

Prosecuting Private Armies: Could the Uniformed Services Employment and Reemployment Rights Act of 1994 Provide a Template for Prosecution of Private Military Contractors?

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I. PROLOGUE

Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; sodomizing a detainee with a chemical light and perhaps a broom stick, and using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.¹

Such terrible acts are not a work of fiction, but were perpetrated by United States military personnel at the Abu Ghraib prison in 2003 *after* the fall of Saddam Hussein's oppressive regime.² These crimes were not the sole acts of sadistic criminal abuses committed upon prisoners at Abu Ghraib, but constitute a mere partial list of treatment of detainees at the hands of, not only US military personnel, but some private military contractors as well.³

The September 16, 2007 Nisoor Square incident in Baghdad, Iraq was brutal, bloody, and completely chaotic, involving a convoy of Blackwater International, Inc. contractors, a white Kia that would not stop as it rapidly approached the convoy, and a square full of civilians and potentially corrupt military police.⁴

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1. Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER (May 10, 2004), <https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib> [<https://perma.cc/QSR6-NPFY>] (quoting descriptions of a report written by Major General Antonio M. Taguba about the extensive systemic and horrific abuse of detainees at the Abu Ghraib prison in Iraq by US military personnel).

2. *Id.*

3. *Id.*; See also Brandi Buchman, *Contractor Must Face Claims Over Abu Ghraib Abuse*, COURTHOUSE NEWS SERVICE (Jun. 26, 2018), <https://www.courthousenews.com/contractor-must-face-claims-over-abu-ghraib-abuse/> [<https://perma.cc/Z8Q4-9GNZ>] (detailing lawsuit by former detainees toward CACI Int'l, with the judge holding that CACI Int'l could be held liable for conspiracy to abuse the prisoners).

4. ERIK PRINCE & DAVID COBURN, CIVILIAN WARRIORS: THE INSIDE STORY OF BLACKWATER AND THE UNSUNG HEROES OF THE WAR ON TERROR 216-217 (Penguin Group (USA) LLC, 2013).

A contractor fired into the Kia, hitting the driver, who turned out to be a medical student driving his mother across town, in the middle of the forehead, starting a massive firefight between Blackwater contractors and Iraqi police, with dozens of civilians caught in the crossfire.⁵ The casualties amounted to two-dozen civilians injured, with seventeen more killed.⁶ The Nisoor Square Massacre immediately became one of the most infamous international incidents of the War on Terror, enraging people across the globe for the deaths and injuries of dozens of innocent Iraqi civilians.

II. INTRODUCTION

The International Code of Conduct Association defines “private security companies” as, “any Company (as defined in this Code) whose business activities include the provision of Security Services either on its own behalf or on behalf of another, irrespective of how such Company describes itself.”⁷ American publications, in reference to the decades-long wars in Iraq and Afghanistan, more frequently refer to government-contracted security services providers as private military companies or contractors (hereinafter “PMCs”) which are suitable terms given the essentially military functions that these companies offering security services perform.⁸ The United States government contracts PMCs to perform a variety of functions, which include lower-level supporting operations, training military personnel of other countries, and providing extensive military and security support through the use of highly trained former soldiers armed with powerful weapons.⁹ These government contracts can be lucrative, with the Department of Defense spending an incredible \$320 billion on federal contracts in 2017 alone, more than all other federal agencies combined¹⁰, and this massive spending is anything but anomalous.¹¹ As of 2016, within the U.S. Central Command area of responsibility, the ratio of private contractors to U.S. military personnel was

5. *Id.* at 217.

6. *Id.* at 218 (noting that the initial figures were eleven casualties, rising to seventeen in the days after the shooting occurred).

7. Int’l Code of Conduct Ass’n, *The International Code of Conduct for Private Security Service Providers*, at 5, Nov. 9, 2010, https://www.icoca.ch/sites/default/files/resources/ICoC_English.pdf [<https://perma.cc/3Z4W-H5PZ>] [hereinafter Int’l Code of Conduct for Private Sec. Serv. Providers].

8. See generally Matt Apuzzo, *In Blackwater Case, Court Rejects a Murder Conviction and Voids 3 Sentences*, N.Y. TIMES (Aug. 4, 2017), <https://www.nytimes.com/2017/08/04/world/middleeast/blackwater-contractors-iraq-sentences.html> [<https://perma.cc/HF5J-7G93>]; Sabrina Tavernise, *U.S. Contractor Banned by Iraq Over Shootings*, N.Y. TIMES (Sep. 18, 2007), <https://www.nytimes.com/2007/09/18/world/middleeast/18iraq.html> [<https://perma.cc/6XBP-CZHT>].

9. Duncan Bell, *Private military company*, ENCYCLOPEDIA BRITANNICA (Nov. 2, 2016), <https://www.britannica.com/topic/private-military-firm> (last visited Mar. 29, 2019) [<https://perma.cc/32A6-BEMK>].

10. MOSHE SCHWARTZ ET AL., CONG. RES. SERV., R44010, DEFENSE ACQUISITIONS: HOW AND WHERE DOD SPENDS ITS CONTRACTING DOLLARS 3 (2018).

