

Rethinking the Regulation of Private Military and Security Companies Under International Humanitarian Law

By Joseph C. Hansen*

The United States and other governments increasingly have turned to hiring private military and private security companies (jointly “PMSCs”) in situations of armed conflict.¹ In light of the sudden prominence of PMSCs, as well as notorious instances of misconduct,² there has been recent critical attention devoted to the role of international humanitarian law (“IHL”) in regulating them. As neither clearly combatants nor civilians, the application of IHL to PMSCs remains unclear. The emerging consensus among academics and the international community is that given the realities of the PMSC industry, the vast majority of PMSC personnel will have the status of civilian, which protects them unless and until they directly participate in hostilities.³

* Law Clerk for Senior Circuit Judge Ruggero J. Aldisert, U.S. Court of Appeals for the Third Circuit, 2010-2011; J.D. 2010, University of Minnesota Law School; B.A. 2005, Grinnell College. The author expresses his gratitude to Professors David Weissbrodt and Fionnula Ní Aoláin for their very helpful suggestions and edits. © Joseph C. Hansen, 2011.

¹ See Mohamad-Mahmoud Ould Mohamedou, *The Nature and Characteristics of Contemporary Armed Conflict*, in NETHERLANDS RED CROSS, PROTECTING HUMAN DIGNITY IN ARMED CONFLICT 20, 21 (Sanne Boswijk ed., 2008) (describing “the privatisation and autonomisation of the use of force” as a prominent phenomenon in a new paradigm of conflict); see generally P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 9 (2003) (“A new global industry has emerged. It is outsourcing and privatization of a twenty-first-century variety, and it changes many of the old rules of international politics and warfare.”).

² See, e.g., David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1 (stating that an inquiry found PSC Blackwater’s shootings in a square had resulted in at least fourteen unjustified civilian deaths).

³ See, e.g., INTERNATIONAL COMMITTEE 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 ARMED CONFLICT (2009) [hereinafter MONTREUX DOCUMENT].

Presumptively treating the vast majority of PMSC personnel as civilians, although consistent with a general IHL presumption in favor of civilian status,⁴ is over-inclusive and leads to legal and practical difficulties: it fails to recognize the truly military-like operations of some PMSCs (indeed, some are contracted to perform direct military operations), the indeterminacy of the nature and temporal scope of direct participation may prove unworkable in practice, and personnel taking an active part in the hostilities are chargeable with unprivileged belligerency for duties they may have been hired to perform.

This article contends that it is possible and preferable to identify a sub-classification within PMSCs by treating differently PMSCs hired to engage in activities that constitute direct participation in hostilities. If PMSCs are contracted to perform specified activities constituting direct participation, defined below as “contractor combatant activities,” they should be considered combatants. Through a suggested treaty provision, States contracting PMSCs to engage in contractor combatant activities would be required to contractually mandate PMSC compliance with Article 4(A)(2) of the Third Geneva Convention. Such an approach carves out from civilian status a category of PMSC personnel that engage in combatant-type activities. Part I provides relevant background on IHL and PMSCs. Part II highlights the theoretical and practical problems with categorically presuming the majority of PMSC personnel to have civilian status. Part III details the mechanics and benefits of this new approach. This approach to regulating PMSCs would be both more functional in practice and more harmonious with the doctrine and purposes of international humanitarian law.

I. PMSCS AND THE INTERNATIONAL HUMANITARIAN LAW FRAMEWORK

⁴ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 50, adopted June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (“In case of doubt whether a person is a civilian, that person shall be considered a civilian.”).

The recent and meteoric rise in the presence of private military and security companies in the theater of armed conflict occurred after the treaties governing the law of war were drafted and largely ratified. This part sets out the strain PMSCs have placed on international humanitarian law by outlining the nature of PMSCs, identifying international humanitarian law governing their status, and detailing attempts to place PMSCs within the framework of IHL.

A. THE RISE AND ROLE OF PMSCS

Private military and security companies have become an increasing presence and played an increasing role in situations of armed conflict.⁵ A preliminary note on terminology: Brookings Institute analyst Peter Singer influentially has divided PMSCs into three categories: military support firms, military consulting firms, and military provider firms.⁶ Other delineations of PMSCs draw distinctions along lethal versus nonlethal capabilities and “active” versus “passive” services.⁷ As international humanitarian law is less concerned with formal labels and more directed at functional behavior, this article eschews sub-classifying PMSCs in favor of a general definition of private contractors engaged in security or military operations, broadly construed.⁸

⁵ For a thorough examination of many facets of PMSCs, see SINGER, *supra* note 1.

