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They're Getting Away with Murder: How the International Criminal Court Can Prosecute U.S. Private Security Contractors for the Nisour Square Tragedy and Why It Should

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THEY'RE GETTING AWAY WITH MURDER: HOW THE INTERNATIONAL CRIMINAL COURT CAN PROSECUTE U.S. PRIVATE SECURITY CONTRACTORS FOR THE NISOOR SQUARE TRAGEDY AND WHY IT SHOULD

On September 16, 2007 private security contractors¹ working for Blackwater² shot and killed seventeen Iraqi civilians in Nisour Square,³ twenty-four were wounded.⁴ Less than a month after the tragedy, the *New York Times* reported federal investigators found that fourteen of the seventeen shooting deaths were unjustified.⁵ Described by U.S.

1. The term private security contractor will be used interchangeably with the terms civilian security contractor, private security provider, and private security company throughout this Note.

2. Former Navy Seals founded Blackwater USA in 1998. *Blackwater Worldwide*, N.Y. TIMES, http://topics.nytimes.com/top/news/business/companies/blackwater_usa/index.html (last updated Apr. 25, 2011). Blackwater was an instrumental security contractor for the United States in both Iraq and Afghanistan. *Id.* In addition to providing security for the U.S. State Department, Blackwater contracted with the U.S. Central Intelligence Agency, from which Blackwater and its associates received up to \$600 million worth of contracts between 2001 and 2010. *Id.* In 2009, Blackwater changed its name to Xe Services. *Id.* Company founder Erik Prince has since moved to Abu Dhabi. *Id.* Blackwater claims to have trained “tens of thousands of security personnel to work in hot spots around the world.” *Id.* In December 2010, USTC Holdings, an investment holding company led by private equity firms Forte Capital Advisors and Manhattan Partners acquired Xe Services on undisclosed terms. *Xe Services, LLC Acquired by USTC Holdings, LLC*, BUS. WIRE (Dec. 17, 2010), <http://www.businesswire.com/news/home/20101217005249/en/Xe-Services-LLC-Acquired-USTC-Holdings-LLC>.

Blackwater USA's primary facility is located in Moyock, North Carolina. *Blackwater Worldwide, supra* 2. The Blackwater Training Center in Moyock is considered the “world’s largest private firearm training facility.” Dante Chinni, *The Way We Live Now: 4-28-02: PHENOMENON; Oh, Shoot*, N.Y. TIMES MAG. (Apr. 28, 2002), <http://www.nytimes.com/2002/04/28/magazine/the-way-we-live-now-4-28-02-phenomenon-oh-shoot.html?ref=blackwaterusa>.

3. Nisour Square is located in Baghdad and at the time of the shooting was close to the “Green Zone.” Scott Horton, *Getting Closer to the Truth about the Blackwater Incident*, HARPER’S MAG. (Nov. 14, 2007), <http://www.harpers.org/archive/2007/11/hbc-90001669>. The “Green Zone” is also officially known as the “International Zone” and refers to a heavily guarded, four square-mile enclosure in Baghdad where the U.S. Embassy is located. Brian Bennett, *Last Call in Iraq*, TIME, May 7, 2007, at 34, available at <http://www.time.com/time/magazine/article/0,9171,1615188,00.html>. The “Green Zone” is considered “the seat of U.S. power in Iraq.” *Id.*

4. Various sources conflict as to the number of persons killed and wounded in the incident. Compare James Glanz & Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES, Oct. 3, 2007, at A1, available at <http://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html> (reporting seventeen deaths and twenty-four wounded), and James Risen, *Interference Seen in Blackwater Inquiry*, N.Y. TIMES, Mar. 2, 2010, at A12, available at <http://www.nytimes.com/2010/03/03/world/middleeast/03blackwater.html> (reporting seventeen deaths), with *United States v. Slough*, 641 F.3d 544, 548 (D.C. Cir. 2011) (finding that fourteen civilians were killed and twenty were wounded), and Sudarsan Raghavan, *Tracing the Paths of 5 Who Died in a Storm of Gunfire*, WASH. POST FOREIGN SERVICE (Oct. 4, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/03/AR2007100302646.html> (reporting fourteen dead and eighteen wounded).

5. David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1, available at <http://www.nytimes.com/2007/11/14/world/middleeast/14>

government officials as a “watershed moment,” the shooting in Nisour Square highlighted the need for increased oversight and accountability of private-security contractors in Iraq.⁶ In December 2007, the U.S. State Department and the U.S. Department of Defense signed a memorandum of agreement wherein each agency agreed to develop and implement standards for managing private-security contractors’ operations, coordinating joint investigations of private-security-contractor personnel, and holding private-security contractors legally accountable.⁷ Yet the issue remains: how will those responsible for Nisour Square be brought to justice?⁸ This Note argues that Iraq, acting on its own, could assent to the jurisdiction of the International Criminal Court (“ICC”) and submit the Nisour Square tragedy to the ICC for prosecution as a war crime.⁹ Furthermore, this Note explains why the United States must assist the ICC in prosecuting the Nisour Square tragedy as a war crime in order to authenticate the United States’ contention that it is committed to justice for a liberated Iraq.

blackwater.html?_r=1.

6. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-966 REBUILDING IRAQ: DOD AND STATE DEPARTMENT HAVE IMPROVED OVERSIGHT AND COORDINATION OF PRIVATE SECURITY CONTRACTORS IN IRAQ, BUT FURTHER ACTIONS ARE NEEDED TO SUSTAIN IMPROVEMENTS 2 (2008), available at <http://www.gao.gov/assets/280/279161.pdf>.

7. *Id.* at 23. The Memorandum of Agreement (“MOA”) expressly provides that the U.S. Department of Defense (“DOD”) and the U.S. State Department take joint responsibility to develop and adhere to disciplinary standards for private security contractors. The agreement also states that “[t]he purpose of this MOA is to clearly define the authority and responsibility for the accountability and operations of USG Private Security Contractors (PSC) in Iraq.” U.S. DEPT. OF DEFENSE, MEMORANDUM OF AGREEMENT (MOA) BETWEEN THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF STATE ON USG PRIVATE SECURITY CONTRACTORS 1 (2007), available at <http://www.defense.gov/pubs/pdfs/Signed%20MOA%20Dec%205%202007.pdf>.

8. Efforts to prosecute those responsible have thus far been unsuccessful. *See, e.g.*, James Risen, *Efforts to Prosecute Blackwater Are Collapsing*, N.Y. TIMES, Oct. 10, 2010, at A1, available at <http://www.nytimes.com/2010/10/21/world/21contractors.html>.

9. This Note discusses how the ICC could have jurisdiction pursuant to a referral by a state party. *See* Rome Statute of the International Criminal Court art. 13(a), opened for signature July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (entered into force July 1, 2002), available at http://untreaty.un.org/cod/icc/statute/english/rome_statute%28e%29.pdf [hereinafter Rome Statute]. In this instance, the state party is Iraq. William A. Schabas points out that whether the ICC here the matter depends on two related concepts: jurisdiction and admissibility. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 172 (3d ed. 2007).

The Court must always satisfy itself that it has jurisdiction over a case, whether or not the parties raise the issue, whereas its consideration of admissibility appears to be only permissive . . . [T]he Court has taken the position that there are two components to the determination of admissibility.

Id. at 173. Schabas explains that the first prong is whether the national justice system is “unwilling or unable” to prosecute, and the second prong is if the alleged crime is of a sufficient gravity. *Id.* at 174.

Although increased oversight may help prevent future tragedies,¹⁰ prosecution of those responsible for the tragedy is necessary to make clear three points: (1) contractors do not operate outside the law; (2) the United States acknowledges that these acts were unlawful and outside the scope of duty for any contractor; and (3) the United States is committed to impartial justice for Iraqi citizens, and to that end, will aggressively prosecute war crimes committed in Iraq by U.S. contractors like Blackwater. This Note focuses on how the ICC could prosecute the individuals responsible for the Nisour Square tragedy and does not discuss criminal liability for the business entities employing those individuals.