11. See Sean McFate, *America’s Addition to Mercenaries*, THE ATLANTIC (Aug. 12, 2016), <https://www.theatlantic.com/international/archive/2016/08/iraq-afghanistan-contractor-pentagon-obama/495731/> [<https://perma.cc/Q9BY-7D3R>] (stating that the Pentagon obligated \$285 billion to federal contracts for 2014).

nearly 3 to 1¹² as compared to World War II, where the ratio of private contractor to U.S. military personnel was about 1 to 7.¹³

Controversy over the government's use of private military contractors in the War on Terror erupted during the 2000s after two separate, tragic incidents involving PMCs: the torture of detainees at the Abu Ghraib prison in 2003 and the Nisoor Square Massacre in 2007, both of which are described in the Prologue. The Abu Ghraib scandal, involving contractors from CACI International, Inc. and L-3 (formerly known as "Titan") that broke in 2004 opened the world's eyes to inhumane conditions and torture of detainees taking place within an American military prison.¹⁴ Even after a decade, those accused of committing the atrocities were not prosecuted.¹⁵ The Nisoor Square Massacre occurred on September 16, 2007 after security guards contracted through Blackwater International, Inc. (hereinafter "Blackwater") rained machine gun fire into a crowd in Baghdad's Nisoor Square, killing 17 civilians and injuring 24 others.¹⁶ Witnesses and victims would later testify in 2015 at the sentencing hearing for former Blackwater security guards who shot into the crowd—Nicholas Slatten, Paul Slough, Evan Liberty, and Dustin Heard—about the unchecked power Blackwater contractors wielded in the aftermath of Saddam Hussein's regime.¹⁷ The perception of PMCs having unchecked power stems from a lack of enforceable legal standards regulating these companies' actions. Although International Humanitarian Law, which governs during armed conflicts, is replete with laws strictly governing state use of force and expectations of punishment of military personnel for violation of those laws, international legal standards regarding actions of private military contractors are few and those regarding state practices are ineffective and lack enforcement mechanisms.¹⁸

12. CONTRACTOR SUPPORT OF U.S. OPERATIONS IN THE USCENTCOM AREA OF RESPONSIBILITY, DEPT. OF DEF., 1 (2016) (reporting that, including all USCENTCOM locations, there were 42,694 contractors for the 16,926 military personnel).

13. CONTRACTORS' SUPPORT OF U.S. OPERATIONS IN IRAQ, CONG. BUDGET OFF., 13 (2008).

14. See Elana Schor, *Former Abu Ghraib detainees sue US contractors*, THE GUARDIAN (Jun. 30, 2008, 2:38 PM), <https://www.theguardian.com/world/2008/jun/30/usa.usforeignpolicy1> [<https://perma.cc/S4LK-KAYJ>]; Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER (May 10, 2004), <https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib> [<https://perma.cc/QSR6-NPFY>] (writing that the prisoners were subject to brutal "enhanced interrogation techniques" and were subject to humiliation in front of other prisoners).

15. Faiza Patel, *A Primer on Legal Developments Regarding Private Military Contractors*, LAWFARE (July 18, 2014, 4:30 PM), <https://www.lawfareblog.com/primer-legal-developments-regarding-private-military-contractors> [<https://perma.cc/J4L9-NDHQ>].

16. James Glanz & Alyssa Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES (Oct. 3, 2007), <https://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html> [<https://perma.cc/A2YR-8MRK>].

17. Amanda Taub, *Blackwater's Baghdad massacre is a reminder of how the US became what it hated in Iraq*, VOX (Apr. 15, 2015, 9:20 AM), <https://www.vox.com/2015/4/15/8419825/blackwater-iraq-war-failure> [<https://perma.cc/KZ7G-YPYL>].

18. See Int'l Comm. of the Red Cross, *The Montreux Document: On pertinent international legal obligations and good practices for States related to operations of private military and security companies during*

The prosecution of PMCs who commit crimes overseas while under contract for the Department of Defense is a prevalent and pressing ethical topic. Though the government's use of PMCs has only increased as the years of the War on Terror have worn on, prosecutions of contractors who commit crimes have proven difficult—the contractors named in connection to the atrocities committed at Abu Ghraib have not been prosecuted and the contractors who committed the Nisoor Square Massacre were tried after seven years in 2014.¹⁹ And even though it is approaching two decades since the start of the Afghanistan war in 2001, the United States' active use of PMCs to supplement its military operations continues. Blackwater's founder and former CEO Erik Prince appeared in the news recently, with a plan to almost fully privatize the war in Afghanistan, rendering void the use of American soldiers held accountable to law by the Uniform Code of Military Justice (hereinafter, "UCMJ").²⁰ Whether the Trump Administration chooses to implement such a plan remains to be seen.

Fundamental to American democracy and an ethical legal system is the notion of liberty and justice for all. The notion that criminals should face the justice system and atone for their crimes is not limited applying solely within American borders. This note recognizes the difficulties of operating in a modern warzone, an asymmetrical environment where enemies often disguise themselves as civilians. This note does not argue for the cessation of use of PMCs, nor does it seek to paint them as inherently evil actors, but rather argues for legislation that would effectively increase the accountability of PMCs and make their use more ethical, as their services become increasingly necessary and as the international landscape becomes increasingly complex.

