5-2010

The Untouchables: Private Military Contractors' Criminal Accountability under the UCMJ

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NOTES

The Untouchables: Private Military Contractors' Criminal Accountability under the UCMJ

I. INTRODUCTION ................................................................. 1048
II. THE RISE AND FALL OF THE UNTOUCHABLES ....................... 1054
   A. The Growth of Modern Civilian Contractors ............... 1054
   B. The Evolution of Military Law: The UCMJ and the Court-Martial System ................. 1056
III. THE UCMJ SHOULD BE USED TO HOLD PMCS CRIMINALLY ACCOUNTABLE ................................................. 1059
   A. International Law: The Geneva Conventions ........... 1059
   B. Host-Nation Law .................................................. 1062
   C. U.S. Civilian Law: The Military Extraterritorial Jurisdiction Act ..................... 1064
   D. The Case for the UCMJ: The Practical and Equitable Benefits .............................................. 1066
IV. THE UCMJ CAN BE USED TO HOLD PMCS CRIMINALLY ACCOUNTABLE ............................................................. 1067
   A. The Constitutional Foundation ............................... 1068
      1. Pre-UCMJ: The Articles of War ....................... 1068
      2. Post-UCMJ: From Quarles to McElroy ............... 1070
   B. The Case for the UCMJ: Solving the Constitutional Conundrum .............................................. 1072
      1. Including Notifications in PMC Contracts... 1074
      2. Applying Only to Quasi-Military PMCs............. 1076
      3. Limiting Initially to Noncapital Crimes with Civilian Analogues ................... 1078
V. CONCLUSION ........................................................................ 1079
I. INTRODUCTION

September 16, 2007 has been called Baghdad's "Bloody Sunday." On that scorching afternoon in Baghdad, Iraq, a team of Blackwater Worldwide private military contractors slew seventeen Iraqi civilians and wounded twenty-seven others. A Blackwater spokesperson claimed that the civilian contractors reacted in response to an attack by enemy combatants and "heroically defended American lives." Despite such claims, U.S. soldiers who arrived at the scene within twenty-five minutes found no evidence of enemy activity and characterized the event as criminal. Despite such evidence and notwithstanding four potential sources of criminal law—international law, host-nation law, U.S. civilian law, and U.S. military law—these Blackwater guards escaped criminal accountability for their actions on Bloody Sunday. Such private citizens employed by the U.S. military in undeclared wars had fallen into a legal loophole, practically beyond the reach of criminal law. They had become "the Untouchables."8

Prior to Bloody Sunday, Congress had recognized that something must be done to bridge this gap and amended U.S. military law in 2007 to bring the Untouchables within the grasp of criminal law. This Note examines the legal loophole into which modern private military contractors had fallen and concludes that U.S. military law can, and should, be used to hold them criminally accountable.


2. In early 2009, Blackwater Worldwide (usually referred to simply as “Blackwater”) changed its name to Xe (pronounced like the letter Z). Dana Hedgpeth, Behind the Blackwater Name Change, WASH. POST, Feb. 17, 2009, available at http://voices.washingtonpost.com/governmentinc/2009/02/behind_the_blackwater_name_change.html. For simplicity, this Note will continue to use the name Blackwater.


Private military contractors ("PMCs" or "contractors"), like the Blackwater employees, have assumed a pivotal role in U.S. foreign relations and combat worldwide. Following a reduction in the general size of U.S. armed forces, the government has turned increasingly to PMCs to perform many functions previously carried out by military personnel. Although these contractors had initially provided mere auxiliary support to the military by supplying instruction, mail delivery, and food services, an overextended U.S. military soon utilized PMCs globally in a wide variety of vital roles, such as "interrogators, complex systems operators, . . . [and] security for high profile politicians and military commanders."

P.W. Singer, a senior fellow and director of the 21st Century Defense Initiative at the Brookings Institution, has recently identified three classifications of firms, based on the services they provide, that supply PMCs to the U.S. military: (1) military support firms that deliver "supplementary military services . . . including logistics, intelligence, technical support, supply, and transportation"; (2) military consulting firms that supply "advisory and training services integral to the operation and restructuring of a client's armed forces"; and (3) military provider firms that focus on the tactical environment by running active combat operations. PMCs who come from military provider firms operate "at the forefront of the battlespace, by engaging in actual fighting . . . and/or direct command and control of field units." Such contractors, like those involved in Bloody Sunday, essentially act in a quasi-military capacity. These

11. Id. at 383.
12. Id. ("[PMCs] provide an unparalleled breadth of support to the U.S. active-duty military force. From providing instructors and manning the day-to-day operations of the Army's Reserve Officer Training Corps' programs; to writing Army Field Manuals; to teaching career senior Army officers graduate-level courses in the military decision-making process and the details of staff planning; to providing mail delivery, food service, power generation, water distribution, refueling, and vehicle maintenance and repair in combat zones; PMFs have become indispensable to the United States' ability to wage war.").
16. Id.
quasi-military PMCs dress like soldiers, bear arms like soldiers, and fill quintessential soldier roles.\textsuperscript{17}

The U.S. military’s use of PMCs in modern times—since the early 1990s—has reached an unprecedented level.\textsuperscript{18} As of late 2007, PMCs in Iraq outnumbered military personnel 180,000 to 165,000, with between 20,000 and 30,000 contractors in quasi-military roles.\textsuperscript{19} As one of the main suppliers of PMCs to the U.S. military, Blackwater provided security to U.S. officials who visited Iraq.\textsuperscript{20} In performing their roles as bodyguards, Blackwater employees frequently escorted U.S. officials through Baghdad in armed convoys.\textsuperscript{21} For Iraqi police officers, it became “a standard part of their workday in occupied Iraq to stop traffic to make room for U.S. VIPs, protected by heavily armed private soldiers, to blaze through.”\textsuperscript{22}

On Bloody Sunday, what began as a routine traffic stop by Blackwater contractors escorting U.S. diplomats ended in a hail of gunfire and Iraqi outrage.\textsuperscript{23} Around noon, the convoy escort, including four heavily armored vehicles, entered Nissour Square in downtown Baghdad.\textsuperscript{24} After Iraqi police attempted to block traffic in order to let the convoy through quickly, the convoy’s vehicles made an unexpected U-turn and began driving the wrong way down a one-way street.\textsuperscript{25} According to eyewitnesses, “a large white man with a mustache, positioned atop the third vehicle . . . began to fire his weapon ‘randomly.’ ”\textsuperscript{26} When the Blackwater contractors shot and killed the driver of one vehicle, his car began to roll forward towards the convoy.\textsuperscript{27} The situation quickly “spiraled into a shooting spree” as the Blackwater forces opened fire upon the square in all directions.\textsuperscript{28} Witnesses recounted how men, women, and children were shot and killed while attempting to flee.\textsuperscript{29} After approximately fifteen minutes,

\begin{itemize}
\item \textsuperscript{17} See Robert W. Wood, Independent Contractor vs. Employee and Blackwater, 70 MONT. L. REV. 95, 95 (2009).
\item \textsuperscript{18} Hurst, supra note 4, at 1310.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} SCAHILL, supra note 1, at 13.
\item \textsuperscript{21} Id. at 3.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id. at 3–9.
\item \textsuperscript{24} Id. at 3.
\item \textsuperscript{25} Id. at 4.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id. at 4–5.
\item \textsuperscript{28} Id. at 6.
\item \textsuperscript{29} Id. at 7–9 (“I saw women and children jump out of their cars and start to crawl on the road to escape being shot . . . . But still the firing kept coming and many of them were killed.” (citing Kim Sengupta, The Real Story of Baghdad’s Bloody Sunday, INDEPENDENT (London),
the melee finally ended, leaving seventeen Iraqis dead and over twenty wounded.\textsuperscript{30}

Unfortunately, Bloody Sunday provides a prime example of how the use of contractors may actually undermine the U.S. military’s effectiveness worldwide. Referring the Nissour Square Shootings, Major Jeffrey S. Thurnher emphasized how PMCs could actually be detrimental to military missions overseas, and the Iraqi mission in particular.\textsuperscript{31} Explaining that PMCs are simply one cog in the Department of Defense’s “‘Total Force’ machine,” Thurnher argued that PMCs must work cohesively with the other elements of the battle force.\textsuperscript{32} Because contractors also supply more manpower than the U.S. military in Iraq, “[h]aving such a large contractor force on the battlefield without adequate oversight is dangerous and irresponsible.”\textsuperscript{33}