This Note analyzes how the ICC could exert jurisdiction over the events of Nisour Square.¹¹ Part I provides a background on the Nisour Square Tragedy. Part II explains how to get the Nisour Square tragedy under ICC jurisdiction. First, Iraq could accept the jurisdiction of the ICC and then submit the Nisour Square tragedy for prosecution pursuant to the terms of the Rome Statute. Then, this Note considers subject matter jurisdiction and addresses mistakes in the U.S. prosecution, and how those mistakes cast doubt on the willingness of U.S. prosecutors to prosecute contractors such as Blackwater. While this doubt is not proof of unwillingness, this Note argues that it does satisfy the jurisdictional triggers of the ICC when coupled with worldwide reaction to contractor abuses in Iraq. Part II also discusses legislative efforts by the United States

10. Measures to improve oversight included the establishment of the Armed Contractor Oversight Division. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 6, at 4. The Multi-National Force in Iraq (MNF-I) established the Armed Contractor Oversight Division to "provide oversight and serve as MNF-I's overall point of contact on policies that govern DOD's PSCs [Private Security Contractors]." *Id.* Pursuant to an agreement between the United States and Iraq, the Multi-National Force-Iraq refers to the coalition of countries who during the "post-occupation period" were authorized to "take all necessary measures to contribute to maintenance of security and stability in Iraq" CATHERINE DALE, CONG. RES. SERV., OPERATION IRAQI FREEDOM: STRATEGIES, APPROACHES, RESULTS, AND ISSUES FOR CONGRESS 25 (2008) (quoting S.C. Res. 1546, ¶ 10, U.N. Doc S/RES/1546 (June 8, 2004)), available at <http://www.fas.org/sgp/crs/mideast/RL34387.pdf>.

11. The issue of whether the use of private security contractors is necessary for or advantageous to U.S. efforts to bring peace in Iraq is beyond the scope of this Note. This Note does not advocate for or disprove of the United States' use of private security contractors for operations in Iraq and Afghanistan. Rather, this Note focuses on ensuring that just as soldiers are held accountable for their conduct under the Uniform Code of Military Justice, private security contractors are held accountable for their conduct abroad. The author wishes to make clear that this Note does not demonize private contractors and recognizes that the current state of warfare requires their services. As noted by the Congressional Research Service report of 2008 on private security contractors in Iraq, "[b]y providing security for reconstruction and stabilization efforts, many analysts and policymakers say, private contractors contribute an essential service to U.S. and international efforts to bring peace to Iraq." JENNIFER K. ELSEA, MOSHE SCHWARTZ & KENNON H. NAKAMURA, CONG. RES. SERV., *Summary of PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 2* (2008).

to close jurisdictional gaps for the extraterritorial applicability of U.S. law to contractors working for agencies in Iraq other than the Department of Defense. Part III argues that, unlike other cases where the ICC has prosecuted individuals for crimes against humanity or war crimes, prosecuting Blackwater individuals for war crimes in connection with Nisour Square does not threaten to destabilize or derail any peace or peace process in the region.¹² Part III also addresses the policy behind holding private-security contractors individually criminally responsible and argues that it is in the interest of the international community to adjudicate war crimes committed by private security contractors in Iraq on an international level rather than a national level.¹³

12. Rather, it is plausible that prosecution may contribute to a sustainable peace by showing the population of Iraq and the surrounding region that the United States is committed to impartial justice.

13. For this Note, a basic understanding of the Iraq war timeline is helpful. The following timeline is drawn from DALE, *supra* note 10:

(1) October 2002—Congress authorizes use of force. *Id.* at 1.

(2) March 20, 2003—Operation Iraqi Freedom begins. *Id.*

(3) April 9, 2003—Symbolic tearing down of Saddam Hussein statue occurs in Baghdad. *Id.* at 23.

(4) May 1, 2003—U.S. President announces end of “major combat operations in Iraq.” *Id.* at 24.

(5) May 8, 2003—John Negroponte, representative of the United States to the United Nations, and Jeremy Greenstock, representative of the United Kingdom to the United Nations, sent a letter to U.N. Security Council explaining the creation of the Coalition Provisional Authority (“CPA”) and that “[t]he States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq.” Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/PRST/2003/538 (May 8, 2003) [hereinafter Letter to the Security Council].

(6) May 22, 2003—U.N. Security Council acknowledges the May 8, 2003 letter from the U.S. and U.K. and the Security Council recognizes those States as “occupying powers” with all entailed responsibilities. S.C. Res. 1483, 2, U.N. Doc. S/RES/1483 (May 22, 2003).

(7) October 16, 2003—U.N. Security Council Resolution 1511 authorizes a multinational force to safeguard Iraq during rebuilding and to ensure stability in the region. S.C. Res. 1511, ¶ 13, U.N. Doc. S/RES/1511 (Oct. 16, 2003).

(8) June 27, 2004—U.S. and Iraqi officials agreed upon the establishment of the Multi-National Force-Iraq (“MNF-I”). DALE, *supra* note 10, at 25–26.

(9) June 27, 2004—the CPA issues Revised Order 17 which among other things provided that “[c]ontractors 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.” COALITION PROVISIONAL AUTHORITY ORDER 17 (REVISED): STATUS OF THE COALITION PROVISIONAL AUTHORITY, MNF-IRAQ, CERTAIN MISSIONS AND PERSONNEL IN IRAQ, § 4, ¶ 3 (June 27, 2004), available at http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf. CPA Order 17 “shall not terminate until the departure of the final element of the MNF from Iraq, unless rescinded or amended by legislation duly enacted and having the force of law.” *Id.* § 20.

I. BACKGROUND: THE USE OF U.S. CONTRACTORS AND THE NISOUR SQUARE TRAGEDY

Iraq has been a sovereign state since June 28, 2004, when the interim government following the U.S. invasion in 2003, the Coalition Provisional Authority, transferred control to the Iraqi Interim Government.¹⁴ At the time of the shooting in Nisour Square, the private security company Blackwater was under contract to provide protective services for the U.S. State Department.¹⁵ Both American and Iraqi investigators questioned the events at Nisour Square,¹⁶ and the U.S. Federal Bureau of Investigation (“FBI”) sent an investigative team to determine whether criminal actions occurred.¹⁷ In December of 2008, a U.S. grand jury indicted five Blackwater members in connection with the events at Nisour Square.¹⁸

The Nisour Square tragedy was not the first time the issue of U.S. security contractor accountability garnered international attention. In 2004, U.S. security contractors had been involved in the infamous Abu Ghraib prison scandal, where U.S. security contractors and military personnel abused prisoners.¹⁹

(10) June 28, 2004—the CPA transferred control of Iraq to the Iraqis. DALE, *supra* note 10, at 24. The deadline for the transfer of control was June 30, 2004. *Id.* at 25.

(11) January 1, 2010—The Multi-National Force-Iraq becomes the United States Force-Iraq because the U.S. is the only member of the original “coalition of the willing” that remains in Iraq. Rod Nordland & Timothy Williams, *Iraq Force Soon to be a Coalition of One*, N.Y. TIMES, July 29, 2009, at A4, available at http://www.nytimes.com/2009/07/29/world/middleeast/29iraq.html?_r=1.

14. *The World Factbook: Middle East: Iraq*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/iz.html> (last visited Jan. 3, 2011).

15. *Blackwater Worldwide*, *supra* note 2.

16. Glanz & Rubin, *supra* note 4, at A1 (explaining that new insights from subsequent interviews with Iraqi witnesses and investigators are “difficult to square with the explanation offered initially by Blackwater officials that their guards were responding proportionately to an attack on the streets around the square”); see also James Glanz, Richard A. Opiel, Jr. & Michael Kamber, *New Evidence that Blackwater Guards Took No Fire*, N.Y. TIMES (Oct. 13, 2007), <http://www.nytimes.com/2007/10/13/world/middleeast/13blackwater.html> (“[A]ccounts . . . given by three rooftop witnesses and by American soldiers who arrived shortly after the gunfire ended, cast new doubt Friday on statements by Blackwater guards that they were responding to armed insurgents when Iraqi investigators say 17 Iraqis were killed at a Baghdad intersection.”).

17. See Horton, *supra* note 3. Less than a month after the incident, the *New York Times* reported that the FBI investigation found that fourteen of the seventeen shooting deaths were unjustified. David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1, available at <http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?scp=1&sq=f.b.i.%20says%20guards%20killed%2014%20iraqis&st=cse>.