This note will propose a solution under United States domestic law that would allow PMCs working under Department of Defense contracts and serving security roles to be subject to the jurisdiction of the UCMJ, providing a better mechanism for pursuing justice than currently exists. The note will begin by describing the current international and domestic legislation and regulations of PMCs and will describe the difficulties of prosecuting PMCs who committed atrocities at Abu Ghraib and Nisoor Square under existing laws. The note will then propose the passing a statute that would bring a very narrow subset of PMCs under the

armed conflict, Sep. 17, 2008, at 16 (stating that, though one of the foremost international authorities on regulation of private military companies, the provisions in its "Good Practices" section do not have legally binding effect). See also *Int'l Code of Conduct*, *supra* note 8, at 3-4, Nov. 9, 2010 (stating that this document is not a legally binding instrument but exists to advise signatory states regarding international obligations).

19. See PATEL, *supra* note 16 (discussing the failure of domestic prosecution of contractors for both the Abu Ghraib and Nisoor Square incidents). See also *US judge dismisses charges in Blackwater Iraq killings*, BBC NEWS (Dec. 31, 2009, 9:50 PM), <http://news.bbc.co.uk/2/hi/americas/8436780.stm> [<https://perma.cc/DQN4-HKP9>] (discussing dismissal of charges against former Blackwater security guards due to prosecution error and inadmissible evidence).

20. Tara Copp, *Here's the blueprint for Erik Prince's \$5 billion plan to privatize the Afghanistan war*, MIL. TIMES (Sep. 4, 2018), <https://www.militarytimes.com/news/your-military/2018/09/05/heres-the-blueprint-for-erik-princes-5-billion-plan-to-privatize-the-afghanistan-war/> [<https://perma.cc/3FW6-AWM7>].

jurisdiction of the UCMJ. The Uniformed Services Employment and Reemployment Rights Act of 1994 provides a template for structuring this sort of legislation, as it functions to give a special legal status to a defined group of individuals. The note will conclude by arguing aggressively that the statute would provide necessary and urgent accountability for PMCs operating abroad.

III. CURRENT INTERNATIONAL AND U.S. DOMESTIC LAWS LACK ENFORCEMENT MECHANISMS TO HOLD PMCS ACCOUNTABLE OVERSEAS

This section will detail the current regulations of PMCs in place under international and United States domestic law, and concurrently discuss their effectiveness. The international documents discussed will be the Montreux Document and the International Code of Conduct for Private Security Service Providers. The domestic laws discussed will be the Military Extraterritorial Jurisdiction Act and the Uniform Code of Military Justice. The section on United States domestic law will discuss the cases of *U.S. v. Slough* and *United States v. Slatten*, the trial court's decision and appellate review of the prosecution of the former Blackwater security guards respectively, in an effort to show the difficulties faced by the judicial system in trying PMCs for crimes committed outside of the United States.

A. THE MONTREUX DOCUMENT ESTABLISHED IMPORTANT GUIDELINES BUT DID NOT PROVIDE NECESSARY ENFORCEMENT MECHANISMS FOR PMCS UNDER INTERNATIONAL LAW

The *Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict* (hereinafter, "The Montreux Document") was a significant development in international law because was the result of the international community's first serious attempt to impose regulations and accountability on PMCs where little previously existed.²¹ It is important to distinguish PMCs from "mercenaries," whose definition in the Geneva Convention does not fit the characteristics of PMCs, leaving their status unaddressed in international law up to this point.²² The first part of the Montreux Document serves to remind the signatory states of their obligations under international humanitarian law.²³ The second part, entitled, "Good practices relating to private military and security companies," gives a general template of ideal behavior for PMCs active in an armed conflict, and provides recommended behaviors for signatory states to follow.²⁴ Yet, the drafters of the Montreux Document recognize that its scope is quite

21. See THE MONTREUX DOCUMENT, *supra* note 19, at 5.

22. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 47, Jun. 8, 1977 (defining a mercenary as, in part, not being a national of a Party to the conflict, which conflicts with the Departments of State or Defense contracting US PMCs for security services).

23. See THE MONTREUX DOCUMENT, *supra* note 19 at 11.

24. *Id.* at 16.

limited, writing that the Montreux Document is not designed to establish new regulations for PMCs but rather it is designed to reiterate States' existing obligations under international humanitarian law.²⁵ The drafters explicitly state that the document shall have no binding legal effect, including the recommendations for good practices.²⁶

This is not to say that the Montreux Document is useless—it provided the necessary starting point for the international community to seriously consider the lack of regulation for contractors who were playing an increasingly important role in international conflicts.²⁷ The Montreux Document reaffirmed PMCs' obligations to comply with international humanitarian law, human rights law, and applicable national laws, noting that PMCs would be subject to prosecution if they commit conduct recognized as crimes while operating abroad.²⁸ By 2013, forty-six states as well as the European Union had become signatories to the document, and many had taken steps toward establishing domestic laws regulating PMCs' behavior abroad and potential prosecution should the situation go awry.²⁹ For example, by 2013, the United States had undertaken a number of legal and regulatory efforts to separate inherently governmental functions from those that could be outsourced, as well as enacting certain statutes and implementing a more robust monitoring system for PMCs, though all of these actions have not reached the extent to which drafters of the Montreux Document aspired.³⁰ Ultimately, results of the Montreux Document have been mixed, with the United States, though enacting better monitoring systems of PMCs' activities, having failed to enact legislation that would effectively bring PMCs under the jurisdiction of United States federal courts, resulting in the continued lack of accountability and an ethical dilemma for PMCs operating abroad.³¹

B. THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS GOES A STEP FURTHER BUT STILL LACKS ENFORCEMENT MECHANISMS

Following the publishing of the Montreux Document in 2008, the International Code of Conduct Association passed *The International Code of Conduct for*

25. *Id.*

26. *Id.*

27. *See Id.* at 5 (explicitly addressing that, though the use of PMCs in international armed conflict is not a new concept, the international community has not given their use much attention – it also appears that the Nisoor Square incident likely spurred the drafting and publication of this document, as it was published a year following the tragic events in Iraq).