⁶ *See id.* at 91.

⁷ *See* Doug Brooks, *Protecting People: The PMC Potential: Comments and Suggestions for the UK Green Paper on Regulating Private Military Services* 3, July 15, 2002, available on www.ipoaonline.org (International Peace Operations Association website).

⁸ Such an approach is consistent with the ICRC’s position. *See* MONTREUX DOCUMENT, *supra* note 3, at 9 (“PMSCs’ are private business entities that provide military and/or security services, irrespective of how they describe themselves.”); *id.* cmt. at 38 (“[F]rom the humanitarian point of view, the relevant question is not how a company is labeled but what specific services it provides in a particular instance.”); Alexandre Faite, *Involvement of Private Contractors in Armed Conflict: Implications Under International Humanitarian Law*, 4 DEF. STUD. 166, 168–69 (2004). Additionally, the UN Working Group on the Use of Mercenaries has offered a similar definition: “[PMSC] refers to a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities.” UN WORKING GROUP ON THE USE OF MERCENARIES, DRAFT OF A POSSIBLE CONVENTION ON PRIVATE MILITARY AND SECURITY COMPANIES (PMSCS) FOR CONSIDERATION AND ACTION BY THE HUMAN RIGHTS COUNCIL art.

While governments have employed private actors in warfare for centuries, the growth and corporatization of private military actors is a post-Cold War phenomenon that emerged in the wake of globalization.⁹ There has been a dramatic increase in the prevalence of PMSCs¹⁰ and now as many as two hundred PMSCs operate worldwide.¹¹ Governments increasingly have used PMSCs in situations of armed conflict.¹² For example, in the first Gulf War there was one contractor per 50 to 100 soldiers.¹³ In 2003, contractors accounted for up to 30% of military support services in Iraq and PMSCs constituted the third largest contributor to the war effort after the United States and Britain.¹⁴ A leaked 2009 congressional report indicated that contractors constituted 47% of U.S. personnel in Iraq and 62% in Afghanistan.¹⁵ At the start of 2011, the U.S. Department of Defense was employing over 87,000 contractors in Afghanistan and over 70,000 in Iraq.¹⁶ In Afghanistan, those numbers equal 84 contractors for every 100 soldiers.¹⁷ In Iraq, the ratio is even higher: 129 contractors to every 100 soldiers.¹⁸

2(a), U.N. Doc. A/HRC/15/25 (July 2, 2010) [hereinafter PMSC DRAFT CONVENTION], *available at* <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf>.

⁹ See SINGER, *supra* note 1, at 39, 40.

¹⁰ *Id.* at 40 (“[T]he private military market has expanded in a way not seen since the 1700s.”).

¹¹ See Adam Ebrahim, Note, *Going to War with the Army You Can Afford: The United States, International Law, and the Private Military Industry*, 28 B.U. INT’L L.J. 181, 184 (2010). *But see* Anthony Bianco & Stephanie Anderson Forest, *Outsourcing War*, BUS. WK., Sept. 15, 2003 (placing the number of PMCs at 90 in 2002).

¹² See *Mercenaries: The Baghdad Boom*, ECONOMIST, Mar. 25, 2004 (describing the “boom” in business for PMCs and citing as an example Global Risk Strategies, which during the invasion of Afghanistan, expanded from a two-man team to a company with over 1,000 guards); *see also* Joshua Lipton, *DynCorp Dynamite on New High*, FORBES, June 6, 2007.

¹³ See Nelson D. Schwartz, *The Pentagon’s Private Army*, FORTUNE, Mar. 17, 2003.

¹⁴ See *Mercenaries*, *supra* note 12; Bianco & Forest, *supra* note 11.

¹⁵ See MOSHE SCHWARTZ, CONGRESSIONAL RESEARCH SERVICE, DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS 7, 12 (2009).

¹⁶ See U.S. DEPARTMENT OF DEFENSE, CONTRACTOR SUPPORT OF U.S. OPERATIONS IN THE USCENTCOM AREA OF RESPONSIBILITY, IRAQ, AND AFGHANISTAN 1 (2011) [hereinafter USCENTCOM CONTRACTORS].

¹⁷ *Id.* at 2.