18. See Indictment at 1, *United States v. Slough*, 677 F. Supp. 2d 112 (D.D.C. 2009) (No. CR-08-360), vacated, 641 F.3d 544 (D.C. Cir. 2011).

19. See, e.g., Seymour M. Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far Up Does the Responsibility Go?*, THE NEW YORKER, May 10, 2004, at 42, available at http://www.newyorker.com/archive/2004/05/10/040510fa_fact (reporting that the U.S. military had

The casualties of Nisour Square enraged the Iraqi government and further highlighted the growing concern about civilian-contractor accountability when working for the U.S. government.²⁰ The United States had used private security contractors in other situations before the 2003 invasion into Iraq.²¹ According to the U.S. Congressional Research Service, however, the operation in Iraq was “the first time the United States has depended so extensively on contractors to provide security in a hostile environment”²²

In the wake of the Nisour Square tragedy, the U.S. Congressional Committee of Oversight and Government Reform acknowledged the existence of “serious questions about Blackwater’s performance [The Nisour Square tragedy] is just the latest in a series of troubling Blackwater incidents.”²³

II. GETTING INTO THE INTERNATIONAL CRIMINAL COURT: OVERCOMING JURISDICTION ISSUES

Neither Iraq nor the United States has accepted the jurisdiction of the ICC.²⁴ The Rome Statute defines the Jurisdiction of the ICC.²⁵ Article

converted the Abu Ghraib prison near Baghdad into a military prison and was abusing prisoners); *see also* Horton, *supra* note 3 (“The Department of the Army’s internal investigation concluded that some of the most severe incidents of criminal abuse involved contractors.”).

20. Horton, *supra* note 3 (“When the dust cleared it appears that 17 Iraqis were dead. The Iraqi Government reacted with outrage, while Blackwater and its patron, the State Department, went into overdrive trying to persuade an audience back in America that incident was justified.”).

21. ELSEA, SCHWARTZ & NAKAMURA, *supra* note 11, at 2 (noting that before the Iraq invasion in 2003, the United States had “contracted for more limited security services in Afghanistan, Bosnia, and elsewhere”).

22. *Id.* The international community has raised concerns about the apparent lack of oversight of private security contractors such as Blackwater operating in Iraq. Mark Townsend, *Fury at ‘Shoot for Fun’ Memo: Outburst by US Security Firm in Iraq is Attacked by Human Rights Groups*, THE OBSERVER (Apr. 2, 2005 20:26 EST), <http://www.guardian.co.uk/world/2005/apr/03/iraq.usa> (stating that human rights groups had concerns about “civilian contractors” in Iraq and that there needs to be greater oversight of these companies).

23. *Blackwater USA: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 1 (2007) (opening statement of Rep. Waxman, Chairman, House Comm. on Oversight and Gov’t Reform).

24. The United States originally signed the Rome Statute on December 31, 2000, but on May 6, 2002, the United States sent notice to the Secretary-General of the United Nations that it did not intend to be bound to the Rome Statute and its signature on December 31, 2000 would not be a basis for any legal obligation. *See* U.N. Treaty Collection, *Chapter XVIII Penal Matters: 10. Rome Statute of the International Criminal Court*, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&mtdsg_no=XVIII-10&chapter=18&lang=en (2011) (communication from the United States May 6, 2002) (“This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligation arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in

13(a)-(c) of the Rome Statute specifies the three circumstances under which the ICC may exercise jurisdiction: (1) a state party in which the crime was committed refers a situation to the ICC Prosecutor; (2) pursuant to Chapter VII of the Charter of the United Nations, the Security Council refers a situation to the Prosecutor, or (3) the Prosecutor acting *proprio motu* (by his or her own initiative) prompts an investigation as allowed by Article 15.²⁶ Of the three, the most viable option is the first: for Iraq to accept the jurisdiction of the ICC thereby becoming a state party that can refer the Nisour Square tragedy to the ICC.²⁷

this letter, be reflected in the depositary's status lists relating to this treaty." In 2005, the Iraqi Transitional Government entertained the idea of joining the ICC but later withdrew. Jefferson Morley, *Iraq's Flirtation with the ICC*, WASH. POST (May 12, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/04/12/AR2005041903143.html>.

25. Rome Statute, *supra* note 9, art. 1 (providing for the establishment of a permanent international court that shall have jurisdiction over individuals for "the most serious crimes of international concern").

26. *Id.* art. 15. Article 13 (a)-(c) states that the ICC may exercise jurisdiction if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Id. art. 13 (a)-(c).

27. Because the United States is one of the five permanent members of the United Nations Security Council and has veto power, satisfying the second condition of referral by U.N. Security Council pursuant to Chapter VII of the U.N Charter is unlikely. Additionally, satisfying the third condition, the ICC Prosecutor initiates an investigation *proprio motu*, is just as unlikely because in a letter dated February 9, 2006, the Office of the Prosecutor for the ICC made clear that he did not believe that the situation in Iraq was sufficient for exercise of the conferred his office under Article 15. See Letter from Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, Office of the Prosecutor (Feb. 9, 2006), <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+ Ref/Iraq/>.

Also, analysis of whether the ICC could have jurisdiction over crimes such as the Nisour Square tragedy requires some discussion of Bilateral Immunity Agreements ("BIAs"). The United States has over a hundred BIAs with other countries wherein the United States and the other signing state agree not to submit cases to the ICC. See American Non-Governmental Organizations Coalition for the International Criminal Court, *Bilateral Immunity Agreements*, http://www.amicc.org/usinfo/administration_policy_BIAs.html (last visited Dec. 17, 2011). The effect of these agreements is to trigger Article 98 of the Rome Statute which bars the ICC from seeking surrender or assistance that would require the requested state, in this case Iraq, to act inconsistently with its obligation under international law to a third state, like the United States in this instance, unless the third state offers waiver of immunity. *Id.* See also Rome Statute, *supra* note 9, art. 98.

A. *Personal Jurisdiction*

A referral under Article 13(a) of the Rome Statute must be made by a “State Party.”²⁸ Although Iraq is not currently a State Party, Iraq could become a State Party and retroactively refer the situation to the ICC²⁹ pursuant to Articles 12(1), 12(2)(a), and 12(3) of the Rome Statute.

Iraq could become a State Party by accepting the jurisdiction of the ICC pursuant to Article 12(1). Once Iraq becomes a State Party, then the ICC could have jurisdiction under Article 12(2)(a), because the Nisour Square tragedy occurred within the territory of Iraq. Finally, there is the issue of retroactive jurisdiction to permit the ICC to prosecute the Nisour Square Tragedy. Article 11(2) establishes that in circumstances where a State Party accepts the jurisdiction of the ICC after the Rome Statute entered into force, “[t]he Court may exercise its jurisdiction only with respect to crimes committed after entry into force of this Statute for that State”³⁰ In other words, there appears to be a ban on retroactive jurisdiction. However, Article 11(2) provides an exception to this ban on retroactive jurisdiction if the State Party makes a declaration pursuant to Article 12(3).³¹ Under this exception, Iraq could lodge a declaration with the Registrar of the ICC to retroactively establish the Court’s jurisdiction over the crimes committed by private security contractors operating in Iraq since 2003.

28. Rome Statute, *supra* note 9, art. 13(a). In addition to the requirement that the referral be made by a state party, Article 13 (a) also requires the referral be made “in accordance with article 14.” *Id.* Article 14 would require Iraq to specify the offenses and provide supporting documentation. *Id.* art. 14(1)–(xx). Given the numerous governmental media reports of the Nisour Square tragedy, Iraq should be able to find the necessary documentation to satisfy the requirements of Article 14.

29. Article 12(1) provides “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.” Rome Statute, *supra* note 9, art. 12(1) ¶ 1. Pursuant to Article 12(2)(a), if the conditions of paragraphs (a) or (c) of Article 13 paragraph (a) or (c) are satisfied, then the Court may exercise its jurisdiction if the State in which crimes occurred has accepted the jurisdiction of the ICC “in accordance with paragraph 3.” *Id.* art. 12(2)(a) ¶ 2 (a). As noted above, the first condition of Article 13 is the one Iraq would most likely satisfy. *See id.* at art. 13(a). Paragraph 3 of Article 12 provides, “[i]f the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration with Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.” *Id.* art 12 (¶ 3).