28. *Id.* at 14–15.

29. MONTREUX FIVE YEARS ON: AN ANALYSIS OF STATE EFFORTS TO IMPLEMENT MONTREUX DOCUMENT LEGAL OBLIGATIONS AND GOOD PRACTICES, AM. UNIV. COLL. OF LAW 7 (2013), <https://www.wcl.american.edu/index.cfm?LinkServID=B1E626D9-095E-4A28-94A94551CEA3488E> [<https://perma.cc/5KKD-QYTJ>].

30. *Id.* at 7–8 (finding a similar result among other signatory nations including the United Kingdom and Iraq – that some regulations were implemented, though they did not go far enough to ensure accountability for PMCs).

31. *Id.* at 157.

Private Security Service Providers (hereinafter, “The Code of Conduct”), seeking to build upon the principles of the Montreux Document and extend more specific guidelines to both signatory nations and signatory companies.³² The Code of Conduct builds upon the foundation created by the Montreux Document: first, it binds not just signatory nations but signatory *companies*, with seven signatory nations and 95 PMCs, including some from non-signatory nations, signed to the document;³³ and second, it provides a much more in-depth analysis of functions performed by PMCs and details stringent regulations for companies to follow.³⁴ The drafters of the Code of Conduct developed standards for a number of functions, including rules for the use of force, detention, apprehending persons, and a general prohibition of torture and other cruel, inhuman, or degrading treatments or punishments upon detainees, and this is not an exhaustive list of standards.³⁵ The Code of Conduct is unique in its targeting of individual companies, and certainly goes further in establishing ethical standards for its signatory PMCs than did its predecessor.³⁶

Despite its unique approach and greater scope, the Code of Conduct does have an important limitation. Much like the Montreux Document, the Code of Conduct is aspirational, with the drafters recognizing that that Code of Conduct complements, but does not replace, existing international or domestic law of the nations in which PMCs operate and that its provisions are nonbinding, creating no legal obligations for its signatories.³⁷ Once again, this creates a vacuum of enforceable legal standards for PMCs in international law. This issue is not unique to either the Montreux Document or the Code of Conduct, but stems from the inherent tension between international and domestic law, where international law seeks to impose greater unification and laws followed by signatory countries, but implementation of treaty provisions requires passing of additional domestic legislation.³⁸ The Montreux Document and the Code of Conduct importantly are not treaties, and their drafters explicitly

32. *The Int'l Code of Conduct for Private Sec. Serv. Providers*, *supra* note 8, at 3.

33. Int'l Code of Conduct Ass'n, *Membership*, <https://www.icoca.ch/en/membership> (last visited Feb. 3, 2019) [<https://perma.cc/8HQ9-A82J>] (including among its signatories companies incorporated in Cyprus, Iraq, and India, even though those nations are not themselves signatories to the Code of Conduct, with these as just a few examples).

34. *See The Int'l Code of Conduct for Private Sec. Serv. Providers*, *supra* note 8, at 3-4.

35. *Id.* at 8-11.

36. Int'l Code of Conduct for Private Sec. Serv. Providers, <https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/international-code-conduct.html> (last visited Feb. 3, 2019) [<https://perma.cc/5YN7-BF6V>].

37. *Id.* at 6.

38. *See Medellín v. Texas*, 522 U.S. 491, 508 (2008) (dismissing the notion that the signing of an international treaty immediately obliges the United States to follow its provisions, and instead holding that the signing of a non-self-executing treaty is simply a commitment on the part of the U.N. members to take future action to comply with the treaty's provisions). This note does not seek to delve into a deep analysis of self-executing versus non-self-executing treaties, but instead wishes to highlight the difficulties in implementing international legislation domestically in the United States.

acknowledge the documents to provide guidelines instead of binding legal authority.

C. PROSECUTION OF CRIMES COMMITTED BY PMCS UNDER THE MILITARY EXTRATERRITORIAL JURISDICTION ACT AND THE UNIFORM CODE OF MILITARY JUSTICE STATUTES IS DIFFICULT AND INEFFECTIVE

This note now turns to analyze the role and scope of United States domestic law in creating legal accountability for PMCs operating abroad. Given the lack of enforcement mechanisms inherent in current international law, domestic law proves more likely to provide a satisfactory answer addressing this ethical gray area. However, under current laws, PMCs still face inadequate accountability for crimes committed abroad, and more must be done in order to provide a solution to this ethical problem.