Additionally, one of the main missions of the counterinsurgency in Iraq is to win local support,\textsuperscript{34} but the use of PMCs can frustrate this goal. When contractors engage in seemingly criminal conduct, as in the shootings on Bloody Sunday, the local populace often fails to distinguish contractors from military personnel. As a result, “[i]n many Iraqi minds, the perceived failures of Blackwater contractors to safeguard Iraqi lives are attributed simply as American failures.”\textsuperscript{35} This response is evident from Iraq’s Prime Minister Nuri al-Maliki’s description of the “sense of tension and anger among all Iraqis, including the government, over [the Bloody Sunday] crime.”\textsuperscript{36} In fact, much of the counterinsurgency efforts in Iraq came to a grinding halt immediately after the Nissour Square shootings when the Department of State “ordered all non-U.S. military officials to remain inside the Green Zone” and stopped all diplomatic convoys.\textsuperscript{37}

\textsuperscript{30} SCAHILL, \textit{supra} note 1, at 6.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 66.
\textsuperscript{35} Id.
\textsuperscript{37} Id.
Although not the only incident of possible criminal conduct by civilian contractors accompanying the U.S. military, the Nissour Square shootings highlight the current lack of accountability for quasi-military PMCs. Iraqi backlash from Baghdad’s Bloody Sunday was swift: within twenty-four hours, the Interior Ministry had banned Blackwater from the country. Yet, four days later, Blackwater contractors were back in Iraq. The return of Blackwater forces to Iraq so soon after the Nissour Square shootings are largely attributable to the U.S. military’s remarkable reliance on contractors.

PMCs must be held accountable for their criminal actions, not merely to provide personal justice for those injured by their crimes, but also for the strategic objectives of organizing the U.S. military’s available manpower effectively and retaining the support of citizens both domestic and abroad. At the same time, it is simply impractical to bring criminal sanctions against all PMCs for every possible crime that they might commit. Criminal sanctions against contractors should, at the very least, reach egregious crimes and should focus on quasi-military PMCs. Operating at the battlefront, quasi-military PMCs pose the greatest threat to the U.S. military’s ability to control the contingency operation. Additionally, because they bear arms and wear uniforms like members of the U.S. military, the local populace is more likely to attribute their actions to the U.S. military. By providing justice for victims, criminal sanctions will further the strategic goal of winning the locals’ support and trust during counterinsurgency efforts.

Unfortunately, while the use of PMCs has grown rapidly in the past decade, the legal apparatus to hold them accountable has failed to keep pace. Currently, four distinct sources of criminal law may hold contractors accountable for their actions: (1) international law, (2) host-nation law, (3) U.S. civilian law, and (4) U.S. military law. As this Note will explain, numerous technical, practical, and evidentiary problems have effectively made the first three forms unworkable. The remaining option is U.S. military law in the form of the Uniform Code

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38. Id. at 10–12 (describing the killings of an Iraqi Vice President’s bodyguard by an intoxicated Blackwater operative and of three Iraqi security guards by a Blackwater sniper); Peters, supra note 10, at 369–70 (recounting the death by hypothermia of a suspected Sunni insurgent in an Army-run prison after Red River Group contractors beat him with a flashlight, hosed him down with cold water, and left him chained and naked overnight).

39. SCAHILL, supra note 1, at 9.

40. Id. at 13.

41. Id.

42. Hurst, supra note 4, at 1309–10.
of Military Justice ("UCMJ"), which underwent a significant jurisdictional expansion in 2007. Prior to 2007, the UCMJ had applied to persons serving with or accompanying an armed force in the field during "times of war," which had been interpreted to mean a congressionally declared war. Because Congress had not declared war in over sixty-five years, the UCMJ had been an ineffective tool for prosecuting PMCs.

However, within the over three thousand provisions of the John Warner National Defense Authorization Act, Congress "clarif[ied]" the UCMJ by making it applicable to persons serving with or accompanying an armed force in the field during a "declared war or a contingency operation." With the addition of these five words and little legislative history, Congress revived the constitutionality question of subjecting civilians to military jurisdiction.

Despite the constitutionality question, this Note argues that the UCMJ presents the best option for holding quasi-military PMCs criminally accountable. A contractually based application of the UCMJ can and should be used as the source for criminal sanctions against quasi-military PMCs, at least for noncapital crimes with civilian analogues. Part II provides background regarding the rise of contractors in augmenting military forces and the UCMJ generally. Part III argues that the UCMJ should be applied to hold contractors criminally accountable by examining the other three potential sources of criminal law—international law, host-nation law, and U.S. civilian law—and arguing that each is ineffective in achieving that goal. In light of these inadequacies, Part III concludes that the UCMJ provides the best source for criminal sanctions against PMCs because of its practical and equitable benefits.

Part IV argues that the UCMJ can be applied constitutionally if three limitations exist: (1) its application must be stated expressly in the contractors' contracts; (2) it can only apply to quasi-military PMCs; and (3) it must, at least initially, be restricted to noncapital crimes with civilian analogues. Part IV.A reviews the constitutional

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44. Id. § 801(a)(10)–(12).
framework for applying U.S. military law to civilians pre- and post-UCMJ. Part IV.B then examines each of the three limitations and demonstrates how they bring the application of the UCMJ to PMCs within Congress’s power to regulate the armed forces. At the same time, it concludes that such restrictions would not destroy the effectiveness of the UCMJ as the source of criminal sanctions.

II. THE RISE AND FALL OF THE UNTOUCHABLES

Use of civilians by militaries is “as old as war itself,”49 and military law has developed over the years in an attempt to encompass them. This Part provides background into the evolution of both civilian contractors and military law. Section A focuses on the rise of civilian contractors from the Revolutionary War to modern times. Section B considers the development of military law from the American Articles of War to the UCMJ.

A. The Growth of Modern Civilian Contractors

Despite condemning the use of mercenaries,50 the U.S. military has not shied away from relying upon civilian support in noncombat contexts.51 During the Revolutionary War, civilians provided numerous vital services, such as transportation, food, and medicine.52 Over the centuries that followed, civilians continued to accompany the U.S. military, both in camp and in the field,53 by providing logistical support.54 Certain categories of civilians at times were subject to military jurisdiction and courts-martial based on their interrelationships with military personnel.55

During the Vietnam War, however, a dramatic change occurred in the functions and services provided to the military by civilians. This war marked the beginning of the rise in contractors. At the height of the United States’s involvement in Vietnam, 9,000 PMCs served alongside 550,000 members of the U.S. armed forces.56 Two trends in the Cold War era of the 1980s further weakened the government’s

49. SINGER, supra note 15, at 19.
51. Thurnher, supra note 31, at 67 (“The United States has fully participated in this rich tradition of using contractors on the battlefield.”).
52. Id.
53. Peters, supra note 10, at 376.
55. See infra notes 69–73 and accompanying text.
56. Peters, supra note 10, at 380.
military monopoly and opened the door for private companies to provide additional personnel and services. First, arms proliferation allowed private actors to purchase weapons for military use. Second, large militaries with many soldiers were no longer needed to fight conflicts, thereby enabling smaller, private armies to assume combat duties.

After the end of the Cold War, both the first Bush Administration and the Clinton Administration initiated an extreme downsizing of military forces, eventually cutting the active-duty force by 30 percent. At the same time, the United States began deploying military forces in humanitarian roles across the world, from the Balkans to Somalia. Thus the modern private military industry surfaced in the early 1990s as a result of three factors: (1) the end of the Cold War; (2) the blurring of the line between civilians and soldiers as PMCs increasingly filled roles previously filled by military personnel; and (3) a "general trend toward privatization and outsourcing of government functions around the world." This decrease in the size of active military personnel, combined with the increase in deployments abroad, led to the development of private military firms organized and run as for-profit corporations.

The 2003 invasion of Iraq, when combined with these trends, resulted in a dramatic escalation of the U.S. military's use of contractors. The choice to conduct combat operations in Iraq simultaneously with reconstruction and economic-development efforts forced the overextended military to rely on PMCs to an extraordinary degree. As of late 2007, PMCs, including 20,000 to 30,000 armed contractors, outnumbered military personnel 180,000 to 165,000 in Iraq. These PMCs hailed from the United States, Iraq, and other nations and worked under numerous federal contracts to provide services that ranged from building roads to gathering intelligence. Such reliance raised several concerns, including whether the U.S. military could function properly without the support of contractors.

