels also examined the scene for evidence, but Federal Bureau of Investigations (FBI) investigators did not arrive in Baghdad until October, weeks after the shooting.<sup>49</sup> Even once they arrived, the investigators were protected and transported outside the fortified Green Zone by contracted Blackwater security guards in an ironic twist and a potential conflict of interest.<sup>50</sup>

Even if *Slough* had made it to trial, a government victory was by no means certain because the defendants may not have fallen under the Federal jurisdiction necessary for the United States to prosecute. The court may not have found that the defendants' employment under State Department contract to protect diplomats "... support[ed] the mission of the DOD overseas."<sup>51</sup> This requirement, a statutory provision passed by Congress before the use of PMCs expanded, is untested in court and raises additional issues for any future prosecutions of DOS PMCs like Blackwater. The *Slough* case is significant because it illuminates numerous legal issues and criminal procedural challenges that arise under the U.S. laws attempting to govern contractors in war zones. It is necessary to identify and examine the legal authorities and their shortcomings.

## **Legal Status and Authorities**

The Military Extraterritorial Jurisdiction Act of 2000 (MEJA) legally recognized for the first time that civilians accompanying the military abroad fell within a jurisdictional loophole

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<sup>47</sup> *Id.* at 3.

<sup>48</sup> *Id.* at 5.

<sup>49</sup> *Id.* at 7.

<sup>50</sup> James Gordon Meek, *Blackwater to Guard FBI Team Probing It*, N.Y. DAILY NEWS, Oct. 3, 2007, [http://www.nydailynews.com/news/national/2007/10/03/2007-10-03\\_blackwater\\_to\\_guard\\_fbi\\_team\\_probing\\_it-2.html](http://www.nydailynews.com/news/national/2007/10/03/2007-10-03_blackwater_to_guard_fbi_team_probing_it-2.html).

<sup>51</sup> 18 U.S.C. § 3261-7.

and attempted to bring them under Federal jurisdiction for criminal prosecution. The statute provided Federal criminal jurisdiction for civilians who committed offenses punishable by more than one year in prison while employed or accompanied by the Armed Forces within the special maritime and territorial jurisdiction of the U.S.<sup>52</sup> This bipartisan legislation, sponsored by Senator Jeff Sessions (R-AL), was introduced in response to a juvenile dependant who escaped criminal liability after committing a sexual offense on a U.S. base in Germany.<sup>53</sup> Since no action could be taken on the juvenile under German law, and because as a civilian he was not a U.S. Army member,<sup>54</sup> his conviction was overturned by the U.S. Court of Appeals for the Second Circuit.<sup>55</sup> The MEJA legislation was also spurred by a recommendation from the Overseas Jurisdiction Advisory Committee,<sup>56</sup> which was established by Congress to study this jurisdictional issue after it had been routinely raised in oversight hearings and introduced for decades in bills that failed to pass both chambers of Congress.<sup>57</sup> Senator Sessions's introductory floor remarks indicate the extent of MEJA's legislative intent:

Because the military continues to rely heavily on civilian assistance and support, the United States must develop an appropriate and effective criminal process to deal with the misbehavior of civilians. It is important to the morale of our military forces that enlisted men and women working outside the United States along with civilian personnel do not believe that civilians who may commit a crime against them are beyond criminal prosecution.<sup>58</sup>

While the Act was clearly intended to bring civilians associated with the Armed Forces under the legal umbrella, it did not anticipate the extent to which agencies besides the military would contract with PMCs or the threat of criminal acts perpetrated by PMCs against the local

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<sup>52</sup> Military Extraterritorial Jurisdiction Act, Pub. L. No. 106-523, 114 Stat. 2488 (2000) (prior to 2004 amendment).

<sup>53</sup> 145 CONG. REC. S3635 (1999) (statement of Sen. Sessions).

<sup>54</sup> *Id.*

<sup>55</sup> H.R. REP. NO. 106-778 pt. 1, at 9 (2000).

<sup>56</sup> 145 CONG. REC. S3635.

<sup>57</sup> H.R. REP. NO. 106-778 pt. 1, at 9.