¹⁸ *Id.*

Private military and security companies perform a wide variety of work, from armed guarding and protection of persons and objects, to maintenance and operation of weapons systems, to prisoner detention, to advice to or training of local forces and security personnel.¹⁹ Some PMSCs are even contracted to engage directly in combat.²⁰ Others, even if contracted to provide defensive services, may find themselves in intense firefights.²¹ According to the security consultancy Hart Group, “All good companies employ only ex-soldiers or policemen.”²² Standard equipment includes pistols, rifles, body armor, and armored vehicles.²³ The PMSCs in Iraq perform the armed services of guarding various fixed sites, convoy security, security escorts of individuals traveling in unsecured areas in Iraq, and personal security for high-ranking individuals.²⁴ They perform the unarmed services of operational coordination (establishing and managing command, control, and communications operations centers), intelligence analysis (gathering information and developing threat analysis), and security training to Iraqi security

¹⁹ See MONTREUX DOCUMENT, *supra* note 3, at 9; see also Amnesty International USA, *Private Military and Security Companies*, <http://www.amnestyusa.org/our-work/issues/business-and-human-rights/private-military-and-security-companies> (last visited June 23, 2011); BBC News Online, *Q&A: Private Security in Iraq* (May 27, 2004), http://news.bbc.co.uk/2/hi/uk_news/3747421.stm [hereinafter BBC Q&A].

²⁰ See Keith Somerville, *Dogs of War into Doves of Peace*, BBC NEWS ONLINE (Nov. 11, 2002), available at <http://news.bbc.co.uk/2/hi/africa/2403517.stm> (describing perhaps the most infamous combat contractor, Executive Outcomes, a now-defunct South African company that was involved in Angola and Sierra Leone). See generally SINGER, *supra* note 1, at 101–18 (devoting a chapter of analysis to Executive Outcomes).

²¹ See, e.g., Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 514 (2004-05) (detailing an incident in which Blackwater USA was attacked by insurgents: in the ensuing firefight, it expended thousands of rounds of ammunition and hundreds of 40mm grenades, and resupplied its employees with its own helicopters).

²² See BBC Q&A, *supra* note 19.

²³ *Id.*

²⁴ See JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 3 (2008).

forces.²⁵ In Afghanistan, over 18,000 private security contractors hired by the U.S. Department of Defense perform “personal security, convoy security, and static security missions,” although, as the Department of Defense somewhat obliquely indicates, “[n]ot all private security contractor personnel are armed.”²⁶

In short, there has been an explosive rise in the prevalence and number of contractor personnel utilized in areas of ongoing conflict. These PMSCs perform a diffuse array of duties, ranging from maintenance to armed convoy security. Even before examining the contours of international humanitarian law, one can begin to imagine the difficulty in coherently classifying or regulating such a diverse set of actors.

B. INTERNATIONAL HUMANITARIAN LAW

At the heart of international humanitarian law lies the fundamental distinction between combatants and civilians.²⁷ This principle performs two equally important functions in situations of armed conflict. First, it aims to protect civilians to the maximum extent possible from the effects of armed conflict.²⁸ Second, only combatants have the right to participate directly in

²⁵ *Id.*

²⁶ USCENTCOM CONTRACTORS, *supra* note 16.

²⁷ *See, e.g.*, Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 587 INT’L REV. RED CROSS 175, 198 (2005) (listing as the very first rule of customary IHL, “The parties to the conflict must at all times distinguish between civilians and combatants”).

²⁸ *See, e.g.*, Faite, *supra* note 8, at 171 (“It is a cornerstone of international humanitarian law that, while civilians must be protected to the largest possible extent from the effects of armed conflict and may not be attacked, enemy combatants represent military targets and may be attacked lawfully as long as they are not *hors de combat*.”).

hostilities.²⁹ This section outlines the provisions of IHL that govern a person’s status, under both international armed conflict and internal armed conflict.³⁰

Treaties applicable to situations of international armed conflict create the binary distinction of members of armed forces and civilians. Under the Third Geneva Convention, combatants include official, militia, and volunteer members of the armed forces (Article 4(A)(1)); members of other militias and volunteer corps that meet specified conditions (Article 4(A)(2)); members of an armed force of a government not recognized by the Detaining Power (Article 4(A)(3)); and participants in a *levée en masse*, or citizens who respond spontaneously to invasion (Article 4(A)(6)).³¹ Article 4(A)(2), based on the Hague Regulations of 1907,³² requires that other militias must “belong” to a party to the conflict, and includes organized resistance movements.³³ To qualify as combatants under Article 4(A)(2), however, the militia or volunteer corps must comply with four requirements: they must (a) have a command structure; (b) have a “fixed distinctive sign recognizable at a distance;” (c) carry arms openly; and (d) conduct their operations in accordance with the laws of war.³⁴ Article 4(A)(2) generated significant controversy in drafting, as States differed on whether to recognize unconventional fighters or

²⁹ See, e.g., Eric Talbot Jensen, *Combatant Status: It Is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT’L L. 209, 218–31 (2005) (describing combatant status under IHL).