57. Jackson, supra note 13, at 259.
58. Id. at 258–59.
59. Peters, supra note 10, at 381.
60. Id.
64. Hurst, supra note 4, at 1310.
65. Lardner, supra note 63.
66. Id.
Additionally, it remained unclear how PMCs who engaged in combat, "a sharp departure from previous conflicts," fit into the military machinery. The numbers and roles of contractors in Iraq demonstrate just how indispensable PMCs have become to the U.S. military. However, the criminal law necessary to hold modern PMCs accountable for their actions has failed to keep pace with the rise of PMCs—until recently.

B. The Evolution of Military Law: The UCMJ and the Court-Martial System

Prior to the enactment of the UCMJ in 1950, the authority to subject civilians to military jurisdiction stemmed from the American Articles of War of 1775 and 1916. As the Supreme Court noted in Madsen v. Kinsella, Article XXXII of the American Articles of War of 1775, which was taken from the British Articles of War, permitted military court-martial jurisdiction over "sutlers" and "retainers" accompanying the Army in the field. A sutler was a "civilian seller of ale, victuals and other merchandise." A retainer "encompassed officers' servants and camp-followers attending the army but not in the public service." As Colonel William Winthrop explained in 1896, this provision of the Articles of War "has always been interpreted as subjecting [sutlers and retainers], not only to the orders made for the government and discipline of the command to which they may be attached, but also to trial by court-martial for violations of the military code." The 1916 Articles of War contained essentially the same provision.

In an exercise of its power over U.S. military forces, Congress passed the Uniform Code of Military Justice ("UCMJ") in 1950 and reestablished the military's customary capacity to prosecute civilians accompanying armed forces. Military jurisdiction under the UCMJ

67. Id.
68. Peters, supra note 10, at 383.
69. 343 U.S. 341, 349 n.15 (1952).
72. WINTHROP, supra note 71, at 98.
73. Sacilotto, supra note 46, at 189.
maintains several crucial procedural differences from U.S. civilian law. The accused can claim neither the Fifth Amendment's right to an indictment by a grand jury nor the Sixth Amendment's right to a trial by a jury of his peers. Instead, the UCMJ contains three different types of courts-martial that provide their own procedural protections: (1) general courts-martial; (2) special courts-martial; and (3) summary courts-martial.76

General courts-martial typically consist of a military judge and at least five court members, although a military judge can preside over a general court-martial alone.77 General courts-martial have jurisdiction over "any offense" under the UCMJ, including capital crimes.78 Special courts-martial usually consist of a military judge, three court members, or both.79 Special courts-martial generally retain jurisdiction over noncapital offenses.80 Finally, summary courts-martial involve one commissioned officer.81 The jurisdiction of summary courts-martial is far less expansive than the two other classifications: they retain jurisdiction only over noncapital offenses and cannot try many low-level military personnel.82 Additionally, an accused maintains the right to object to a summary court-martial and demand trial by special or general court-martial.83

With regard to substantive law, the UCMJ criminal provisions contain offenses with and without civilian analogues.84 For example, the UCMJ's punitive articles prohibit murder,85 manslaughter,86 and

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76. Sacilotto, supra note 46, at 207.
77. 10 U.S.C. § 816; Sacilotto, supra note 46, at 207.
78. 10 U.S.C. § 818; Sacilotto, supra note 46, at 207–08. However, general courts-martial consisting of one military judge cannot try capital cases "unless the case has been previously referred to trial as a noncapital case." 10 U.S.C. § 818.
79. 10 U.S.C. § 816(2); Sacilotto, supra note 46, at 207.
80. 10 U.S.C. § 819; Sacilotto, supra note 46, at 208.
81. 10 U.S.C. § 816(3); Sacilotto, supra note 46, at 207.
82. 10 U.S.C. § 820; Sacilotto, supra note 46, at 208.
83. 10 U.S.C. § 820; Sacilotto, supra note 46, at 208.
84. 10 U.S.C. §§ 880–933.
85. Id. § 918 ("Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he:[1] (1) has a premeditated design to kill; (2) intends to kill or inflict great bodily harm; (3) is engaged in an act which is inherently dangerous to another and evinces a wanton disregard of human life; or (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson; is guilty of murder. . . ").
86. Id. § 919(a)–(b) ("Any person subject to this chapter who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter . . . [while] [a]ny person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human
robbery.\textsuperscript{87} Such crimes have easily identifiable civilian counterparts. On the other hand, the UCMJ also criminalizes actions that have no civilian analogues, including aiding the enemy\textsuperscript{88} and malingering.\textsuperscript{89} Additionally, the UCMJ contains a catchall provision that includes those offenses that interfere with the military’s good order and discipline and those that bring discredit to the military.\textsuperscript{90} The catchall provision also covers any noncapital crime not already defined in the UCMJ.\textsuperscript{91}

For civilians accompanying the military, the UCMJ originally applied during “times of war.”\textsuperscript{92} In 1970, the Court of Military Appeals construed this language to mean that the UCMJ could only be applied to civilians during a congressionally declared war.\textsuperscript{93} As the highest military court, the Court of Military Appeals essentially halted any application of military jurisdiction over civilians accompanying the military because Congress had not officially declared war since World War II.\textsuperscript{94} Thus, for over thirty years, the UCMJ was not an option for holding modern PMCs criminally accountable for their actions.

In 2006, Congress dramatically changed this landscape by “clarifying” the UCMJ as applying to civilian contractors serving with or accompanying an armed force in the field during a “declared war or a contingency operation.”\textsuperscript{95} These five words, somewhat hidden in a massive military omnibus bill, opened the door for applying the UCMJ

\begin{eqnarray*}
\text{being[\ldots] (1)} \text{ by culpable negligence; or (2) while perpetrating or attempting to perpetrate an} \\
\text{offense \ldots directly affecting the person is guilty of involuntary manslaughter. \ldots.} \\
\text{87. Id. } \S \text{922 (“Any person subject to this chapter who with intent to steal takes anything of} \\
\text{value from the person or in the presence of another, against his will, by means of force or} \\
\text{violence or fear of immediate or future injury to his person or property or to the person or} \\
\text{property of a relative or member of his family or of anyone in his company at the time of the} \\
\text{robbery, is guilty of robbery. \ldots.”).} \\
\text{88. Id. } \S \text{904 (“Any person who[\ldots] (1) aids, or attempts to aid, the enemy with arms,} \\
\text{ammunition, supplies, money, or other things; or (2) without proper authority, knowingly} \\
\text{harbors or protects or gives intelligence to, or communicates or corresponds with or holds any} \\
\text{intercourse with the enemy, either directly or indirectly; shall suffer death or such other} \\
\text{punishment as a court-martial or military commission may direct.”).} \\
\text{89. Id. } \S \text{915 (“Any person subject to this chapter who for the purpose of avoiding work,} \\
\text{duty, or service[\ldots] (1) feigns illness, physical disablement, mental lapse or derangement; or (2)} \\
\text{intentionally inflicts self-injury; shall be punished as a court-martial may direct.”).} \\
\text{90. Id. } \S \text{934.} \\
\text{91. Id.} \\
\text{92. Id. } \S \text{801(a)(10)-(12) (2006).} \\
\text{93. United States v. Averette, 19 C.M.A. 363, 365 (1970).} \\
\text{94. Cara-Ann M. Hamaguchi, Between War and Peace: Exploring the Constitutionality of} \\
\text{Subjecting Private Civilian Contractors to the Uniform Code of Military Justice During} \\
\text{“Contingency Operations,” 86 N.C. L. Rev. 1047, 1050 (2008).} \\
\text{364, § 552, 120 Stat. 2083, 2217 (2006) (emphasis added).} 
\end{eqnarray*}
to PMCs. At the same time, these words also revived the main objection to military jurisdiction over civilians: that application of the UCMJ unconstitutionally deprives civilians of the legal protections that they would otherwise receive in a U.S. civilian court. However, these constitutional objections are not insurmountable. Given the remarkable increase in the use of modern PMCs, the UCMJ should hold them criminally accountable because it represents the most viable and effective source of criminal sanctions. Additionally, the UCMJ’s jurisdiction over quasi-military PMCs should be within Congress’s power to regulate the armed forces when initially restricted to noncapital crimes with civilian analogues. With this clarification of the UCMJ, Congress provided the tool necessary to bring the Untouchables within the embrace of criminal law.