30. Rome Statute, *supra* note 9, art. 11(2) ¶ 2. Article 11 provides:

(1) The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

(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 entry into force of this Statute for that State, *unless that State has made a declaration under article 12, paragraph 3.*

Id. art. 11 (emphasis added).

31. *Id.* arts. 12(3) ¶ 3, 11(2) ¶ 2.

B. Subject Matter Jurisdiction

Establishing Iraq's status as a State Party eligible to refer the Nisour Square tragedy to the ICC is just the first step. Next, Iraq would need to show that the Nisour Square tragedy is a crime within the subject matter jurisdiction of the ICC according to Article 5 of the Rome Statute.³² Iraq can satisfy this requirement by submitting the Nisour Square shootings as war crimes as defined by Article 8 of the Rome Statute.³³

Article 8(1) of the Rome Statute has a jurisdictional trigger that dictates that the ICC has "jurisdiction in respect of war crimes *in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.*"³⁴ It is unclear whether the phrase "in particular" means exclusively such that war crimes cannot be isolated acts but must be acts committed as "part of a plan or policy" or "large-scale commission."³⁵

1. Two-Prong Analysis of the "In Particular" Language

A two-pronged analysis helps clarify how the words "in particular" may limit the jurisdiction of the ICC: (1) reviewing the drafting documents to ascertain the intentions and concessions of the states who participated in drafting the Rome Statute, and (2) referring to the Office of the Prosecutor's interpretation of the words "in particular" in Article 8(1) of the Rome Statute. The words "in particular" exist in Article 8(1) as a result of the United States' determined effort to limit the jurisdiction of the ICC.³⁶ The United States wanted to use the word "only" such that the ICC would "only" have jurisdiction over war crimes that are part of a "plan or

32. *Id.* art. 5 (pointing out that the ICC has jurisdiction only over "the most serious crimes of concern to the international community as a whole"). Specifically, these crimes are genocide, crimes against humanity, war crimes, and the crime of aggression. *Id.* art. 5(1)(a)–(d).

33. *Id.*, art. 8.

34. *Id.* art. 8(1) (emphasis added); see also HERMAN VON HEBEL & DARRYL ROBINSON, *Crimes within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUE, NEGOTIATIONS, RESULTS*, 79, 107 (Roy S. Lee ed., 1999).

35. It is clear from the language in the Rome Statute that if war crimes are committed either (1) as part of a plan or policy, or (2) as part of a large scale commission, then the jurisdictional threshold of Article 8(1) is achieved. See Rome Statute, *supra* note 9, art. 8(1).

36. In 1997, the United States introduced the jurisdictional threshold element of Article 8. HEBEL & ROBINSON, *supra* note 34, at 107. The threshold clause, a controversial issue, was arguably beneficial because (a) it would not overload the court with smaller-scale offenses better left to domestic prosecution, and (b) it adequately reflected the mission of ICC to oversee those crimes that "would be of concern to the international community," such as war crimes on a larger scale or as part of a plan or policy. *Id.*

policy” or “large-scale commission.”³⁷ A majority of states wanted no jurisdictional threshold, meaning war crimes would include a single event outside of a plan, policy, or large-scale commission.³⁸

The international community wanted the United States to become a member of the ICC, so even though the majority of delegations supported eliminating the jurisdictional threshold, a compromise was made to include the words “in particular.”³⁹ Despite this concession to allay the United States’ concerns, the United States has not accepted the jurisdiction of the ICC.⁴⁰ The United States went one step further and enacted the American Servicemembers’ Protection Act of 2002, prohibiting U.S. Government agencies from cooperating with the ICC.⁴¹ Given that the majority of delegations who originally drafted the Rome Statute wanted the ICC to have a less stringent jurisdictional trigger, and the United States, the strongest proponent of a more stringent jurisdictional trigger, is not a party to the Rome Statute, the words “in particular” should not be construed as meaning “only” or “exclusively.” The second prong of the analysis examines how the Office of the Prosecutor has interpreted the words “in particular” in the jurisdictional threshold of Article 8 of the Rome Statute. Louis Moreno-Ocampo, the Chief Prosecutor of the ICC, has noted that the words “in particular” in Article 8(1) do not create an

37. *Id.*

38. Opposition to the existence of any threshold requirement noted that any concern that the ICC would overreach its jurisdiction and prosecute isolated incidences were unfounded because the Rome Statute integrated a principle of complementarity. *Id.* at 108. The principle of complementarity is found in article 17 of the Rome Statute, which provides that the ICC will not have jurisdiction where a case is inadmissible. *See* Rome Statute, *infra* note 44, art. 17. A case is inadmissible under article 17 if (1) it is being investigated or prosecuted at the national level, (2) the state has investigated and has decided not to prosecute, (3) the person accused has already been tried, or (4) the crime is not sufficiently grave. *Id.* art. 17 ¶ 1(a)–(d). The only exceptions are in cases where the State in possession of the accused is unwilling or unable to prosecute or investigate. *Id.* art. 17 ¶ 1(a)–(b). The principle of complementarity says that the ICC is a court of last resort and that member states of the ICC have an obligation to first attempt domestic prosecution before resorting to the ICC. HEBEL & ROBINSON, *supra* note 34, at 108.

39. HEBEL & ROBINSON, *supra* note 34, at 108.

40. *See* U.N. Treaty Collection, *supra* note 24; Jefferson Morley, *supra* note 24.

41. American Servicemembers’ Protection Act of 2002, Pub. L. No 107-206, 116 Stat. 899 (2002) (codified at 22 U.S.C. §§ 7401–433 (2006)). *See, e.g.*, 22 U.S.C §§ 7423 (b)–(h) (providing prohibitions and restrictions for any agency of the United States Government regarding: (b) responding to requests for cooperation; (c) transmittal of letters rogatory from the International Criminal Court; (d) extradition to the International Criminal Court; (e) provision of support to the International Criminal Court; (f) use of appropriate funds to assist the International Criminal Court; (g) assistance pursuant to mutual legal assistance treaties; and (h) investigative activities of agents). Further analysis, which is beyond the scope of this Note, is needed to determine whether this domestic legislation (American Servicemembers’ Protection Act of 2002) complies with the United States’ international obligations as recognized by the United States’ signing of the 1949 Geneva Conventions and passage of a war crimes statute. 18 U.S.C. § 2441 (2006); UNITED STATES ARMY, *infra* note 54, at FOREWORD.

absolute requirement but rather serve as a guidepost for the Court to ensure the international community is focusing its efforts on appropriate cases.⁴²

The Nisour Square tragedy received worldwide attention, and the United States acknowledged the incident was a watershed moment, illustrating a need for more effective oversight of its contractors. The United States failed to hold those responsible accountable. On account of the gravity of the tragedy and its worldwide attention, the Office of the Prosecutor for the ICC should make a case that the events of Nisour Square satisfy the jurisdictional threshold of Article 8(1) if Iraq accepts ICC jurisdiction.⁴³

2. *The “Unwilling or Unable to Prosecute” Nexus*

For the ICC to have jurisdiction over the perpetrators of the Nisour Square tragedy, the United States must be unwilling or unable to prosecute

42. Letter from Luis Moreno-Ocampo, *supra* note 27. The Prosecutor concluded that there was a reasonable basis to believe that war crimes, specifically willful killings of civilians and inhuman treatment of detainees, had occurred. *Id.* at 8. The letter responded to allegations that war crimes, crimes against humanity, illegal war, and genocide were committed in Iraq during the invasion from March 2003 to May 2003. *See generally id.* From the evidence, the Prosecutor concluded that less than twenty people were victims of the war crimes of willful killing and inhuman treatment. *Id.*

The Prosecutor, however, found that the war crimes did not meet the gravity threshold (that the crimes be committed as part of a plan or policy or of a large-scale commission). *Id.*

Accordingly, the Prosecutor found that the killings and inhuman treatment did not meet the threshold element for war crimes in article 8(1). *Id.*; Rome Statute, *infra* note 44, art. 8 ¶ 1.