³⁰ As do many academic commentaries, for the sake of simplicity, this paper classifies IHL provisions on armed conflict into “international” and “internal” (or “non-international”). See, e.g., Faite, *supra* note 8, at 171–72. Nonetheless, it bears noting that there are gradations within both international and internal armed conflict. See, e.g., RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 247–69 (2002) (describing five distinct categories of armed conflict: two international (Geneva Conventions, Protocol I), two internal (Protocol II, Common Article 3), and internal disturbances not cognizable as armed conflict under IHL).

³¹ Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

³² See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 207 Consol. T.S. 277.

³³ Geneva Convention III, *supra* note 31, art. 4(A)(2).

³⁴ *Id.*

resistance groups as combatants.³⁵ They reached a compromise by including the four formal requirements.³⁶ The *levée en masse* constitutes the only armed actors without any institutional organization to still be considered combatants.³⁷

Protocol I to the Geneva Conventions maintains a similar approach and clarifies that a civilian is any person who does not belong to one of the above specified categories of combatants.³⁸ Moreover, in case of doubt, a person shall be considered a civilian.³⁹ Protocol I also carves out mercenaries from having combatant privileges.⁴⁰ The treaty defines mercenary narrowly, however, with six formal elements that must be met: (a) being specially recruited in order to fight; (b) taking a direct part in the hostilities; (c) being motivated essentially by the desire for private gain; (d) being neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) not being a member of the armed forces of a Party to the conflict; and (f) not being sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.⁴¹

In internal armed conflict, neither Common Article 3 nor Protocol II defines combatant or civilian.⁴² Nonetheless, both assume categorical distinctions by using the terminology of “armed

³⁵ See Sean Watts, *Combatant Status and Computer Network Attack*, 50 VA. J. INT’L L. 391, 417–20 (2010).

³⁶ *Id.* at 418.

³⁷ See Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 831, 839 (2010).

³⁸ Protocol I, *supra* note 4, arts. 43, 50; see generally FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 87 (3rd ed. 2001) (describing the Protocol I distinction between combatants and civilians).

³⁹ Protocol I, *supra* note 4, art. 50.

⁴⁰ *Id.* art. 47.

⁴¹ *Id.* art. 47(2); see also Faite, *supra* note 8, at 169 (stating that the rigid definition of mercenary has been judged unworkable by many).

⁴² See Geneva Convention III, *supra* note 31, art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International

forces.”⁴³ According to the International Committee of the Red Cross (“ICRC”), the “wording and logic” of both reveal that “civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict.”⁴⁴ This proposition is not entirely settled,⁴⁵ but none doubt that IHL aims to protect civilians in both international and internal armed conflict.⁴⁶ Accordingly, in any armed conflict of sufficient magnitude to trigger application of the regime of IHL, the principle of civilian/combatant distinction applies.

A broader terminology—based upon the international humanitarian law treaties—describes various types of combatants in both international and internal armed conflict as “organized armed groups.” In international armed conflict, they are either the irregular armed forces belonging to a State (such as militia and volunteer corps), or organized resistance

Armed Conflicts (Protocol II), adopted June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

⁴³ See Geneva Convention III, *supra* note 31, art. 3(1) (“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat . . .”); Protocol II, *supra* note 42, art. 1(1) (describing conflict between “armed forces and dissident armed forces or other organized armed groups”).

⁴⁴ INTERNATIONAL COMMITTEE OF THE RED CROSS, DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 28 (2009) [hereinafter DIRECT PARTICIPATION]; see also Fionnuala Ní Aoláin, Hamdan and Common Article 3: Did the Supreme Court Get It Right?, 91 MINN. L. REV. 1523, 1527 (2007) (“Common Article 3 necessarily presumes the existence of combatants, because by protecting civilians, the article explicitly affirms the existence of hostilities, which inevitably draws attention to the legal status of those persons engaged in violence.”).

⁴⁵ Compare Beth Van Schaack, *Atrocity Crimes Litigation: 2008 Year-in-Review*, 7 NW. U. J. INT’L HUM. RTS. 170, 189 n.89 (2009) (describing an ICTY case accepting as analogous rules governing status in international and internal armed conflicts), with Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 421 (2009) (highlighting the position of some that the status of combatant has no relevance in internal armed conflict).