III. THE UCMJ SHOULD BE USED TO HOLD PMCs CRIMINALLY ACCOUNTABLE

As the number of modern contractors increases at a rapid pace, the need to hold them criminally accountable for their actions for both moral and strategic reasons has also increased. Currently, four sources of law could subject PMCs to criminal sanctions for their actions: (1) international law; (2) host-nation law; (3) U.S. civilian law; and (4) U.S. military law. Unfortunately, the first three have failed to evolve along with the unprecedented use of modern PMCs, thereby rendering them ineffective for holding such contractors criminally accountable. An examination of these three potential sources of criminal law reveals that U.S. military law under the UCMJ remains the only viable option.

A. International Law: The Geneva Conventions

International law, in the form of the Geneva Conventions, could potentially subject PMCs to criminal sanctions because it contains prohibitions against the use of mercenaries. However, the


98. See infra Part IV.B.
Geneva Convention Relative to the Treatment of Prisoners of War contains several restrictions that, in today's modern warfare, essentially cripple their potential to accomplish that goal. First, for this Geneva Convention to apply, there must be a "declared war or . . . any other armed conflict" between at least two nations that are "High Contracting Parties" to the Convention. This provision establishes two separate preconditions for a conflict to qualify for the protections of the Geneva Convention: the conflict must be armed, and it must be between two or more parties.

Although the preconditions seem straightforward and easily satisfied, the Iraqi campaign demonstrates that they actually exempt many modern armed conflicts from the Geneva Convention. While the Iraq war initially began as an armed conflict between two parties (the United States and Iraq), it later became "difficult to construe the conflict . . . in the same light." After passing sovereignty to the Iraqi government in mid-2004, the President repeatedly asserted that the United States would leave Iraq if requested by the Iraqi government. Although the conflict in Iraq was indeed armed, these actions demonstrate that the conflict had become one "between the Iraqi government and its allies, including the United States, and dissident elements within Iraq." Thus, in this light, there would be no armed conflict between parties to the Geneva Convention, and its provisions would no longer apply.

Assuming that these prerequisites were met, the Geneva Convention's ban on mercenaries would still be ineffective against a large portion of contractors because of several important exemptions to the definition of a mercenary. Protocol I to the Geneva Conventions defines a "mercenary" as follows:

any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; [and] (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party. . . .

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101. Id. at 206.
102. Id.
103. Id.
At first glance, many modern PMCs seemingly fit Protocol I’s definition of a mercenary. For those PMCs in quasi-military roles, the hiring firm and the U.S. government specifically recruit them to fight in armed conflicts; they often do take part in armed conflicts and are paid substantially in excess of military personnel in similar positions.\(^{105}\)

Despite this initial definition comporting with the traditional “guns for hire”\(^{106}\) view of mercenaries, Protocol I exempts “a national of a Party to the conflict [and] a resident of territory controlled by a Party to the conflict. . . .”\(^{107}\) These exemptions mean that any U.S. PMC who engages in combat during a U.S. operation would not be a mercenary and thus would not be subject to international criminal sanctions under the Geneva Convention. Because “there is a great deal of overlap between the nationalities of armed contractors and the nations that most employ them,”\(^{108}\) many modern contractors would not be subject to international restrictions against mercenaries. As a result, this exemption creates “extremely inequitable . . . effects on armed contractors who are nationals of developing countries as opposed to those who are citizens of wealthy, developed countries.”\(^{109}\) Such inconsistency is both unfair and irrational.

For example, so long as the United States remains a party to the Iraqi conflict, any U.S. PMC involved in that conflict would be exempt from the Geneva Conventions’ definition of a mercenary.\(^{110}\) At the same time, nationals of third-party countries would be exposed to criminal sanctions under the Geneva Conventions.\(^{111}\) It is illogical to treat two individuals who commit the same crime differently based solely on their country of origin. This inequity is further exacerbated by the definition’s requirement that mercenaries be paid substantially higher than the military personnel of their hiring nations. Thus, wealthy nations like the United States, who can afford to pay the high market rate for modern PMCs, need only pay third-party nationals the substantially lower salary given to their own military personnel.\(^{112}\) If the third-party contractor seeks to charge the market rate for his

\(^{105}\) Singer, \textit{supra} note 96 (“[A] lance corporal or a specialist earns less than $20,000 a year for service in Iraq, while a contractor can earn upwards of $100,000-200,000 a year (tax free) for doing the same job and can quit whenever they want.”).

\(^{106}\) Morgan, \textit{supra} note 75, at 221.

\(^{107}\) Protocol I., Art. 47, \textit{supra} note 104.

\(^{108}\) Morgan, \textit{supra} note 75, at 221.

\(^{109}\) \textit{Id.} at 223.

\(^{110}\) Peters, \textit{supra} note 10, at 413 n.229.

\(^{111}\) Morgan, \textit{supra} note 75, at 223.

\(^{112}\) \textit{Id.}
services, as his U.S. counterparts in Iraq do, he could face charges as a mercenary.113

This inconsistency is clear when one considers the Nissour Square shootings and hypothetically assumes that one of the PMCs involved is a U.S. national while another, who performed the exact same actions, is from a third-party nation. Although the U.S. contractor remains free from a mercenary classification, his counterpart could face criminal sanctions under the Geneva Conventions. The only way for the third-party national PMC to avoid that possibility is to accept a substantially lower salary for performing the same functions in the same violence-ridden area of the world. As this hypothetical demonstrates, such an approach violates basic principles of fairness. In the end, the line drawn between contractors and mercenaries is unclear and inconsistent, rendering it extremely difficult to subject modern PMCs to international criminal sanctions under the current definition of mercenary.114

B. Host-Nation Law

The second potential source of criminal law applicable to modern PMCs is that of the host nation, or the territory in which the contractors are actually employed, with the host nation using its own court system. Because there are numerous possible host nations, each with differing legal regimes and criminal sanctions, this Section examines the general difficulties in applying any host nation's laws, as opposed to problems with the laws themselves. As former U.S. Army Captain Michael Hurst has pointed out, applying host-nation criminal law to modern PMCs may provide several benefits to the U.S. military in its recent contingency operations. First, because such operations often seek "to establish a legitimate, stable, sovereign, democratic host-nation government," the use of host-nation law over contractors who commit crimes within the host-nation's territory against its citizens helps establish the sovereignty of the host nation.115 Such recognition of sovereignty reassures the local populace that the U.S. military merely serves a temporary role in providing stability while seeking to establish the autonomy of the host-nation.116 Thus, the reinforcement of the U.S. military's short-term goals may garner

113. Id.
114. See id. at 221 ("[I]t is very hard to be convicted of mercenary acts.").
115. Hurst, supra note 4, at 1317.
116. Id.
support for armed conflicts, or at least stave off criticism, from citizens both domestic and abroad.

When the military operation focuses on counterinsurgency efforts, as in the Iraq war, applying host-nation law potentially becomes even more appealing. Because winning over the local populace is integral to a successful counterinsurgency operation, recognizing the sovereignty of the host nation assumes a heightened level of importance. During these operations, insurgents often attempt to destabilize local support for the host nation’s government by taking advantage of the response—or lack thereof—to perceived abuses. Allowing the host nation to use its own courts and apply its own criminal laws to PMCs operating within its territory would thus “reinforce[] government legitimacy and blunt[] the ability of insurgents to gather support by exploiting nonexistent or failed prosecutions by U.S. officials.”

Despite such appeal, using host-nation law as the source of criminal law against PMCs presents several obstacles. First, the use of host-nation law would lead to inconsistency in subjecting contractors to numerous divergent laws. Because the U.S. military could conduct, and indeed is currently conducting, several contingency operations across the world, PMCs would be subject to widely varying criminal sanctions depending upon their location of employment. Just as it is inconsistent to hold certain PMCs accountable under international law while relieving others of accountability solely due to nationality, it is incongruent for two contractors who perform essentially the same roles and commit essentially the same crimes to face different criminal standards based solely on where they work.