The Prosecutor could have ended the analysis there. Yet, the Prosecutor went one step further to note that even if the threshold element of article 8(1) was satisfied, further analysis of the gravity of the situation under Article 53 of the Rome Statute would be required. *See* Letter from Luis Moreno-Ocampo, *supra* note 27. Article 53 states that when the Prosecutor is deciding whether to initiate an investigation, the Prosecutor shall consider the admissibility of the case under Article 17. *See* Rome Statute, *infra* note 44, art. 53. Article 17(1)(d) provides that a case is inadmissible if it is “not of sufficient gravity to justify further action by the Court.” *Id.* art. 17 ¶ 1(d). The Prosecutor noted that the willful killing and inhuman treatment of less than twenty people was not on the same scale as the other situations that the Court was currently examining, such as the crisis in Darfur, which involved thousands of war crimes. Letter from Luis Moreno-Ocampo, *supra* note 27.

The letter was written February 9, 2006 before the tragedy of Nisour Square on September 16, 2007. *See id.*

43. *See* SCHABAS, *supra* note 9, at 174. Schabas points out the crimes must be of a sufficient gravity to warrant the attention of the ICC. *Id.* Given the worldwide media attention and world perception that those responsible have escaped prosecution because of the unwillingness of the invading state, the ICC should find the Nisour Square tragedy of sufficient gravity to warrant prosecution.

those individuals.⁴⁴ To determine whether a particular state is unwilling to prosecute, the ICC will consider (1) whether the state engaged in a national proceeding “for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court”; (2) whether there has been an unjustified delay in the prosecution that would give rise to a reasonable inference that the state is not interested in carrying out justice; or (3) whether the proceedings are not being carried out impartially to the extent that justice is prejudiced.⁴⁵ This Note argues that the United States is able to prosecute but unwilling.⁴⁶

Determining whether the United States is unwilling to prosecute “should be based on *procedural* and *institutional* factors, not the

44. Rome Statute, *supra* note 9, art. 17 ¶ 1 (a). Article 17 of the Rome Statute provides as follows:

1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

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

. . . .

Id.

45. *Id.* art. 17(2) (a)–(c). The statute provides as follows:

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. *Id.*

46. To determine whether a state is unable to prosecute requires a showing that the state is unable to carry out the proceeding because of a “total or substantial collapse or unavailability of its national judicial system” *Id.* art. 17(3). The statute provides as follows:

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise is unable to carry out its proceedings.

Id. It is unlikely that the ICC would find that the United State is unable to prosecute private security contractors for crimes within Iraq because the phrase “unavailability of its national judicial system” most likely embodies a situation where the judicial infrastructure of a state has collapsed. *See* SCHABAS, *supra* note 9, at 184–85 (“[T]he difficulties involved in challenging a State with a sophisticated and functional justice system would be virtually insurmountable.”). Accordingly, proving that the U.S. judicial infrastructure is overly corrupt or on the verge of collapse may be an insurmountable burden. Therefore, it is more likely that the ICC, after considering the factors discussed below, will find that the United States may be able but is unwilling to prosecute. A state is unwilling if it is simply “going through the motions” in order to create the illusion of a substantive prosecutorial effort. *Id.* at 184.

substantive outcome.”⁴⁷ Because of the factual differences surrounding each case, there is no exhaustive list of circumstances from which the ICC can conclude a state engaged in a domestic prosecution so as to shield the accused from ICC prosecution.⁴⁸ Nevertheless, the ICC can assess whether a state has been unwilling to prosecute by looking at guidelines developed by other international courts.⁴⁹ To ensure an objective assessment, it is essential that at least part of the assessment of the United States’ willingness to prosecute those responsible for the Nisour Square tragedy occurs from non-U.S. evaluators; otherwise, the world might think the United States is practicing “victor’s justice.”

Analysis of the shortcomings of the Blackwater prosecution has three subparts: (1) questioning the decision to charge those responsible with voluntary manslaughter and attempt to commit manslaughter rather than war crimes; (2) analyzing mistakes made by the U.S. Department of Justice (“DOJ”) in failing to properly screen its investigators and attorneys from exposure to inadmissible information; and (3) questioning the policies of the U.S. State Department that created large evidentiary obstacles for the prosecution. Since the Blackwater contractors responsible for the Nisour Square tragedy have not been acquitted or convicted as a result of the U.S. prosecution, the concept of double jeopardy—or, as it is referred to in the international criminal context, *ne bis in idem*—is not at issue.⁵⁰

In *United States v. Slough*,⁵¹ the DOJ charged five Blackwater guards involved in the Nisour Square Tragedy with voluntary manslaughter and attempt to commit manslaughter in violation of 18 U.S.C. §§ 1112, 1113.⁵² Yet, why did the DOJ not also charge the Blackwater guards with

47. MOHAMED M. EL ZEIDY, *THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL LAW: ORIGIN, DEVELOPMENT, AND PRACTICE* 174 (2008) (citation omitted) (quoting another source).

48. *Id.* at 175.

49. *Id.* For example, the ICC could import the conditions set forth by the European Court of Human Rights in assessing the effectiveness of a domestic criminal prosecution. *Id.* at 177.

50. See SCHABAS, *supra* note 9, at 191–92. Article 20 of the Rome Statute codifies the ban on double jeopardy or *ne bis in idem*. *Id.* at 191. “If a domestic trial has already been completed, the judgment is a bar to prosecution by the Court” *Id.* at 192.

51. *United States v. Slough*, 677 F. Supp. 2d at 112 (D.D.C. 2009), *vacated*, 641 F.3d 544 (D.C. Cir. 2011). In *Slough*, there was no judgment on the merits of the case; the district court dismissed the indictments because of evidentiary improprieties by the prosecution. *Slough*, 677 F. Supp. 2d at 165–66. The district court’s decision was reversed on appeal and remanded to “determine, as to each defendant, what evidence—if any—the government presented against him that was tainted as to him, and, in the case of any such presentation, whether in light of the entire record the government had shown it to have been harmless beyond a reasonable doubt.” *Slough*, 641 F.3d at 554–55.

52. See Indictment at 1, *Slough*, 677 F. Supp. 2d 112 (D.D.C. 2009) (No. CR-08-360).

committing war crimes in violation of 18 U.S.C. § 2441?⁵³ In accordance with its international obligations under the 1949 Geneva Conventions,⁵⁴

53. The War Crimes Statute, effective as of October 17, 2006, provides:

(a) Offense—Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, . . .

(b) Circumstances—The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States . . .

(c) Definition—As used in this section the term “war crime” means any conduct—

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party; . . .

(3) which constitutes a grave breach of [C]ommon Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; . . .

(d) Common Article 3 violations—

(1) Prohibited conduct—In subsection (c)(3), the term “grave breach of [C]ommon Article 3” means any conduct (such conduct constituting a grave breach of Common Article 3 of international conventions done at Geneva August 12, 1949), as follows:

. . . .

(D) Murder—The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.

(3) Inapplicability of certain provisions with respect to collateral damage or incident of lawful attack—The intent specified for the conduct stated in subparagraphs (D), (E), and (F) or paragraph (1) precludes the applicability of those subparagraphs to an offense under subsection (a) by reasons of subsection (c)(3) with respect to—

(A) collateral damage; or

(B) death, damage, or injury incident to a lawful attack.

18 U.S.C. §§ 2441(a)–(d) (2006).

54. The 1949 Geneva Conventions consist of four treaties designed to regulate the conduct of participants in an armed conflict, and specifically to protect civilian populations as well as persons no longer able to fight during armed conflict. *The Geneva Conventions of 1949 and Their Additional Protocols*, INT’L COMM. OF THE RED CROSS (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> [hereinafter ICRC]. See also Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. Geneva Conventions I through IV all share the same Article 3, Common Article 3, which “contains the essential rules of the Geneva Conventions in a condensed format and makes them applicable to conflicts not of an international character.” ICRC, *supra* note 54. The relevant portion of Common Article 3 provides:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with

the United States enacted 18 U.S.C. § 2441 to enable domestic prosecution for war crimes.