<sup>58</sup> 145 CONG. REC. S3635.

population during the wars in Iraq and Afghanistan. In response to the increased wartime use of PMCs in 2002, an amendment to MEJA was passed in 2004.<sup>59</sup> As amended, MEJA now includes in Federal criminal jurisdiction not only civilian employees of the Department of Defense, but also contractors and employees of contractors of “. . . any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.”<sup>60</sup> However, this language is vague and untested by the courts,<sup>61</sup> and it is unclear what would legally constitute employment supporting a DOD mission overseas. In the five years of wartime since the MEJA amendment, PMCs have been hired by numerous U.S. agencies operating in Iraq and Afghanistan, for purposes other than supporting the Armed Forces.

The scope of U.S. laws is significant because of the immunity that many PMCs still receive from Iraq and Afghanistan law. Contractors in these countries operate under the domestic law of the host country, as well as the international order of the laws and usages of war, United Nations Security Council Resolutions, and treaties.<sup>62</sup> The courts of Iraq and Afghanistan only have jurisdiction to prosecute PMCs pursuant to the applicable status of forces agreements (SOFA) with the United States, bilateral treaties establishing the framework under which the U.S. military will operate and addressing how domestic law will apply to U.S. military and personnel.<sup>63</sup> A U.S.-Iraq SOFA authorized the Coalition Provisional Authority to function as the transitional government in Iraq, and in June 2003 that transitional government issued Order 17 to immunize contractors from Iraqi legal processes for acts performed under their contracts.<sup>64</sup>

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<sup>59</sup> Ronald W. Reagan National Defense Authorization Act, Pub. L. No. 108-375, § 1088, 118 Stat. 1820 (2004).

<sup>60</sup> 18 U.S.C. § 3267 (2004).

<sup>61</sup> ELSEA, *supra* note 18, at 1.

<sup>62</sup> *Id.* at 2.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 12.

When the CPA dissolved in June 2004, certain CPA orders like Order 17 remained in effect until the Iraqi government modified or rescinded them.<sup>65</sup> While the Iraq government has negotiated over Order 17, it has not been formally rescinded. A U.S.-Iraq Withdrawal Agreement that went into effect in January 2009, however, gave Iraq primary jurisdiction over DOD contractors and their employees. This jurisdictional definition suffers from the same language problems that plague MEJA, covering only those who “...supply goods, services, and security in Iraq to or on behalf of the United States Forces under a contract or subcontract with or for the United States Forces.”<sup>66</sup> It is unclear how this definition applies to contractors employed by the DOS and other U.S. agencies.

In Afghanistan, PMCs are definitively afforded complete immunity from local laws. U.S.-led Operation Enduring Freedom (OEF) personnel are governed by an exchange of notes between the two countries’ governments, and the NATO-led International Security Assistance Force (ISAF) is governed by a Military Technical Agreement in the country. A 2002 OEF-Afghan agreement covers U.S. military and DOD personnel, making them immune from criminal prosecution by Afghan authorities and explicitly authorizing the U.S. criminal jurisdiction. ISAF’s Military Technical Agreement provides that all ISAF and supporting personnel are subject to exclusive jurisdiction of their own governments and immunity from arrest or detention by Afghan authorities.

Other relevant legal authorities governing certain PMCs include DOD rules implemented under the authority of MEJA and its Uniform Military Code of Justice (UMCJ). DOD rules

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<sup>65</sup> *Id.*

<sup>66</sup> Agreement on the Withdrawal of United States Forces from Iraq and the Organization of their Activities during their Temporary Presence in Iraq, U.S.-Iraq, Article 12, Nov. 17, 2008.

issued in 2005 and the UMCJ are still subject to the vague definitional requirements in MEJA,<sup>67</sup> despite language added to the UMCJ authorizing DOD action regarding “...persons serving with or accompanying an armed forces in the field” that was intended to address contractor issues.<sup>68</sup> Even Secretary of Defense Robert Gates cited in an official memorandum “a particular need for clarity regarding the legal framework that should govern a command response to any illegal activities by DOD civilian employees and DOD contractor personnel overseas with our Armed Forces.”<sup>69</sup> In addition, a prosecution and trial of a civilian contractor by court-martial under UMCJ might face a Constitutional challenge, as the Supreme Court has previously said in dicta that courts-martial are never proper for the trial of civilians.<sup>70</sup>

Even the international community has made a significant effort to clarify the legal responsibilities of PMCs. A United Nations Commission on Human Rights (UNCHR) working group drafted a new International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies.<sup>71</sup> Additionally, government experts from the United States and sixteen other countries created the Montreux Document, which sets forth best practices regarding the legal obligations of companies during armed conflicts.<sup>72</sup> Among other things, the Montreux Document urges states to evaluate whether their legislation and procurement regulations are adequate to ensure accountability.<sup>73</sup> In particular, contracting states

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<sup>67</sup> 32 C.F.R. § 153 (2005) (implementing policies and procedures and assigning responsibilities under MEJA as amended for exercising extraterritorial criminal jurisdiction).