Second, because PMCs are frequently employed in unstable regions of the world that lack strong sovereign authorities, the judicial systems of such host nations will likely be nonfunctional. Until the judicial systems of these nations function properly, any attempt to subject contractors to host-nation law is undesirable. Captain Hurst partially addressed this concern by proposing a tiered system for imposing criminal sanctions against PMCs, with a preference for the UCMJ over host-nation law until the U.S. government certifies the host nation’s legal system as functional. In the process, however, he highlighted the third main criticism of using host-nation law: the

117. Thurnher, supra note 31, at 66.
118. Hurst, supra note 4, at 1317–18.
119. Id. at 1318.
120. Id. at 1311.
121. Id. at 1311–12.
notion that “a PMC may not get a fair trial because of host-nation bias against foreigners.”122 Far from being remote, these concerns have already manifested themselves in U.S. contingency operations. For example, in Iraq, U.S. military officials executed a sweeping directive that granted immunity to contractors, preventing them from being tried in Iraqi courts.123 Thus, all of the PMCs involved in the Nissour Square shootings were immunized from criminal charges, at least under Iraqi law, for their actions on Bloody Sunday. Because many PMCs, particularly those filling quasi-military roles, are likely to be employed in such volatile regions before any host-nation judicial system is functional or reliably free from bias, the application of host-nation law remains a nonviable option.

C. U.S. Civilian Law: The Military Extraterritorial Jurisdiction Act

In an attempt to close the legal loophole into which PMCs had fallen, Congress created a third potential source of criminal sanctions against modern PMCs by passing the Military Extraterritorial Jurisdiction Act (“MEJA”) in 2000.124 MEJA gave federal prosecutors jurisdiction to bring criminal cases against Department of Defense contractors and employees in U.S. courts for crimes committed abroad that would be felonies if they had occurred within the United States.125 Because many PMCs contract with governmental agencies other than the Department of Defense, Congress amended MEJA in 2004 to cover contractors of any governmental agency “supporting the mission of the Department of Defense.”126

After the Nissour Square shootings, the House of Representatives passed the MEJA Expansion and Enforcement Act of 2007 (“MEJA Expansion Act”), which would have extended the reach of MEJA to all contractors “in an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces is conducting a contingency operation.”127 In essence, this amendment would have brought those contractors not technically “supporting [a] mission of the Department of Defense”128 within MEJA’s reach. Additionally, the MEJA Expansion Act sought to create Theater Investigative Units of the Federal Bureau of Investigation to

122. Id. at 1321.
123. See SCAHILL, supra note 1, at 15.
125. Id. § 3261(a)(1).
126. Id. § 3267(1)(A).
review allegations of criminal misconduct by contractors. Although the MEJA Expansion Act passed the House of Representatives on October 4, 2007, the Senate failed to act on the bill, thereby killing it.

Even if the amendment had passed, it remains unclear if the expanded jurisdiction and the establishment of FBI Theater Investigative Units would alleviate the evidentiary and motivational issues that have plagued application of MEJA to civilian contractors, rendering it "largely impotent." One of the main obstacles to MEJA's effectiveness is the difficulty in gathering evidence from distant locations days, or even weeks, after the event. Further, such investigations often must occur in far-off war zones, and investigators must face language barriers and severe safety concerns. Asking civilian investigators to enter these violence-ridden areas to conduct criminal investigations is unreasonable and unrealistic. Moreover, assuming that physical evidence could be gathered, federal prosecutors face the daunting task of securing witnesses to testify in the United States.

These evidentiary problems lead to the most difficult obstacle to overcome: lack of prosecutorial motivation. MEJA essentially assumes that civilian prosecutors have the knowledge and expertise to determine what is proper conduct in military conflicts, as well as the desire to gather evidence and depose witnesses in the middle of war zones. As Singer eloquently puts it: "The reality is that no US Attorney likes to waste limited budgets on such messy, complex cases 9,000 miles outside their district, even if they were fortunate enough to have the evidence at hand." One final impediment is the U.S. military's need for civilian contractors to conduct its operations. With such a strong reliance on these contractors, federal investigators and prosecutors may face pressure to not fully investigate or prosecute cases.

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129. H.R. 2740, § 3.
131. Finer, supra note 3, at 263.
132. Id.
133. Id. at 264.
134. Id.
135. Singer, supra note 96.
136. Id.
137. See SCAHILL, supra note 1, at 29 (quoting military law expert Scott Horton of Human Rights First as stating that the Department of State's investigation into the Nissour Square shootings "seem[ed] less to be to collect the facts than to immunize Blackwater and its employees").
Bloody Sunday provides a prime example of the difficulties in applying MEJA to civilian contractors. Two weeks passed after the Nissour Square shootings before an FBI investigative team traveled to Baghdad. 138 Such delay makes it nearly impossible to gather enough reliable evidence to reach a conviction. 139 For instance, before the FBI could examine the vehicles involved in the Nissour Square shootings, Blackwater had repaired and repainted them, thus compromising the evidence. 140 The official inquiry by the Department of State faced an additional conflict of interest because the investigators’ personal safety rested in the hands of Blackwater, the very same corporation whose personnel were the focus of the investigation. 141 Finally, when the Department of State actually interviewed the Blackwater contractors present at Nissour Square, each contractor was granted use immunity, 142 which meant that anything a contractor said, or any evidence gathered by virtue of what he said, could not be used in any criminal prosecution against him. Thus, when the Department of Justice charged five Blackwater contractors with manslaughter and weapons violations in connection with the Nissour Square shootings, a federal judge dismissed the case in part because of these grants of use immunity. 143 In light of the inadequacies presented by international law, host-nation law, and MEJA, the UCMJ stands as the only potentially viable source of criminal sanctions against PMCs.

D. The Case for the UCMJ: The Practical and Equitable Benefits

The UCMJ should supply the criminal law for PMCs because it avoids the implementation pitfalls and unfairness presented by the other three potential sources. First, there would be little practical difficulty in securing evidence and witnesses for the proceedings. The investigative unit would already be on the scene because the military would be present in the area. For example, on Bloody Sunday, the

138. Id. at 28.
139. Id. at 27–28.
140. Id. at 31–32.
141. Id. at 28 (“[T]he official investigation of the Bush administration would be conducted by the State Department, whose personnel continued to depend on the chief suspects to keep them alive.”).
142. Id. at 28 (stating that the contractors’ sworn statements all began with the following: “I . . . understand that neither my statements nor any information or evidence gathered by reason of my statements can be used against me in a criminal proceeding.”); see also BLACK’S LAW DICTIONARY 754 (7th ed. 1999) (defining use immunity as “[i]mmunity from the use of the compelled testimony (or any information derived from that testimony) in a future prosecution against the witness”).
143. Associated Press, supra note 7.
military arrived at Nissour Square within twenty-five minutes.\textsuperscript{144} Similarly, there would be no concern over whether the courts are operating properly and without anti-American sentiment since the trials would occur in functioning U.S. military courts. Third, it is unlikely that there would be a lack of prosecutorial motivation because military personnel would want to ensure that contractors were held criminally accountable for strategic reasons. In modern counterinsurgency operations, much of the battle lies in winning over the local populace.\textsuperscript{145} For many of the inhabitants, PMCs are indistinguishable from the U.S. military, and their actions are attributed to U.S. forces.\textsuperscript{146} As the ones who bear the brunt of any local backlash, high-level military personnel would likely be diligent in bringing contractors who commit crimes to justice.

Fourth, the UCMJ provides equitable benefits because it would apply equally to all quasi-military PMCs. That is, these PMCs would face the same criminal sanctions under the UCMJ regardless of their nationality, place of employment, or pay. Finally, for those soldiers who perform quintessentially military roles on the battlefield, it is logical to hold them to the same standards as those military personnel that they operate alongside. It would be inequitable and unfair to allow these contractors to escape criminal charges for their actions while holding their military companions criminally accountable. Despite these benefits, the constitutionality of applying the postclarification UCMJ to modern PMCs remains untested.