U.S. courts are not unfamiliar with allegations of war crimes committed by private security contractors working in Iraq. In *Estate of Manook v. Research Triangle Institute*,⁵⁵ the plaintiffs alleged that individuals working for the private security contractor Unity Resource Group shot and killed, without cause, Iraqi citizens Marani Manook and Geneva Antranick, who were driving together on a street in Baghdad.⁵⁶ The plaintiffs in *Estate of Manook* alleged murder as a war crime under 18 U.S.C. § 2441. The court noted that 18 U.S.C. § 2441 defines a war crime as conduct that would be a “grave breach” of the 1949 Geneva Conventions, and according to the Fourth Geneva Convention, the willful killing of a protected person such as a civilian constitutes a “grave breach.”⁵⁷ The court stated that “[p]laintiffs have alleged sufficient facts to establish that [d]efendants have allegedly committed war crimes and thus met their burden in order to survive a motion to dismiss.”⁵⁸ The facts of the Nisour Square tragedy were just as egregious as the facts of *Estate of Manook*,⁵⁹ yet the prosecution in *Slough*, unlike the plaintiffs in *Estate of Manook*, did not allege war crimes.

The U.S. prosecutors may reason that by charging the accused directly with manslaughter, they have a greater chance of getting a conviction than if they had to prove manslaughter in addition to the other elements that constitute a war crime, such as a grave breach of any of the 1949 Geneva

respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds

Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3].

The United States ratified the four Geneva Conventions of 1949, and they came into force for the United States on February 2, 1956. UNITED STATES ARMY, *Forword* to DEPARTMENT OF THE ARMY FIELD MANUAL FM27-10, THE LAW OF LAND WARFARE, at i (1956), available at http://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf. The U.S. Supreme Court has said Common Article 3 “is part of a treaty the United States has ratified and thus accepted as binding law.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 642 (2006). Further, the Supreme Court in *Hamdan* cited 18 U.S.C. § 2441 as its justification that “[b]y Act of Congress, moreover, violations of Common Article 3 are considered ‘war crimes,’ punishable as federal offenses, when committed by or against United States nationals and military personnel.” *Id.*

55. 693 F. Supp. 2d 4 (D.D.C. 2010).

56. *Id.*

57. *Id.* at 18.

58. *Id.*

59. *Id.* at 10. The complaint in *Estate of Manook* alleged that the victims were driving together when Unity Resource Group killed them without cause. *Id.* Just as the plaintiffs in *Estate of Manook* alleged murder as a war crime under 18 U.S.C. § 2441, federal prosecutors should have charged the Blackwater guards responsible for the Nisour Square tragedy with war crimes.

Conventions. This reasoning is flawed. Federal prosecutors could charge the accused with both manslaughter and war crimes, thereby permitting the jury to return a verdict for only manslaughter if the prosecution could not meet its burden of proof for the war crimes charge. Under the 1949 Geneva Conventions, the issue of whether private security contractors such as Blackwater are considered combatants, noncombatants, or illegal combatants remains unresolved.⁶⁰ The U.S. statute for war crimes, however, is clear on the issue of who is covered: 18 U.S.C. § 2441 provides for domestic prosecution of “whoever, whether inside or outside the United States, commits a war crime.”⁶¹ “The law applies to members of the U.S. armed forces as well as to any U.S. citizen, regardless of his or her employment.”⁶²

Thus, U.S. prosecutors do not need to determine the legal status of those individuals responsible for the Nisour Square tragedy in order to prosecute them for war crimes under 18 U.S.C. § 2441. The U.S. prosecutors only need to establish that the Nisour Square shootings were a grave breach of any of the 1949 Geneva Conventions. The U.S. prosecutors could allege that the willful killing of seventeen Iraqi citizens was a grave breach of the Fourth Geneva Convention of 1949 just as the *Estate of Manook* alleged that the willful killing of two Iraqi citizens was a grave breach of the Fourth Geneva Convention of 1949.

By charging the accused with war crimes in addition to manslaughter, the U.S. prosecutors can publicly acknowledge that what took place has a special reserved status within international criminal law. The charge of a war crime illuminates the special status of the crime that the U.S. Congress acknowledged when it created a war crimes statute; a special status that U.S. prosecutors should not ignore.

The second part of the analysis on the shortcomings of the U.S. prosecution looks at the mistakes made by the DOJ in prosecuting the Blackwater guards for the Nisour Square tragedy, in addition to the policy and actions of the U.S. State Department that created obstacles to effective prosecution—both of which indicate the United States’ unwillingness to

60. CONG. BUDGET OFFICE, CBO-3053, CONTRACTORS’ SUPPORT OF U.S. OPERATIONS IN IRAQ 22 (2008) (“The legal status of government civilians and contractor personnel becomes even less certain when they are armed. The in-theater military commander may authorize them to be armed for their own protection or to use arms in security guard functions. Even if those personnel shot at enemy forces in self-defense, their noncombatant status could be open to challenge. The distinction between performing security functions and taking ‘no active part in hostilities’ may be ambiguous in an atmosphere of frequent attacks.” (internal citations omitted)).

61. 18 U.S.C. § 2441.

62. CONG. BUDGET OFFICE, *supra* note 60, at 24.

prosecute. Hours after the tragedy in Nisour Square, the State Department ordered the Blackwater guards involved in the shooting to undergo interviews in Baghdad at the State Department's offices.⁶³ At the time, it was State Department policy, as set by the Regional Security Officer Mark Hunter, that all Blackwater employees who were involved in a shooting incident must immediately report to the State Department Office for a debriefing.⁶⁴ Following the debriefing after the Nisour Square tragedy, those who had discharged their firearms were given a "Garrity Warning"⁶⁵ on which they were to attach their written statement of the events of the shooting.⁶⁶ The *Garrity* Warning provides the protection that those making a statement under threat or reasonably perceived threat of job loss if they do not cooperate will not have that statement used against them in a criminal prosecution.⁶⁷ Furthermore, statements made under *Garrity* are immunized from derivative use, meaning that such statements are inadmissible evidence before a grand jury when seeking an indictment.⁶⁸

Understandably, the U.S. State Department has an interest in debriefing its contractors and learning about the contractors' actions. Given the gravity of shooting incidents, however, where the U.S. State Department or any government department has contracted with private security contractors, there should be an FBI or DOJ liaison in charge of initially debriefing contractors involved in a shooting incident to avoid evidentiary issues that could make statements made without the officers present inadmissible. Any argument that such presence would be an unnecessary drain on the resources of the FBI and DOJ is unsound because the increased difficulty in having immunized statements in a prosecution consumes greater resources in the long run than simply having a liaison available for debriefing. Having an FBI or DOJ liaison makes all the more sense if shooting incidents occur with some regularity.

Concern over improper use of *Garrity* information disqualified the DOJ Criminal Division from prosecuting the case. As a result, the Counterterrorism Section of the National Security Division took over.⁶⁹ To

63. United States v. Slough, 677 F. Supp. 2d 112, 117 (D.D.C. 2009).

64. *Id.* at 118.

65. *See id.* at 118–19 (citing *Garrity v. State of New Jersey*, 385 U.S. 493 (1967)). As noted by the court in *Slough*, the "admonishment—that an employee must make a statement or face termination but that any statement so made cannot be used in a subsequent criminal prosecution—is commonly referred to as a 'Garrity warning' or 'Kalkines warning.'" *Slough*, 677 F. Supp. 2d at 118

66. *Id.*

67. *Id.* at 115.