<sup>68</sup> 10 U.S.C. § 802(a)(10) (as amended by the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364 (2006)).

<sup>69</sup> Secretary of Defense Memorandum on UMCJ Jurisdiction over DOD Civilian Employees, DOD Contractor Personnel, and Other Persons Serving with of Accompanying the Armed Forces Oversees during Declared War and in Contingency Operations (Mar. 10, 2008).

<sup>70</sup> *O’Callahan v. Parker*, 395 U.S. 258 (1969).

<sup>71</sup> ELSEA, *supra* note 18, at 8.

<sup>72</sup> See International Committee of the Red Cross, *The Montreux Document*, Aug. 2009 (The International Committee of the Red Cross is the only body that can produce authoritative commentaries and interpretations of the Geneva Conventions).

<sup>73</sup> ELSEA, *supra* note 18, at 8.

are advised to provide for criminal and civil jurisdiction over activities of private military and security companies.<sup>74</sup>

## **The Civilian Extraterritorial Jurisdiction Act of 2010 (CEJA)**

Five years after the MEJA amendment attempted to close the criminal liability “loophole” for PMCs abroad and one month after a U.S. Federal court dismissed criminal indictments against five Blackwater PMC defendants, Senator Patrick Leahy (D-VT) introduced the Civilian Extraterritorial Jurisdiction Act of 2010 (CEJA) to definitively close jurisdictional gaps for certain contractors and to authorize additional investigative and reporting resources.<sup>75</sup> CEJA would add another section after MEJA in the U.S. Code that allows Federal criminal jurisdiction 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>76</sup> This language is simple, but it effectively brings all PMCs employed by the U.S. government under the same umbrella. No longer would there be a liability distinction based on the department or agency that contracts with a PMC. For example, Blackwater PMCs under contract with the DOS would clearly fall within the statute.

While Senator Leahy’s impetus for introducing this legislation might stem from his known opposition to the Iraq War, CEJA addresses a demonstrated criminal procedure problem with the current law as evidenced in *Slough*. In his introductory remarks referencing *Slough* on the Senate floor, Senator Leahy stated, “I believe that, had jurisdiction for these offenses been clear, FBI agents would have been on the scene immediately, which could well have prevented

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<sup>74</sup> *Id.* at 11.

<sup>75</sup> Civilian Extraterritorial Jurisdiction Act of 2010, S. 2979, 111th Cong. (2010).

<sup>76</sup> S. 2979.

the problems that have plagued the case.”<sup>77</sup> These comments connote the troublesome weeks-long delay before FBI agents flew to Iraq to begin their investigation. In addition to providing a jurisdiction clearly encompassing all contractors, the legislation would also establish “Investigative Units for Contractor and Employee Oversight” to investigate allegations of criminal offenses.<sup>78</sup> Arrest authority would also be expanded from current law to include anyone serving in a law enforcement position in any U.S. department or agency,<sup>79</sup> not just persons at the DOD. These provisions attempt to provide additional resources that would improve upon the ambiguous investigative procedures that surrounded the Nisoor Square shooting.

CEJA is not the first bill in recent Congresses to directly address liability shortcomings regarding PMCs in Iraq and Afghanistan, but because of its sponsor and its timing, the legislation has a good chance of passage. Senator Leahy is Chairman of the Judiciary Committee to which the bill has been referred. His Committee leadership position increases the likelihood that CEJA will be considered before and passed out of Committee for full consideration by the Senate. Committee chairmen have significant influence in selecting the few bills, out of the many that are introduced, for consideration before the full Committee in a hearing or for a Committee vote.