\textbf{IV. THE UCMJ CAN BE USED TO HOLD PMCS CRIMINALLY ACCOUNTABLE}

An examination of the constitutional framework for the application of military law to civilians reveals that Congress's authority to regulate the military should include the ability to subject modern PMCs to military courts-martial for noncapital crimes with civilian analogues, at least when the contractors perform quasi-military roles during times of actual conflict. Article I of the U.S. Constitution grants Congress both the specific power to "make Rules for the Government and Regulation of the land and naval Forces"\textsuperscript{147} and the plenary power to pass laws "necessary and proper" to

\textsuperscript{144} Raghavan & White, \textit{supra} note 6.
\textsuperscript{145} Thurnher, \textit{supra} note 31, at 66.
\textsuperscript{146} \textit{Id}.
\textsuperscript{147} U.S. CONST. art. I, § 8, cl. 14.
executing its constitutional responsibilities. This Part examines the historical application of military law to civilian contractors and concludes that the postclarification UCMJ can be applied constitutionally to PMCs, provided that several restrictions are incorporated. Section A examines the use of military jurisdiction over civilians, both pre- and post-UCMJ. Section B argues that the UCMJ, when its application is limited to quasi-military PMCs and noncapital crimes with civilian analogues, can provide the source of criminal law for contractors.

A. The Constitutional Foundation

When considering Congress's power to extend military jurisdiction to civilians, three important constitutional provisions should be kept in mind: (1) the Fifth Amendment rights to indictment by a grand jury “except in cases arising in the land or naval forces” and to due process of law; (2) the Sixth Amendment guarantee of a trial by a jury of one's peers; and (3) Article III's establishment of federal courts that try both civil and criminal cases between individuals and the federal government. This Section highlights the development and interaction of these constitutional protections by examining the pre- and post-UCMJ case law of military jurisdiction over civilians.

1. Pre-UCMJ: The Articles of War

In 1866, the Supreme Court decided Ex parte Milligan, one of the first cases to consider court-martial jurisdiction over civilians under the American Articles of War. The Court held that a civilian from Indiana with no connection to the armed forces could not constitutionally be subject to military jurisdiction. In finding a lack of jurisdiction, the Court held that military jurisdiction “can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process

148. Id. cl. 18.
149. Sacilotto, supra note 46, at 188.
150. U.S. CONST. amend. V.
151. Id. amend. VI.
152. U.S. CONST. art. III, §§ 1–2; see also United States ex rel Toth v. Quarles, 350 U.S. 11, 15 (1956) ("Article III provides for the establishment of a court system as one of the separate but coordinate branches of the National Government. It is the primary, indeed the sole business of these courts to try cases and controversies between individuals and between individuals and the Government. This includes trial of criminal cases.").
153. 71 U.S. (4 Wall.) 2, 121 (1866).
unobstructed.” At the same time, the Court emphasized that the civilian had absolutely no connection with the military. This important qualification limits Milligan’s applicability to modern PMCs, which have a definite connection to the military. Milligan nonetheless provides several guidelines for considering the applicability of military law to civilians: (1) civil trials are strongly preferred over military trials; (2) military jurisdiction over civilians must be “confined to the locality of war”; and (3) military jurisdiction cannot exist in territories “where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.”

During the late 1800s, the Supreme Court addressed the constitutionality of subjecting civilian paymaster clerks to military jurisdiction. In Ex parte Reed, the Supreme Court held that military courts had jurisdiction over civilian paymaster clerks in the Navy. The petitioner was a duly-appointed paymaster clerk who had applied for a writ of habeas corpus after being found guilty of malfeasance in military court. In holding that such civilians were “in the naval service,” the Court emphasized the status of the paymaster clerks within the structure of the Navy:

The place of paymaster’s clerk is an important one in the machinery of the navy. Their appointment must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the navy must be in writing, and filed in the department. They must take an oath, and bind themselves to serve until discharged. The discharge must be by the appointing power, and approved in the same manner as the appointment. They are required to wear the uniform of the service; they have a fixed rank; they are upon the payroll, and are paid accordingly. They may also become entitled to a pension and to bounty land.

The good order and efficiency of the service depend largely upon the faithful performance of their duties. If these officers are not in the naval service, it may well be asked who are.

Since civilian paymaster clerks were deemed part of the Navy, the Court denied the writ and held that the “constitutionality of the acts of Congress touching army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court.”

154. Id.
155. Id. at 121–22.
156. Sacilotto, supra note 46, at 191.
158. Id.
159. 100 U.S. 13, 23 (1879).
160. Id. at 21–22 (citations omitted).
161. Id. at 21.
Similarly, in *Johnson v. Sayre*, the Court denied a writ of habeas corpus for a civilian paymaster clerk who had been convicted of embezzlement in a military court.\(^{162}\) Again, the Court viewed the clerk as in the Navy and thus within Congress's power to regulate the armed forces.\(^{163}\) *Johnson* also demonstrates Congress's power to provide for use of courts-martial over civilians during both times of war and peace.\(^{164}\) Thus, these paymaster cases demonstrate that some civilians are so intricately involved with the military that they can be deemed "in" the military and thus subject to military law, regardless of the existence of hostilities.

2. Post-UCMJ: From *Quarles* to *McElroy*

Five years after the Congress passed the UCMJ in 1950, the Supreme Court held in *United States ex rel. Toth v. Quarles* that military jurisdiction could not extend to ex-military persons who had "severed all relationship with the military and its institutions."\(^{165}\) *Quarles* involved an ex-Air Force member who had been honorably discharged five months prior to the court-martial for murder.\(^{166}\) By restricting court-martial jurisdiction to actual members of the armed forces, the Court specifically desired to avoid an encroachment on the jurisdiction of Article III courts. The Court also emphasized the procedural differences between military tribunals and civilian courts with a particular regard for the Fifth Amendment guarantee to trial by jury.\(^{167}\) *Quarles* thus makes clear that Article III and the Fifth Amendment prohibit application of military law to civilians with no current connection to the military.

While *Quarles* dealt with Congress's general constitutional powers over the armed forces with regard to ex-military personnel, the Supreme Court specifically dealt with the applicability of the UCMJ to civilians in *Reid v. Covert*.\(^{168}\) At the time, the UCMJ applied to "persons serving with, employed by, or accompanying the armed forces outside the United States."\(^{169}\) Covert was tried and convicted under court-martial for murdering her husband, a sergeant in the Air Force,

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\(^{162}\) 158 U.S. 109, 118 (1895).

\(^{163}\) *Id.* at 114, 117.

\(^{164}\) Sacilotto, *supra* note 46, at 191.


\(^{166}\) *Id.* at 13.

\(^{167}\) *Id.* at 18 ("[T]he premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists . . . [and this] idea is inherent in the institution of trial by jury.").

\(^{168}\) 354 U.S. 1, 3 (1957).

while living on a military base in England.\textsuperscript{170} In a plurality opinion, the Court held that military jurisdiction could not be extended to civilian dependents living with servicemen overseas because "[t]he term 'land and naval Forces' refers to persons who are members of the armed services and not to their civilian wives, children and other dependents."\textsuperscript{171} As in Quarles, the Court emphasized that the Fifth Amendment right to trial by jury and the Sixth Amendment right to due process restricted the scope of the Necessary and Proper Clause as applied to the regulation of armed forces.\textsuperscript{172} At the same time, the plurality examined Article 2(a)(10) of the UCMJ and noted that a person "could be 'in' the armed services . . . even though he had not formally been inducted into the military or did not wear a uniform."\textsuperscript{173} Such a classification could only occur during times of actual conflict when, "[i]n the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront."\textsuperscript{174}

In the companion cases of Grisham v. Hagan\textsuperscript{175} and McElroy v. United States ex rel. Guagliardo,\textsuperscript{176} the Court restricted the scope of military jurisdiction in the context of a civilian employee of the armed forces, as opposed to a civilian dependent of a member of the armed forces. Grisham involved a civilian employee of the Army stationed in France who was charged with premeditated murder under the UCMJ.\textsuperscript{177} The Court held that when a capital offense is charged under the UCMJ, the defendant should be afforded the constitutional right to a trial by jury because of the irreversibility of the death penalty.\textsuperscript{178} In McElroy, the Court held that military jurisdiction could not constitutionally extend to civilian employees charged with noncapital crimes, at least in peacetime.\textsuperscript{179} The defendant, an electrical lineman for the Air Force, was convicted of larceny and conspiracy to commit larceny while stationed near Morocco.\textsuperscript{180} While acknowledging the

\textsuperscript{170.} Reid, 354 U.S. at 3.
\textsuperscript{171.} Id. at 20–21.
\textsuperscript{172.} Id. at 10 ("Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience.").
\textsuperscript{173.} Id. at 22–23.
\textsuperscript{174.} Id. at 33.
\textsuperscript{175.} 361 U.S. 278, 278–79 (1960).
\textsuperscript{176.} 361 U.S. 281, 282 (1960).
\textsuperscript{177.} 361 U.S. at 279.
\textsuperscript{178.} Id. at 280.
\textsuperscript{179.} 361 U.S. at 284.
\textsuperscript{180.} Id.
historical evidence of court-martial jurisdiction over sutlers and retainers, the Court found this evidence “too episodic, too meager, to form a solid basis in history, preceding and contemporaneous with the framing of the Constitution, for constitutional adjudication.” At the same time, the Court noted that “procedure along the lines of that used by the navy as to paymasters' clerks might offer a practical alternative to the use of civilian employees by the armed services.”