1. THE MILITARY EXTRATERRITORIAL JURISDICTION ACT REQUIRES A FACT-INTENSIVE INQUIRY AFTER CRIMES OCCUR OVERSEAS, AND THIS INQUIRY MAKES IT DIFFICULT TO PROSECUTE PMCS BECAUSE PROSECUTORS HAVE NO MEANS TO CONDUCT A THOROUGH INVESTIGATION OVERSEAS

The most important domestic law regarding the prosecution of PMCs is the Military Extraterritorial Jurisdiction Act (hereinafter, “MEJA”). This statute authorizes the prosecution of extraterritorial crimes committed by civilians employed by the Department of Defense or its contractors, with a later amendment expanding the scope of MEJA to include all contractors employed by “any other Federal agency . . . to the extent such employment relates to supporting the mission of the Department of Defense overseas.”³⁹ Legislative intent behind the 2004 amendment extending the scope of MEJA is clear: Congress added the amendment to address the “jurisdictional gap” that existed, as those contractors working for departments other than the Department of Defense would not be subject to jurisdiction under MEJA in its original form.⁴⁰ Under the current law, United States federal courts should have jurisdiction over qualifying crimes committed by PMCs working abroad, so long as they work to further the mission of the Department of Defense, regardless of the department that hired them.⁴¹ An offense committed abroad falls under MEJA jurisdiction if the offense would be punishable by imprisonment had it occurred in the territorial jurisdiction of the

39. 18 U.S.C. §§ 3261(a), 3267(1)(A)(II); *See also* United States v. Slatten, 865 F.3d 767, 779 (D.C. Cir. 2017).

40. *See* Slatten, 865 F.3d at 779 (detailing the legislative history of MEJA and explaining that the original code only subject civilian contractors to jurisdiction of the U.S. federal courts who worked under contracts for the Department of Defense, and that Congress designed the amendment to bring contractors who worked under contracts from other departments, such as State or the Interior, under jurisdiction of United States federal courts as well).

41. *Id.*

United States and was committed by a contractor employed by or accompanying the Armed Forces overseas.⁴²

The Blackwater contractors on trial for the Nisoor Square Massacre, however, did not view MEJA's jurisdiction as absolute. The United States Court of Appeals for the District of Columbia addressed the issue of the extent of MEJA's applicability during an appeal of a district court's ruling that MEJA's jurisdiction applied to the actions committed by Nicholas Slatten, one of the responsible Blackwater contractors.⁴³ The court and defendants acknowledged that it was undisputed that the murders met MEJA's required standard of being punishable by over one year in prison if committed in the territorial jurisdiction of the United States.⁴⁴ The challenged issue was exactly what kind of actions MEJA encapsulated: The defendants argued that MEJA's jurisdiction was limited regarding the meaning of the "to the extent" language of 18 U.S.C. § 3267(1)(A)(iii)II and the "while employed" language of 18 U.S.C. § 3261 was a temporal limitation.⁴⁵ The court dismissed these arguments, noting that if MEJA's jurisdiction were to be applied so narrowly, it would leave a dangerous loophole in prosecution of crimes committed by contractors abroad, which is exactly what MEJA's drafters sought to address.⁴⁶ The court concluded that, "Providing security to the State Department personnel who themselves acted jointly with the Defense Department to aid the Iraqi people and whose protection would have continued to require military personnel . . . necessarily 'relate[d] to' supporting the Defense Department's mission," and that the contractors could be tried under MEJA's jurisdiction.⁴⁷ The court's opinion subsequently addressed a myriad of other issues for each of the individual defendants, and vacated Slatten's first degree murder conviction and remanding for a new trial, as well as remanding the remaining defendants' sentences for resentencing consistent with the opinion, none of which would have happened without the court upholding jurisdiction under MEJA.⁴⁸ Upon remand, Slatten was convicted of first-degree murder after his third trial, with no sentence yet imposed as of December 2018.⁴⁹

Prosecution of the Blackwater contractors under MEJA proved quite difficult, with the court's lengthy opinion demonstrating the inherent difficulties faced by courts in applying the statute.⁵⁰ Although the court in *Slatten* did uphold MEJA's

42. 18 U.S.C. § 3261(a).

43. See Slatten, 865 F.3d at 778.

44. *Id.* at 781.

45. *Id.* at 782–83.

46. *Id.* at 783.

47. *Id.* at 782.

48. *Id.* at 820.

49. Michael Collins, *Former Blackwater guard convicted of instigating mass shooting in Iraq*, USA TODAY (Dec. 19, 2018, 12:13 PM), <https://www.usatoday.com/story/news/politics/2018/12/19/iraq-war-jury-convicts-ex-blackwater-guard-second-time-massacre/1941149002/> [<https://perma.cc/QJ8D-LFUQ>].

50. See Slatten, 865 F.3d at 779-781. For a discussion about ethical problems prosecutors face when trying PMCs, see DonnaMarie McKinnon, *Federal Civilian Crim. Prosecutions of Private Military Contractors*:

jurisdiction, the process of arriving at that result was lengthy and complicated. One of the inescapable difficulties in applying the statute is that, though the Act gives American courts the ability to try PMCs for crimes committed overseas, it fails to give the prosecutors the means with which to conduct a thorough investigation of the allegations.⁵¹ Unfortunately, the Department of Justice's lack of means to conduct a thorough investigation and gather evidence from Baghdad, in combination with a debate over the use of the contractors' eventually inadmissible statements, caused the prosecution to drag on for eleven years and three trials.⁵² *United States v. Slatten* shows that, although American federal courts have begun applying MEJA in prosecution of criminal PMCs, the act itself provides no assistance to the prosecution and Department of Justice in building a case. While prosecutions under this statute begin to bring some accountability to PMCs who commit atrocities during combat, MEJA does not go far enough in providing a more streamlined process for doing so, failing to give prosecutors the means to conduct an investigation and helping to prolong the process of justice.