In addition, recent legislative history on the criminal jurisdiction loophole of PMCs demonstrates Congressional interest in the issue. During the last Congress, then-Senator Barack Obama introduced legislation similar to CEJA titled The Security Contractor Accountability Act of 2007, and Congressman David Price (D-NC) introduced the MEJA Expansion and

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<sup>77</sup> 156 CONG. REC. S442 (2010) (statement of Sen. Leahy).

<sup>78</sup> S. 2979.

<sup>79</sup> *Id.*



Enforcement Act of 2007 as a companion bill in the House of Representatives.<sup>80</sup> Congressman Price's bill passed in the House with a broad bipartisan majority of 389-30,<sup>81</sup> but neither it nor Senator Obama's bill was ultimately considered before the full Senate. Congressman Price has reintroduced legislation as a companion bill to Senator Leahy's CEJA in the 111th Congress that already has 31 cosponsors.<sup>82</sup> Because the House comprises the same Democratic majority and passed similar legislation only two and a half years ago, it would likely support the same measure again.

It is also clear that President Barack Obama still supports the idea of increasing accountability and liability for contractors through Congressional legislation. As CEJA sponsor Senator Leahy noted, "President Obama has been working hard to restore America's credibility in the world and our reputation for justice and our commitment to the rule of law."<sup>83</sup> The recent failed DOJ prosecution of Blackwater contractors increase the likelihood that President Obama will push for the legislation's passage. The *Slough* case demonstrated that convictions may not be possible in Federal Court under the current framework. Finally, the likely announcement that the DOJ will reverse itself and attempt to prosecute 9/11 mastermind Khalid Sheik-Mohammed in a military tribunal instead of a criminal court has drawn intellectual criticism.<sup>84</sup> If such a policy reversal reaches fruition, the President may support CEJA in an attempt to build good will in the international community where some may be disappointed by that decision, by showing that the United States remains committed to the rule of law, even in difficult times of war.

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<sup>80</sup> Security Contractor Accountability Act of 2007, S. 2147, 110th Cong. (2007); MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. (2007).

<sup>81</sup> Roll Call No. 940, 110th Cong. (2007).

<sup>82</sup> Civilian Extraterritorial Jurisdiction Act of 2010, H.R. 4567, 111th Cong. (2010).

<sup>83</sup> 156 CONG. REC. S442.

<sup>84</sup> Evan Perez, *Trial Move Could Hurt Holder*, WALL ST. J., Mar. 10, 2010, <http://online.wsj.com/article/SB20001424052748704145904575112072380877534.html>

## Policy Implications

Expanding the scope of criminal liability for PMCs abroad has a number of positive international implications for the United States. Conclusively bringing PMCs currently in Iraq and Afghanistan within the U.S. legal framework could provide those countries with greater confidence in the American legal system, and may allow the U.S. to execute its mission more effectively there. It may be difficult for local Iraqis to distinguish between soldiers of the U.S. Armed Forces and PMCs because they can perform similar security functions, so holding PMCs to a high liability standard like that of soldiers under the UCMJ makes sense. The Nisoor Square shooting has also demonstrated how anger over potentially unlawful incidents can be detrimental to the U.S. image and to U.S.-Iraqi relations. The likelihood of insurgency spurred by such events may be decreased if the local population knows there is a clear pathway to bring those responsible to justice.

Additionally, creating a more clearly defined legal structure could avoid undesirable pressure from the international community. The U.N. has already attempted to address the growing concern about PMCs<sup>85</sup> and preempting any significant effort on their part is important to U.S. sovereignty. “This is a nice way we can tell the rest of the world, ‘we’ve got it, we’ll take them home and rap their knuckles. We can hold up the conviction and say we punished our own. Our house is in order,’” stated a U.S. Senate military aide and Iraq war veteran.<sup>86</sup> Passing CEJA would also lessen any argument by the international community or domestic factions for turning over criminal PMCs to host countries, to the U.N, or even to the International Criminal Court

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<sup>85</sup> ELSEA, *supra* note 18, at 8.

<sup>86</sup> Interview with U.S. Senate military aide, *supra* note 22.

(ICC). While the United States is not a member of the ICC,<sup>87</sup> U.N. pressure can still be influential, and it is in the U.S. interest to set and abide by its own rules.