The application of the UCMJ to civilians seemed to be laid to rest by the Court of Military Appeals in United States v. Averette. The court construed the application of the UCMJ to civilians “in times of war” to be restricted to “a war formally declared by Congress.” The “clarification” that the UCMJ applies to civilian contractors, combined with the dramatic increase in the number of civilian contractors filling quasi-military roles, suggests that a new examination into the constitutionality of Congress's expansion of military jurisdiction is warranted.

B. The Case for the UCMJ: Solving the Constitutional Conundrum

Although prior case law fails to deal directly with the situation facing modern PMCs, the Supreme Court has laid out several guiding factors. First, Milligan demonstrates that there is generally a strong preference for using civilian courts over military courts when trying civilians, at least when the civilian courts are open and functioning. While Milligan seems to hold that military courts-martial should not be utilized against civilians, this case was limited to a person with no connection to the military whatsoever. At the same time, Reed and Johnson maintain that military jurisdiction over civilians is justifiable when civilian employees are deemed to be members of the armed services, such as Navy paymaster clerks. As Quarles, Reid, and McElroy make clear, such jurisdiction must respect the constitutional boundaries set by the Fifth and Sixth Amendments and cannot occur without active hostilities. Finally, McElroy provides a potential

181. Id. (citing Reid v. Covert, 354 U.S. 1, 64 (1957) (Frankfurter, J., concurring)).
182. Id. at 285.
184. Id. at 365.
185. Id. at 116.
186. 71 U.S. (4 Wall.) 2 (1866). Modern PMCs, particularly those PMCs who perform quasi-military functions alongside members of the armed services, clearly have a definite relationship with the military.
187. See supra notes 159–164 and accompanying text.
188. See supra notes 165–182 and accompanying text.
solution that would remain within those constitutional boundaries: the implementation of an approach similar to those found in the Navy paymaster clerk cases.189

Critics may initially argue that any application of the UCMJ to PMCs during contingency operations is analogous to the jurisdiction in Quarles, which the Supreme Court found to be unconstitutional. There, the jurisdiction was extended to an individual who had severed all ties with the military. Allowing such jurisdiction, the Court concluded, would encroach upon the federal courts’ Article III powers.190 In addition, the Quarles Court emphasized the inherent differences between military courts-martial and Article III courts, “where persons on trial are surrounded with more constitutional safeguards....”191 These critics could also highlight the Milligan Court’s establishment of a powerful preference for civilian trials as opposed to military trials.192

Despite the general preference for civilian courts expressed in Quarles and Milligan, Article III provides that criminal trials “shall be held in the State where the . . . Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”193 Because the UCMJ applies only to persons accompanying armed forces in the field during contingency operations, most, if not all, crimes committed by modern contractors will be committed abroad. As such, they will not be committed within any state, and Congress retains the power to determine where such crimes shall be prosecuted. As Professor William C. Peters pointed out, “Congress has directed, through appropriate legislation in the form of the UCMJ, that when civilians accompanying an armed force in the field during time of war commit crimes ‘not within any state,’ they may be tried by courts-martial wherever they are found.”194 Professor Peters also emphasized the general principle that Congress’s discretionary power to create federal courts inferior to the Supreme Court195 necessarily includes the power to define the scope of their jurisdiction.196

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191. Id.
192. 71 U.S. (4 Wall.) 2, 121 (1866).
193. U.S. CONST. art. III, § 2, cl. 3.
195. U.S. CONST. art. I, § 8, cl. 9 (giving Congress the power to create inferior courts but not explicitly requiring it).
Additionally, the Supreme Court has expressed that Congress’s power to regulate the armed forces is quite broad, at least when applied to those who are actual members of the armed forces.\textsuperscript{197} The section that contains the clause granting Congress power to regulate the military also includes clauses conferring the powers to borrow money, regulate interstate commerce, coin money, and declare war.\textsuperscript{198} Thus, the Court found “no indication that the grant of power . . . was any less plenary than the grants of other authority to Congress in the same section.”\textsuperscript{199} Because the UCMJ applies only during contingency operations and only where the civilian is accompanying an armed force in the field, any geographical or temporal concerns should be alleviated. These constraints should help bring the postclarification UCMJ within Congress’s broad plenary powers to regulate the armed forces.

Taking all of these factors into consideration, subjecting modern PMCs to criminal sanctions under the UCMJ will be constitutional if certain limitations are implemented. First, the U.S. military should immediately and systematically include provisions subjecting modern contractors to the UCMJ in its contracts with private military firms and individual PMCs. Second, the UCMJ should only be applied to those PMCs who perform quasi-military roles. In other words, it should be limited to those contractors who can be seen as functional members of the military—whether formally inducted into the military. Finally, only noncapital provisions of the UCMJ that have civilian analogues, such as murder or robbery, should be used. An examination of each of these elements reveals that such an approach to holding PMCs criminally accountable under the UCMJ would be constitutional.

1. Including Notifications in PMC Contracts

The starting point for solving this constitutional conundrum is to capitalize on the Supreme Court’s suggestion in \textit{McElroy} to implement procedures similar to those approved for Navy paymaster clerks in \textit{Reed} and \textit{Johnson}. According to Singer, the clarification of the UCMJ “is the 21st century business version of the rights contract.”\textsuperscript{200} In other words, the UCMJ provides the means by which modern PMCs can contract away their Fifth and Sixth Amendment

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\textbf{198.} Id. (citing U.S. CONST. art. I, § 8).
\textbf{199.} Id.
\textbf{200.} Singer, \textit{supra} note 96.
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rights in order to be employed by the U.S. military during contingency operations. Where Singer errs, however, is in assuming that the clarification itself provides the proper contractual basis and notification to contractors that they are subject to military courts-martial.

As the Reed Court pointed out, a key factor in subjecting Navy paymaster clerks to military jurisdiction was their agreement to submit to military jurisdiction in a signed writing. Such a contract-based approach is also appropriate in the context of PMCs. In fact, after the Nissour Square shootings, the Department of Defense attempted to strengthen its control over PMCs by altering the terms of their contracts. Although this emphasis on a written agreement would mean that the UCMJ could not be retroactively applied to contractors currently under contract, an immediate and systematic inclusion of a written provision in PMCs’ contracts presents a forward-looking solution to holding future PMCs accountable in military courts.

A written-acknowledgment requirement would help prevent Fifth and Sixth Amendment objections to subjecting civilians to military jurisdiction by serving as the functional equivalent of an enlistment contract, waiving constitutional rights not found in military courts-martial. Although such a contractual provision would help the constitutionality of the UCMJ as applied to PMCs, more limitations would likely be needed under Reed and Johnson, given the Supreme Court’s strong preference for civilian courts over military courts-martial.

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201. Id. ("If a private individual wants to travel to a warzone to do military jobs for profit, on behalf of the US government, then that individual agrees to fall under the same codes of law and consequence that American soldiers, in the same zones, doing the same sorts of jobs, have to live and work by.").

202. Id. (noting that the new law could be applied as is to currently contracted civilians and to embedded journalists, who are not under contract).

203. 100 U.S. 13, 22 (1879).

204. Thurnher, supra note 31, at 82–83 (describing how the Department of Defense altered the terms of contracts with PMCs by creating an affirmative duty for PMCs to report criminal conduct to commanders, mandating compliance with the military commander’s orders, and, in one instance, specifying the situations in which weapons may be used).

205. Jackson, supra note 13, at 288.
2. Applying Only to Quasi-Military PMCs

The UCMJ should only be applied to quasi-military PMCs because the contractual waiver of rights by contractors would likely not eliminate the need to consider whether modern PMCs are “in” the military. The Supreme Court’s decision in McElroy tacitly acknowledged the requirement of contractors being considered “in” the military when it described procedures similar to those applied to Navy paymaster clerks as “a practical alternative to the use of civilian employees by the armed services.” Additional, the Court based its holdings in Reed and Johnson on Navy paymaster clerks both submitting to military jurisdiction in writing and being “in” the military to some extent.