2. IT IS EXTREMELY CHALLENGING TO PROSECUTE CIVILIANS UNDER THE UNIFORMED CODE OF MILITARY JUSTICE, BUT EFFORTS HAVE INCREASED IN RECENT YEARS TO CHANGE THIS FOR PRIVATE CONTRACTORS

The Uniformed Code of Military Justice (hereinafter, "UCMJ") is the law that applies to crimes committed by members of the United States military, subjecting military personnel to the jurisdiction of military tribunals as opposed to United States federal or state court jurisdiction.⁵³ Whether or not civilians can be subjected to the jurisdiction of the UCMJ has changed with time, be it during peacetime or wartime, and the nature of the role the civilians play.⁵⁴ Throughout the middle of the 20th century, the Supreme Court and U.S. Court of Military Appeals, in a series of cases, indicated disapproval of the court-martialing of civilians who were not members of the armed forces during times of peace.⁵⁵ The

Inherent Legal Ethics Issues, 24 GEO. J. LEGAL ETHICS 695, 702-704 (2011) (explaining that, though the most important factor contributing to courts' difficulty in prosecuting PMCs is the difficulty in applying MEJA, other factors also cause significant difficulty, including the impossibility of collecting evidence for a trial from the war zones where crimes took place, lack of means to conduct a thorough investigation, and assertions of self-defense claims by contractors).

51. *See Id.* at 702.

52. *Id.*; *see also* Collins, *supra* note 50 (providing a description of the posture of the case).

53. 10 U.S.C. § 802.

54. Adam R. Pearlman, *Applying the UCMJ to Contractors in Contingency Operations*, 6 AM. UNIV. NAT'L SEC. LAW BRIEF 1, 3-4 (2016) (providing a brief history of the ability to court martial civilians from the American Revolution into the present day).

55. *See* U.S. *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (holding that civilians generally are entitled to protection of trial under federal or state courts and should not be subject to court martial); Reid v. Covert, 354 U.S. 1 (1957) (holding that a civilian wife accused of murdering her military serviceman husband could not be subjected to a court martial during peacetime); *United States v. Averette*, 41 C.M.R. 363 (C.M.A. 1970) (concluding that, for a civilian to be triable by court-martial in a time of war, a "time of war" requires a congressional declaration of war).

U.S. Court of Military Appeals even held that court-martialing of civilians could not be done during the Vietnam War, because Congress had not formally issued a declaration of war against North Vietnam.⁵⁶ These cases suggest that civilians could be subjected to the jurisdiction of military courts during wartime; however, Congress' failure to formally declared war since December of 1941 created a jurisdictional gap that left the prosecution of civilians and contractors accompanying the United States armed forces in a state of flux.⁵⁷ The issue became more pronounced as private contractors became a more popular fixture in Department of Defense operations and as the United States engaged in frequent military operations around the world without a declaration of war. Finally, in 2006, Congress amended 10 U.S.C. § 802(a)(10), expanding the applicability of the UCMJ's jurisdiction, "In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field."⁵⁸ A contingency operation is a military operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States, encompassing America's long-term conflicts in the Middle East.⁵⁹

The court-martialing of PMCs after the enactment of the amendment to 10 U.S.C. § 802(a)(10) has not been successful in the prosecutions of PMCs who committed the atrocities at either Abu Ghraib or Nisoor Square. For torturing inmates at Iraq's Abu Ghraib prison, soldiers at fault received formal punishment under UCMJ jurisdiction, but it turned out differently for the private contractors.⁶⁰ Former prisoners settled a lawsuit against contractor L-3 in 2012 for \$5.28 million, nearly a decade after the revelations of Abu Ghraib came to international attention.⁶¹ Worse still, the court only *just* set a trial date for the lawsuit against L-3's fellow contractor, CACI Premier Technology, scheduled to take place on April 23, 2019, thirteen years after the plaintiffs filed the lawsuit and a full fifteen years after the international community's discovery of the crimes.⁶² Military courts never tried the Blackwater contractors for their roles in the Nisoor Square massacre either, and the civil lawsuit against one of the contractors came to a

56. See Averette, 41 C.M.R. at 365-366 (acknowledging that, though Vietnam qualifies as a war by "any standard of comparison—the number of persons involved, the level of casualties, the ferocity of the combat, the extent of the suffering, and the impact on our nation . . . such a recognition should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction").

57. See Pearlman, *supra* note 55, at 2.

58. 10 U.S.C. § 802(a)(10); see also Pearlman, *supra* note 55 at 3.

59. 10 U.S.C. § 101(a)(13).

60. Robert Beckhusen, *A Decade Later, Contractor Pays Out Millions for Iraq Prisoner Abuse*, WIRED (Jan. 9, 2013, 12:45 PM), <https://www.wired.com/2013/01/torture-settlement/> [<https://perma.cc/3SRW-GLJ6>].