68. *Id.*

69. On September 26, 2007, Representatives of the Department of Justice (DOJ) Criminal Division met with and reviewed the initial report by the State Department officials who investigated

prosecute Slough and the other defendants who had given *Garrity* statements in the aftermath of Nisour Square shooting, the U.S. prosecution faced the strict evidentiary burden imposed by *Kastigar v. United States*.⁷⁰ *Kastigar* provides that when a defendant who gave a statement under a grant of immunity is prosecuted for involvement in the subject matter of the statement, the prosecution must affirmatively show that its evidence for use in prosecuting the immunized individual was not the product, directly or derivatively, of the immunized statement.⁷¹ The D.C. District Court found that the U.S. prosecution had “utterly failed” to carry this burden and dismissed the indictments against the defendants.⁷² On appeal, the D.C. Circuit reversed the district court and remanded the case for further findings because “the district court’s findings depend[ed] on ‘an erroneous view of the law.’”⁷³

The recent reversal by the Court of Appeals for the D.C. Circuit gives the DOJ another chance to revive the indictments against the Blackwater guards responsible for the Nisour Square tragedy. In the event the DOJ successfully re-indicts the Blackwater guards and obtains convictions, if the charges do not include war crimes, then the prosecutorial effort fails on the international level. If the convictions are manslaughter rather than war crimes, then the United States will be perceived as understating the gravity of the crimes committed at Nisour Square. Truth and reconciliation between the Iraqi people and the United States requires acknowledgement that the Nisour Square tragedy was a war crime, that it is a crime of the most serious international concern rather than simply mass manslaughter.⁷⁴ Moreover, failing to charge those Blackwater guards

Nisour Square. *Id.* at 122. Two days later, State Department legal counsel notified the DOJ Criminal Division that some of the information shared in the meeting might have been derived from protected *Garrity* statements. *Id.* This had the effect of disqualifying the DOJ Criminal Division from further prosecuting the case. From there, the case was assigned to the Counterterrorism Section of the National Security Division. *Id.* A “taint attorney”—an attorney tasked with making sure the prosecutors and investigators are screened from *Garrity* statements or derivative information—was assigned to oversee the investigation. *Id.*

70. 406 U.S. 441 (1972). The district court in *Slough* explained, “*Kastigar* clearly prohibits the government from making any direct or indirect evidentiary use of immunized testimony” *United States v. Slough*, 677 F. Supp. 2d 112, 117 (D.D.C. 2009) (citing *Kastigar*, 406 U.S. at 460). Further, the district court recognized, “[e]videntiary use of immunized testimony includes the direct presentation of immunized testimony to the grand or petit jury, as well as any derivative (or indirect) use of the immunized testimony.” *Slough*, 677 F. Supp. at 130.

71. *Kastigar*, 406 U.S. at 460.

72. *Id.* at 116.

73. *Slough*, 641 F.3d at 554 (quoting *United States v. Kilroy*, 27 F.3d 679, 687 (D.C. Cir. 1994)).

74. Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Humans Rights*, 59 LAW & CONTEMP. PROBS. 127, 129 (1996) (“When trials are undertaken, are they better conducted by an international tribunal . . . or by local courts of the country

responsible for the Nisour Square tragedy with war crimes undercuts the international criminal norm of recognizing individual criminal liability for war crimes—a matter of international concern.⁷⁵

The failure of the U.S. prosecution in its first attempt to prosecute the Blackwater guards raises two primary issues. First, does the prosecution's failure to properly screen tainted information and testimony rise to the level of "serious negligence" such that the prosecutorial effort could be conceived as a veiled attempt to shield the accused from Prosecution?⁷⁶ Second, is the immediate debriefing policy of the State Department demonstrative of the United States' unwillingness to prosecute?⁷⁷

Any state agency policy or action that directly impedes the collection of evidence or taints existing evidence necessary for a prosecution warrants careful scrutiny by the international community when the crime being prosecuted is of international concern. The U.S. State Department and the DOJ are departments under the U.S. government's executive branch, and the FBI is an organization within the DOJ. A policy of the State Department that directly impedes evidence-collection efforts by the FBI as well as handicaps prosecutorial efforts by the DOJ should impute an unwillingness to prosecute to the entire U.S. executive branch. Otherwise, legally suspect actions of the State Department⁷⁸ can interfere

concerned? . . . An international tribunal is better positioned to convey a clear message that the international community will not tolerate such atrocities, hopefully deterring future carnage of that sort both in the country in question and worldwide.”).

75. *Id.* (asserting that key international principles include the ideas that “human rights of individuals and groups are a matter of international concern, that the international community's interest in preventing or punishing offenses against humanity committed within states qualifies any concept of national sovereignty, that not just states but individuals can be held accountable under international law for their role in genocide or other atrocities”).

76. These mistakes, independently, do not prove that the U.S. DOJ intentionally mishandled the prosecution. Nevertheless, the presence of these mistakes militates in favor of an objective review. To allow the U.S. prosecution to self-assess whether its investigation was an earnest attempt to bring those responsible to justice undermines the general idea of objective review. Therefore, the mistakes made in the prosecution should not be explained by U.S. DOJ that performed the initial investigation, but rather such mistakes should serve as a trigger for the ICC to review the propriety of the prosecutorial efforts. The following excerpts from the district court's opinion in *Slough*, illustrate some of the mistakes by the prosecution: (1) “[T]he government's trial team repeatedly disregarded the warnings of experienced, senior prosecutors . . . that this course of action threatened the viability of the prosecution.” *Slough*, 677 F. Supp. 2d at 115; (2) “By all accounts, these prophylactic measures fell well short of expectations. . . .” *Id.* at 123; (3) “In direct contravention of Hulser's [the “taint attorney”] designed to screen exposure to compelled statements and derivative information] unequivocal warnings. . . .” *Id.* at 124; (4) “Despite these efforts, ‘miscommunications’-as the government charitably deems them-persisted. . . .” *Id.* at 125.

77. In other words, is the debriefing policy an unnecessary obstacle to prosecution? In the interest of preserving evidence (avoiding immunized statements), why can't FBI or DOJ representatives interview those involved in shootings before the State Department?

78. Greater scrutiny of the propriety of the Hunter Memorandum and the policy in place

with domestic prosecution and potentially shield the accused from the jurisdiction of the ICC.

The argument that the United States is unwilling to prosecute is further supported by the case of Andrew Moonen, a Blackwater guard accused of shooting and killing the bodyguard of then Iraqi Vice President, Raheem Khalaf Sa'adon. Similar to the Blackwater guards involved in the Nisour Square shooting, immediately following the incident, Moonen gave a statement to State Department officials and was given a *Garrity* Warning that hindered effective prosecution.⁷⁹ Moonen's case illustrates the unwillingness of the United States to prosecute private security contractors in Iraq.

3. *The Availability of Alternative Applicable Statutes: The Military Extraterritorial Jurisdiction Act*

Originally, the United States asserted jurisdiction over the Blackwater security guards pursuant to the Military Extraterritorial Jurisdiction Act ("MEJA").⁸⁰ The defendants filed a motion to dismiss for lack of jurisdiction arguing that MEJA did not apply to their situation because the private security contractors involved in the Nisour Square tragedy were not "employed by or accompanying the Armed Forces outside the United States"⁸¹—a necessary condition for U.S. courts to have jurisdiction under MEJA.⁸²

requiring immediate debriefing by State Department officials following a shooting incident is required. Factors to consider are whether other State Department offices have implemented similar policies in other parts of the world, how often this policy has hindered prosecution, and the State Department's reasoning behind such a policy.

79. Risen, *supra* note 8. Thirty-six hours after the shooting, the State Department and Blackwater collaborated to remove Moonen from the country; Moonen's quick departure from the country in spite of the wishes of the Iraqi government to hand him over for criminal prosecution could be seen as a concerted attempt to avoid prosecution. John M Broder, *State Dept. Plans Tighter Control of Security Firm*, N.Y. TIMES (Oct. 6, 2007), <http://www.nytimes.com/2007/10/06/washington/06blackwater.html>; Scott Horton, *Licensed to Kill*, HARPER'S MAG. (Oct. 6, 2007), <http://harpers.org/archive/2007/10/hbc-90001367>.

80. The Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261, provides:

(a) Whoever 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 the special maritime and territorial jurisdiction of the United States—

(1) while employed by or accompanying the Armed Forces outside the United States . . . shall be punished as provided for that offense. § 3261(a)(1) (2006).

81. Defs.' Motion to Dismiss for Lack of Jurisdiction at 14-15, *United States v. Slough*, 677 F. Supp. 2d 112 (D.D.C. 2009) (No. 1:08-CR-360) (quoting 18 U.S.C. § 3261 (a) (1) (2006)).

82. *See* 18 U.S.C. § 3261.