Unambiguously establishing U.S. liability may also be reassuring for American contractors. American PMCs are more familiar with the system of law and government of their homeland, and would presumably not want to be turned over to the U.N. or to what may pass for courts in the country in which they work. Knowing there is no question as to how they would be handled or treated abroad may induce some contractors to work in semi-lawless countries. With the increasing use of PMCs overseas, these implications exist not only for war zones, but for troubled areas like Haiti, Darfur, and the pirated Somali coast, which could all benefit from a contractor security presence. This contractor presence was demonstrated recently when private security guards on a merchant vessel shot dead a Somali pirate in the first killing of its kind, illuminating the legal jurisdictional question of to whom these newly utilized contractors are responsible.<sup>88</sup>

On the other hand, exposing all U.S. contractors abroad to criminal liability may worry and deter individual contractors from taking up much-needed employment in dangerous war zones. This deterrent effect may apply to PMC companies as well. According to a Senate aide, “In the short term I would admit that we’ll probably grind a few gears and experience some critical shortages in the area of contractor availability. Or the few that stick around we’ll maybe pay them a little more in the short term. There will be costs like that.”<sup>89</sup> Instead of entering what can be a very lucrative market, PMCs may chose to focus their businesses on obtaining U.S.

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<sup>87</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

<sup>88</sup> Katharine Houreld, *Private Guards Kill Somali Pirate for First Time*, A.P., Mar. 24, 2010, <http://www.washingtonexaminer.com/world/private-guards-kill-a-somali-pirate-for-first-time-highlighting-lack-of-regulation-89019362.html>

<sup>89</sup> Interview with U.S. Senate military aide, *supra* note 22.

domestic contracts. Conversely, they may decide to contract with other countries and foreign entities that do not impose any criminal restrictions on the actions of their employees. It would make sense to watch the PMC market over the next few years if CEJA is passed to see if contractor availability is decreased in the long run.

While CEJA casts a broader net than MEJA, this wider international reach is justified. The rapid deployment of PMCs in the last decade has shown that it is difficult to anticipate and predict the extent of contractor usage. In this sense, a broad statute avoids dealing with more unforeseen future problems in a piecemeal fashion. Hemming in the United States in its ability to effectively govern its citizens, as DOJ prosecutors have experienced, is not an encouraging trend or phenomenon. For the long term interests of U.S. rule of law and long term American credibility abroad, it is necessary to supplement the current statutory framework.

The privatization of certain security and military functions of the DOD, DOS, USAID, and CIA has been definitively established during the wars in Iraq and Afghanistan, and the tremendous use of PMCs is likely to continue. A stabilizing U.S. presence in Iraq and Afghanistan will likely exist for many years even if President Obama withdraws the bulk of U.S. troops from those countries. This presence, potentially for purposes of construction and nation building, could further prolong contractor use.<sup>90</sup> The employment of PMCs might also become a useful tool in an effort to decrease troop numbers, because PMCs could be substituted for soldiers in order to bring down official numbers of U.S. troops abroad. Now that PMCs are part of our system, it is necessary to treat them similarly and unambiguously under the rule of law. “Not to short these guys; they were necessary. But reigning them in—it’s time—and it’s kind of normal. The law is usually catching up.”<sup>91</sup>

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<sup>90</sup> SCHWARTZ, *supra* note 16, at 13.

<sup>91</sup> Interview with U.S. Senate military aide, *supra* note 22.

## **Conclusion**

A legislative solution like CEJA would accomplish the equitable goal of equivalent treatment of PMCs in Iraq and Afghanistan. While the increased scope of criminal liability may deter those contractors wary of or unwilling to comply, the systematic benefits of a clear U.S. commitment to the rule of law outweighs these costs. On the whole, the credibility within the international community and the confidence of foreign governments and their local populations could increase the effectiveness and execution of the U.S. mission. PMCs may be afforded more respect by the local populations and even by members of the U.S. Armed Forces with whom they collaborate and coordinate. It is also in the U.S. interest to proactively administer and supervise its contractors abroad, as opposed to feeling pressure from outsiders to do so. Based on recent failures to apply Federal criminal jurisdiction and prosecute PMCs in the *Slough* case, and the encouraging political prospects CEJA has in this Congress, we may soon see a clarification and complement to the Military Extraterritorial Jurisdiction Act and the current legal framework.