61. *Id.*

62. Kevin Gosztola, *Decade of Attempts by CACI to Block Abu Ghraib Torture Lawsuit End as Judge Sets Trial Date*, SHADOWPROOF (Feb. 28, 2019), <https://shadowproof.com/2019/02/28/decade-of-attempts-by-caci-to-block-abu-ghraib-torture-lawsuit-end-as-judge-sets-trial-date/> [<https://perma.cc/FWX3-L463>] (noting that CACI's attorneys tried to prevent the lawsuit from going forward a total of sixteen times, a separate ethical problem regarding client selection).

conclusion only in December of 2018.⁶³ With regards to the Abu Ghraib contractors, court-martialing might not have even been an option as punishment for the contractors because court-martial jurisdiction requires that the accused be subject to the UCMJ at the time of the alleged offenses, because they occurred before the statutory amendment in 2006.⁶⁴

It is clear that the statutory authority under 10 U.S.C. § 802(a)(10) failed to translate into actual authority for the prosecution of PMCs under the UCMJ during the 21st century, and that military courts are hesitant to break with historical trends and try civilians. The idea of subjecting civilians to the jurisdiction of military courts during peacetime causes problems with multiple constitutional rights, the foremost being the Sixth Amendment's right to a fair and speedy trial by jury.⁶⁵ For the Armed Forces, however, military courts provide a streamlined and efficient judicial process. Three types of court-martial exist depending on the severity of the committed offense: summary, typically resolved after a few weeks or a couple of months; special, usually lasting between three and six months; and general, which can take sixth months to a year to resolve.⁶⁶ While the preliminary investigation, the longest part of the process, can significantly add to these timeframes, it does not take decades for the military to reach a verdict.⁶⁷

Both international law and United States domestic law currently possess no judicial mechanism that is sufficient for holding PMCs accountable within a reasonable timeframe for crimes committed while accompanying the Armed Forces overseas. International law, while providing guidelines and standards for actions and legal treatment of PMCs, lacks binding legal power on United States domestic law. United States domestic law does not go far enough to provide adequate accountability for PMCs who commit crimes overseas and justice for their families: MEJA's applicability is shaky, and, while trying contractors under the UCMJ could provide a more efficient option, the justice system is hesitant to bring civilians under the authority of military law.

63. See Collins, *supra* note 50.

64. United States v. Jewell, 2014 WL 7494739 at *2 (A.F. Ct. Crim. App. 2014).

65. For a discussion of some of the more prevalent constitutional issues involved in subjecting a civilian to military jurisdiction, see Reid, *supra* note 56 at 30 (“... it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were ‘necessary and proper’ for the regulation of the ‘land and naval Forces.’”).

66. *What Is A Typical Court Martial Timeline?*, DENVER, CO MARTIAL LAW BLOG (Jun. 23, 2016), https://courtmartiallaw.com/lawyer/2016/06/23/Court-Martial-Law/What-Is-A-Typical-Court-Martial-Timeline_bl25409.htm [<https://perma.cc/YJQ7-R7UD>].

67. *Id.*

IV. A WAY FORWARD: THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 OFFERS A TEMPLATE THAT COULD BE USED TO BRING A SUBSET OF PRIVATE CONTRACTORS UNDER THE JURISDICTION OF THE UCMJ

The Blackwater contractors performed many of the same duties performed by members of the Armed Forces in providing security to high-priority persons, yet the legal system held them to a different standard of accountability. While the Blackwater contractors will face justice upon sentencing, that sentencing will occur only in 2019, over a decade since the shootings. There needs to be a better mechanism for prosecution of PMCs overseas, because such a long delay in sentencing is unjust for the contractors themselves and, of course, for the victims and their families. The passing and implementing of new legislation to bring a small subsection of PMCs under the jurisdiction of the UCMJ and military courts could be a starting point in solving this ethical issue and could provide more effective accountability and prosecution of PMCs.

Congress passed the Uniformed Services Employment and Reemployment Rights Act of 1994 (hereinafter, “USERRA”) for the purpose of assisting veterans in job acquisition after serving in the Armed Forces and to prevent employers from discriminating against former military personnel during the hiring process.⁶⁸ It ensures that returning service members can be reemployed in a job that they could have attained had they not been absent for military service.⁶⁹ The employment and reemployment rights it grants apply to any member of the Armed Forces who left on favorable terms, no matter in what capacity they served, and all employers must follow its regulations, no matter their size.⁷⁰ The core function of USERRA provides an interesting concept: it ensures a certain status for members of the military when they transfer from the military to the civilian employment sphere, creating new rights and legal causes of action against employers as members of the Armed Forces attain civilian status.⁷¹ To achieve this, the Act is quite complex, as is to be expected when conferring new rights and status to a large group of individuals.⁷²

A potential solution to the ethical dilemma of prosecuting PMCs could be created using the general function of USERRA as a guideline. This solution would address the gaps in current United States domestic law regarding UCMJ

68. U.S. DEPT. OF LABOR, *VETS USERRA Fact Sheet 3: Job Rights for Veterans and Reserve Component Members*, https://www.dol.gov/vets/programs/userra/userra_fs.htm (Last visited Mar. 10, 2019) [<https://perma.cc/X9MY-37CJ>].

69. *Id.*

70. HRdirect, *What USERRA Means for Employers*, <https://www.hrdirect.com/hr-101/what-userra-means-for-employers> (Last visited Mar. 11, 2019) [<https://perma.cc/NMN8-C9G7>].

71. 38 U.S.C. § 4301.

72. 38 U.S.C. §§ 4301–4335. USERRA is an extremely long statute and it does not cover just the acts of employment and reemployment, but extends to cover other benefits such as health insurance and access to other benefit and pension plans.

jurisdiction: while there is currently a provision within the UCMJ to allow prosecution of contractors under its jurisdiction, that provision has failed to translate into actual authority to prosecute civilian contractors under the UCMJ, and more is needed.⁷³ A new statute would aim to bring a very small subsection of civilian contractors under its jurisdiction, and would be modeled after USERRA.