In support of their argument, the defendants pointed out that the statutory language of MEJA very specifically defines “employed by,”⁸³ and furthermore, because the defendants’ contract was with the U.S. State Department, they were not accompanying the Armed Forces or furthering the mission of the U.S. Department of Defense (“DOD”).⁸⁴ Therefore, the defendants argued, MEJA did not apply to them.⁸⁵

The U.S. prosecution, on the other hand, argued that the U.S. State Department and the DOD had intertwined responsibilities and that, “in Iraq both departments fulfill mutually supporting responsibilities and work hand-in-hand to achieve that single, common objective.”⁸⁶ The issue of whether MEJA applies to private security contractors who committed crimes in Iraq while working for the State Department remains unresolved. The district court in *Slough* chose to focus on whether the indictments were improperly obtained using immunized *Garrity* statements.⁸⁷ Therefore, the court did not have to determine whether MEJA provided jurisdiction over the defendants.

Fixing this “jurisdiction gap” is not necessary for effective prosecution of the Blackwater guards responsible for the Nisour Square tragedy if Iraq voluntarily accepts the jurisdiction of the ICC and submits the incident to the ICC for investigation.⁸⁸

83. In particular, the definition applicable to MEJA identifies three specific groups: civilian employees, contractors, or employees of a contractor. 18 U.S.C. § 3267 (2006). Any member of one of those groups who either works for the Department of Defense or works for “any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas” is considered “employed by the Armed Forces outside the United States,” and, therefore, is within the reach of MEJA. *See* 18 U.S.C. § 3267 (2006).

84. Defs.’ Motion to Dismiss for Lack of Jurisdiction at 3-4, *Slough*, 677 F. Supp. 2d 112 (D.D.C. 2009) (No. 1:08-CR-360).

85. *Id.*

86. Gov’t’s Resp. to Def.’s Motion to Dismiss for Lack of Jurisdiction at 2, *Slough*, 677 F. Supp. 2d 112 (D.D.C. Cir. 2009) (No. 1:08-CR-00360). The Prosecution also noted that the Department of State and the Department of Defense had a mutual objective: “the overarching mission of the United States in Iraq was to win the war against opposition forces and bring stability to that country, a goal the Executive assigned the Department of Defense . . . to lead.” *Id.*

87. *See* United States v. *Slough*, 677 F. Supp. 2d 112, 117 (D.D.C. 2009), *vacated*, 641 F.3d 544 (D.C. Cir. 2011) (focusing on the dismissal of the indictments because of evidentiary issues but not discussing the motions submitted by the defense and prosecution concerning the applicability of MEJA). After the original indictment was dismissed, two of the accused moved to have the indictment dismissed with prejudice. United States v. *Slough*, 679 F. Supp. 2d 55, 56 (D.D.C. 2010). The motion was denied, and the possibility of re-indictment of at least two of the accused exists provided the U.S. government has sufficient untainted evidence to support another indictment. *Id.* at 62.

88. Since 2007, Congress has unsuccessfully attempted to amend MEJA to clarify the scope of jurisdiction and Congress’s intent to hold security contractors liable in U.S. Courts. *See* H.R. REP. NO. 110-352, at 3 (2007) (“MEJA Expansion and Enforcement Act of 2007” [is to] make contractors and contract personnel under Federal contracts criminally liable for crimes committed overseas In addition to closing [the jurisdictional] gap in current law, H.R. 2740 would designate the Justice

III. GOING FORWARD: WHY AN INDEPENDENT INTERNATIONAL TRIBUNAL SHOULD PROSECUTE CRIMES COMMITTED BY U.S. CONTRACTORS IN IRAQ AND THE POLITICAL IMPLICATIONS

Iraq is unable to prosecute,⁸⁹ and the United States has demonstrated an unwillingness to prosecute. Unless the DOJ—on its second attempt—is able to indict and convict the Blackwater guards for war crimes rather than manslaughter, the ICC is the last resort for justice for the Nisour Square tragedy.

The Iraqis saw the dismissal of the Blackwater guards' indictments for the Nisour Square shootings as a failure to prosecute that cast doubt on the sincerity of U.S. efforts to hold contractors liable for war crimes.⁹⁰ Even though the dismissal of the indictments has been reversed on appeal, it is possible that on remand the indictments could be reinstated or reissued. The fact remains that those responsible for the Nisour Square tragedy in 2007 have still not been held accountable. Moreover the U.S. legislators' failure to close the "jurisdictional gap" in MEJA further delays efforts to hold contractors liable.⁹¹

The U.S. evidentiary system has built-in safeguards for constitutional rights which, in some circumstances, warrant dismissal of an indictment for prosecutorial misuse of tainted evidence. There is a danger that parties unfamiliar with necessity of the U.S. evidentiary safeguards, such as the Iraqi citizens, may see the dismissal as "victor's justice."⁹² To lend

Department to be the lead agency responsible for investigating allegations of contractor criminal misconduct."); *see also* H.R. 4567, 111th Cong. (2010) (a bill called the Civilian Extraterritorial Jurisdiction Act ("CEJA") introduced by Congressman David Price (D-NC) designed to close the jurisdictional gap in MEJA being exploited by civilian contractors); S. 2979, 111th Cong. (2010) (Senator Patrick Leahy (D-VT) introducing companion legislation to H.R. 4567, 111th Cong. (2010)). On February 2, 2010, Senate Bill 2979 was referred to the Committee on the Judiciary. House Bill 4567 was referred to the House Committee on the Judiciary on February 2, 2010; that committee referred the bill to the Subcommittee on Crime, Terrorism, and Homeland Security on April 26, 2010. To keep updated on the status of these bills, visit the U.S. Library of Congress's online database of legislative materials at <http://thomas.loc.gov>.

89. The Iraq Special Tribunal is set up to deal only with war crimes committed under Saddam Hussein's reign up to May 1, 2003. *Iraq: Iraqi Special Tribunal—Fair Trials Not Guaranteed*, AMNESTY INT'L, 5 AI Index MDE 14/007/2005 (May 12, 2005), <http://www.amnesty.org/en/library/info/MDE14/007/2005/en>.

90. Matt Apuzzo, *Iraq Dismayed by Blackwater Dismissal*, CBS NEWS (Jan. 23, 2010), <http://www.cbsnews.com/stories/2010/01/01/world/main6044525.shtml>.

91. While U.S. contractor liability is ultimately an issue that deserves great congressional scrutiny, the exigency of the Iraq conflict and gravity of the Nisour Square shootings require swift action perhaps better suited to an executive-branch-like position, such as the ICC Prosecutor, rather than the legislative process of the U.S. Congress.

92. *See, e.g.,* ZEIDY, *supra* note 47, at 172–73 (discussing condemnation of the *Leipzig* trials of Germans post WWI for war crimes where only a few of the Germans tried before the *Reichsgericht*

credibility to the U.S. contention that the United States only wants to help Iraq survive as a sovereign nation, the United States must allow Iraq to submit cases such as the Nisour Square tragedy to the ICC.

It is uncontested that private security contractors were, and continue to be, an integral part of the U.S. mission in Iraq. Exposing those individuals to potential criminal liability before the ICC would not mean the United States is turning its back on those who supported the mission in Iraq. Rather, it would demonstrate to the world that parties involved in armed conflict who commit war crimes will be held accountable.

Prosecution of private security contractors for war crimes in Iraq, unlike the other ICC prosecutions,⁹³ does not risk destabilization of the region because prosecution is desired in the region. If anything, effective prosecution would strengthen the claim that the United States was and is committed to justice in the process of rebuilding Iraq

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[German High Court] were convicted and given sentences too light compared to the offenses committed).

93. See, e.g., HUMAN RIGHTS WATCH, *Arab States: Press Sudan on Darfur Aid: Use Summit to Urge Reversal of Humanitarian Groups's Expulsions* (Mar. 29, 2009), available at <http://www.hrw.org/en/news/2009/03/29/arab-states-press-sudan-darfur-aid> (noting that ICC efforts to prosecute Sudanese President Omar al-Bashir may "threaten peace efforts in the region"); see also Ahmed M Kamara, *ICC's Intent on Prosecution is a Big Threat To Guinea's Security*, NEWSTIME AFRICA (Jan. 20, 2010), <http://www.newstimeafrica.com/archives/10476>.

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