Critics may contend that the Reed Court’s holding that Navy paymasters were “in” the armed forces was based on numerous factors that do not apply to even quasi-military personnel. For example, the Court emphasized that Navy officials needed to approve their appointment and discharge and that they were on the Navy payroll. However, such a narrow focus ignores the central point of Reed: Navy paymaster clerks were essential to the “good order and efficiency” of the Navy. In modern times, the unprecedented reliance on contractors indicates that they have become an indispensable asset to the U.S. military. In particular, quasi-military PMCs provide tactical support on the front lines of hostile conflicts. This is exactly where military commanders must have broad authority to govern those involved. Finally, quasi-military PMCs are ones who have taken over quintessential soldier roles: wearing uniforms, bearing arms, and being on the battlefield. The locals often cannot distinguish between quasi-military PMCs and U.S. military personnel. As the Reed Court emphasized with respect to Navy paymaster clerks, if these quasi-military PMCs are “not in the... service, it may well be asked who are.”

207. Johnson v. Sayre, 158 U.S. 109, 118 (1895); Ex parte Reed, 100 U.S. 13, 22 (1879).
208. Reed, 100 U.S. at 22.
209. Id.
211. SINGER, supra note 15, at 92.
212. Reed, 100 U.S. at 22.
213. See Wood, supra note 17, at 95.
214. Thurnher, supra note 31, at 66.
215. Reed, 100 U.S. at 22.
This limitation also resolves one of the main criticisms of the postclarification UCMJ: it is overbroad because it could conceivably be applied to any civilian accompanying military forces during contingency operations.\textsuperscript{216} For example, during the enactment of the original UCMJ, the assistant general counsel of the Department of Defense lamented that military jurisdiction could be extended to Red Cross workers and embedded journalists.\textsuperscript{217} However, the application of the UCMJ to PMCs would likely only face as-applied overbreadth challenges because the Supreme Court recently disapproved of facial overbreadth challenges.\textsuperscript{218} In the 2004 case of \textit{Sabri v. United States}, the Court stated that facial challenges should be infrequent and that, “[a]lthough passing on the validity of a law wholesale may be efficient in the abstract, . . . [f]acial adjudication carries too much promise of premature interpretation of statutes on the basis of factually bare-bones records.”\textsuperscript{219} Thus, it is seemingly irrelevant that the UCMJ may apply to any civilian accompanying the armed forces. Instead, cases will likely focus upon whether the particular application at issue is overbroad. Restricting the applicability of the contractual provision to those contractors filling quasi-military roles should alleviate overbreadth concerns and help ensure that the individual would be deemed “in” the military when faced with an as-applied constitutional challenge.

Critics may argue that limiting the application of the UCMJ to only quasi-military PMCs would be just as unfair as the inconsistencies found in international and host-nation law because it differentiates based solely on the contractors’ roles and functions. However, this criticism is largely meritless. Since most modern U.S. military conflicts involve counterinsurgency efforts that seek to win the support of the local populace, the United States must pragmatically focus on changing the perception that egregious abuses will go unpunished. In the event that a non-quasi-military PMC commits such an egregious crime, MEJA remains a secondary, but less effective, source of criminal sanctions. If a contractor is deemed non-quasi-military, that means that he was likely not on the battlefield, and the dangers of investigation would be alleviated.

Additionally, the UCMJ should only be applied to those PMCs who perform quintessential roles. The UCMJ does not contain numerous constitutional safeguards available in U.S. civilian

\textsuperscript{216} Finer, supra note 3, at 262.
\textsuperscript{217} Corn, supra note 48, at 518–19.
\textsuperscript{218} Sacilotto, supra note 46, at 209 (citing Sabri v. United States, 541 U.S. 600 (2004)).
\textsuperscript{219} 541 U.S. at 608–09.
courts. If a contractor does not perform the quintessential functions of a soldier, it is unfair and unconstitutional to subject him to the rigors of a military court-martial. For quasi-military PMCs, it is both fair and consistent to hold them criminally accountable under the same standards as those military personnel with whom they operate on the battlefront.

3. Limiting Initially to Noncapital Crimes with Civilian Analogues

Limiting the application of the UCMJ to noncapital crimes with civilian analogues, at least initially, avoids two potential problems. First, confining the applicable crimes to those that do not result in the death penalty would avoid Grisham's admonition against trying civilians by court-martial for capital crimes. Second, the inability to charge quasi-military PMCs with capital crimes would not seriously undermine the UCMJ as the most viable source of criminal law, given that many charges would still be available to bring justice to victims and to ensure the success of U.S. efforts to win over local communities. Recent history demonstrates that the UCMJ would be at least as substantively viable as MEJA even if it did not apply to capital crimes; here, recall that the Blackwater contractors involved in Bloody Sunday were only charged with manslaughter under MEJA.

Additionally, limiting the preliminary applications of the UCMJ to those charges with civilian analogues will help avoid a second overbreadth argument. Critics may argue that the UCMJ would subject contractors to purely military regulations, such as those pertaining to sexual orientation or disparagement of the Commander in Chief. They may point to the UCMJ's catchall provision and argue that it will "trigger substantial due process concerns" when applied to civilians. However, similar to the restriction to quasi-military PMCs, the limitation to crimes with civilian analogues will help avoid an as-applied overbreadth challenge. The catchall provision could be used to invoke those charges with civilian analogues that are not specifically laid out in the UCMJ. This provision should not raise

220. See supra note 191 and accompanying text.
221. Associated Press, supra note 7.
222. Corn, supra note 48, at 524 ("[T]his jurisdiction is not restricted to criminal offenses normally applicable to civilians ... Instead, in addition to the UCMJ prohibitions against what could reasonably be considered civilian offenses, every other offense established by the UCMJ is applicable to civilian augmentees ... including offenses unique to the military, such as disobedience to orders, disrespect toward superiors, absence without authority, desertion, missing movement, and misbehavior before an enemy."); Finer, supra note 3, at 262. See generally notes 88–91 and accompanying text.
223. Corn, supra note 48, at 525.
due process concerns, as quasi-military PMCs would already be on notice that they could face these charges by virtue of MEJA and their newly added contractual provisions. Thus, the UCMJ would supply most of the same charges as MEJA while avoiding its practical pitfalls.

It remains unclear whether this limitation is even necessary, given that the Supreme Court has allowed purely military charges to be brought against civilians. For example, in Reed, the Supreme Court upheld a conviction for malfeasance because the civilian Navy paymaster clerk was deemed “in” the military. Thus, if a quasi-military PMC is indeed a functional member of the military, then he conceivably could be charged with a crime that lacks a civilian analogue. To avoid compounding and complicating the issues, this scenario should be avoided in the beginning stages of applying the UCMJ to quasi-military PMCs. Initial cases should focus solely on establishing that quasi-military PMCs must be sufficiently “in” the military in order to be subject to the UCMJ. Following that finding, such contractors should then be susceptible to charges of any crime under the UCMJ.

V. Conclusion

As the Blackwater example emphasizes, action must be taken in order to hold quasi-military PMCs accountable for their criminal actions. The United States simply cannot allow them to continue to operate as the Untouchables. The consequences that can flow from the military’s failure to oversee its own private contractors are demonstrated by the Iraqi backlash to Bloody Sunday and the banning of Blackwater PMCs from Iraq. If the U.S. military wishes to continue to rely on high levels of quasi-military PMCs in contingency operations, it must hold them criminally accountable or risk losing their support altogether.

By clarifying the UCMJ in 2007, Congress has determined that U.S. military law is the most viable source of criminal law applicable to contractors. In order to be placed firmly within the constitutional guidelines set forth by the Supreme Court, several restrictions on the application of the UCMJ should be implemented: (1) the application of the UCMJ should be limited to quasi-military PMCs; (2) the applicable provisions of the UCMJ should be limited to those with civilian analogues; and (3) the government should begin to incorporate these changes and acknowledgments of them in the contracts signed

224. 100 U.S. 13, 23 (1879).
by the providing firms and the individual PMCs. With these limitations, military prosecutors will be able to wield the tool provided by Congress and bring the Untouchables within the grasp of criminal law.

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