USERRA begins with a section describing its purpose and scope, as mentioned above.⁷⁴ USERRA continues, noting that it will supersede existing legislation that is less favorable to former military personnel seeking employment in the civilian sector and that it will not supersede more favorable legislation.⁷⁵ This, importantly, strictly limits the rights of private companies and individuals to set their own employment standards. It goes on to flesh out the limitations of its reach, stating that the statute does not apply to former service members who left the Armed Services under anything less than honorable conditions.⁷⁶ After describing its reach and limitations, USERRA lists the reemployment rights now inherent to military personnel seeking employment in the civilian sector, eventually listing certain benefits to which former service members are entitled.⁷⁷ USERRA also includes a section detailing enforcement of its provisions, and establishes a system whereby former service members can bring claims under the statute.⁷⁸

A statute seeking to bring PMCs performing certain activities overseas under the jurisdiction of the UCMJ could be structured very similarly to USERRA. It would begin by detailing its scope, describing, briefly, the great ethical dilemma posed in this note. USERRA is careful to limit its applicability to those former military personnel who left the military under honorable conditions; likewise, this new statute would cover only a certain subsection of PMCs. This could include contractors performing security functions, like the Blackwater contractors, or those who frequently interact with enemy prisoners, like the Abu Ghraib contractors. This limitation would be key, as attempting to bring too many PMCs under the UCMJ's jurisdiction would likely be met with great backlash. The statute would go on to describe its relationship to other laws; namely, MEJA. Ideally, it would supersede MEJA's jurisdiction for the small subsection of PMCs brought under the jurisdiction of the UCMJ, but would not supersede MEJA's applicability to the remaining PMCs working under government contracts. The statute would not need to be as lengthy as USERRA, but it would function very similarly.

73. 10 U.S.C. § 802(a)(10).

74. 38 U.S.C. § 4301.

75. 38 U.S.C. § 4302.

76. 38 U.S.C. § 4304.

77. 38 U.S.C. §§ 4312-4318.

78. 38 U.S.C. § 4322.

Of course, any statute limiting the rights of civilians is likely to be met with backlash. One potential argument would be to strengthen MEJA instead, and the idea of a provision strengthening MEJA's jurisdictional reach is not new.⁷⁹ In 2012, Congress introduced the Civilian Extraterritorial Jurisdiction Act, which aimed to supplement MEJA by streamlining the process of federal prosecution of some crimes committed abroad by PMCs.⁸⁰ However, an expansion of MEJA's jurisdiction would not solve many of the issues with MEJA previously discussed, most importantly the lack of means to conduct a thorough investigation after a crime occurs, given the inherent limitations faced by the Department of Justice in attempting to conduct investigations in a warzone.⁸¹ The reality is that the military is much better situated to conduct thorough investigations into crimes that occurred during military operations, and a provision that strengthens the power of military courts to try civilian contractors would be more likely to yield results to this ethical dilemma than would an expansion of the jurisdiction of the federal court system given the more streamlined process.

The statute would undoubtedly be challenged on grounds of the constitutionality of subjecting civilians to military jurisdiction, given the courts' historical reluctance to do so.⁸² This is where the hypothetical statute's narrow construction becomes important: the smaller the group of PMCs brought under the jurisdiction of the UCMJ, the more likely courts will give more weight to the public policy concerns addressed by the statute instead of regarding it as entirely unconstitutional. Courts would be more likely to take into account the fundamental question of fairness: If a soldier had been one of the shooters at Nisoor Square, he would have been disciplined long before 2019.

The question of how to hold PMCs, who commit crimes overseas while under government contracts, accountable is complex and there are neither obvious nor easy solutions. Yet, the difficulties posed in attempting to solve this problem—the interaction between international and domestic laws, the historical constitutional difficulties of subjecting contractors to military jurisdiction, and the government's increasing reliance upon contractors abroad—do not belie the necessity of working toward a better solution. USERRA provides an interesting template and a creative answer toward the problem, and statute modeled after USERRA could more effectively bring a relevant subsection of contractors under

79. The idea of strengthening and streamlining MEJA and UCMJ jurisdiction is also a somewhat frequent topic of discussion in other law review articles, but most articles do not take into account recent developments, especially the *Slatten* case as it pertains to MEJA. See, e.g., Ian W. Baldwin, *Comrades in Arms: Using the Uniform Code of Military Justice and the Military Extraterritorial Jurisdiction Act to Prosecute Civilian-Contractor Misconduct*, 94 IOWA LAW REV. 287 (2008); Matthew R. Engel, *The Court or Court-Martial: What is the Proper Venue for Trying "Accompanying" and "In the Field" Civilian Contractors*, 44 SETON HALL LAW REV. 1195 (2014).

80. CHARLES DOYLE, CONG. RESEARCH SERV., CIVILIAN EXTRATERRITORIAL JURISDICTION ACT: FEDERAL CONTRACTOR CRIMINAL LIABILITY OVERSEAS, R42358 at 7 (2012).

81. See McKinnon, *supra* note 51 at 702.

82. See Pearlman, *supra* note 55, at 3-4.

the jurisdiction of the UCMJ, leading to a higher likelihood that said contractors would be held accountable for their crimes. Such a statute would undoubtedly face challenges, be they constitutional or otherwise, but as the government increases its use of contractors in areas of conflict, it would be a starting point in the right direction.