⁴⁶ See, e.g., Arie J. Schaap, *Cyber Warfare Operations: Development and Use Under International Law*, 64 A.F. L. REV. 121, 150 (2009) (stating that as “an uncontroversial principle of customary international law, parties to an armed conflict must distinguish between the civilian population and combatants,” which extends to situations of internal armed conflict).

movements.⁴⁷ In internal conflict, they are the armed forces of a non-State party.⁴⁸ As Nils Melzer, legal adviser to the ICRC, explains, “[O]rganized armed groups constitute armed forces in a strictly functional sense, in that they are de facto charged with the conduct of hostilities on behalf of a party to the conflict.”⁴⁹ Determining membership in an organized armed group is a functional, not formal, inquiry that turns on whether the group’s continuous function is to directly participate in hostilities.⁵⁰ This terminology is helpful as it bridges both international and internal armed conflict to identify non-State combatant actors.

Regardless of the nature of conflict, another foundation of international humanitarian law is that civilians are to be protected unless and until they directly participate in hostilities.⁵¹ The Commentary to Protocol I defined “direct participation” as “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”⁵² Nonetheless, the concept of “direct participation” has been difficult to delineate.⁵³ This difficulty is intuitively unsurprising, as the permutations of activities that could be interpreted to support hostilities is nearly limitless. One can imagine a spectrum ranging from the soldier on the ground to the taxpayer whose money funds the military. At what point in between does one draw the line for activities that constitute “direct participation” and those activities that do not? Compounding the difficulty is status fluidity: a civilian who directly participates in hostilities

⁴⁷ See Melzer, *supra* note 37, at 838; see also Geneva Convention III, *supra* note 31, art. 4(A)(1) & (2).

⁴⁸ See Melzer, *supra* note 37, at 838.

⁴⁹ See *id.* at 839.

⁵⁰ See *id.*

⁵¹ See Henckaerts, *supra* note 27, at 198 (listing this proposition as one of the customary rules of IHL).

⁵² COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 ¶ 1944 (Yves Sandoz et al. eds., 1987).

⁵³ See DIRECT PARTICIPATION, *supra* note 44, at 6 (labeling the issue as “one of the most difficult, but as yet unresolved issues of international humanitarian law”).

loses civilian status, but only “for such time as” she participates directly.⁵⁴ Once the civilian ceases to participate directly, she regains her civilian status. Although simple in theory, the temporal requirement can lead to fears of a “revolving door” in which a daytime civilian fights during the night, only to return to protected civilian status the next day, and so on and so forth.⁵⁵

Following a large-scale endeavor to better clarify the concept, the ICRC released guidance on “direct participation in hostilities.”⁵⁶ Condensing the ninety-odd pages of analysis, essentially a civilian directly participates through a specific act that meets a certain threshold of harm, has a direct causal link to the harm, and is designed to support one party in the conflict to the detriment of another.⁵⁷ The ICRC also focused the temporal component: “Civilians lose protection against direct attack *for the duration of each specific act* amounting to direct participation in hostilities.”⁵⁸ Notwithstanding the extended effort to bring clarity to “direct participation,” commentators already have launched a heated debate as to the approach, viability, and feasibility of the document.⁵⁹ The central fault-line concerns whether the ICRC’s publication too heavily favors civilian protection at the expense of military efficiency and necessity.⁶⁰ This article leaves to better hands the task of striking the proper balance between military necessity

⁵⁴ Protocol I, *supra* note 4, art. 51(3); *see also* Bill Boothby, “*And for Such Time As*”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L & POL. 741, 742 (2010).

⁵⁵ *See* Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 686 (2010); *see also* Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 157 (2010) (examining complications of temporal civilian status).

⁵⁶ DIRECT PARTICIPATION, *supra* note 44.

⁵⁷ *Id.* at 16–17.

⁵⁸ *Id.* at 70 (emphasis added).

⁵⁹ *See generally* New York University Journal of International Law and Politics, Forum, *Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 637, 637–916 (2010) (containing four articles critiquing and one defending the ICRC’s approach).

⁶⁰ *See* Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SECURITY J. 5 (2010).

and civilian protection, but simply notes that satisfactorily defining “direct participation in hostilities” has proven to be an elusive beast.

Overall, the principle of distinction between combatants and civilians is virtually the *sine qua non* of international humanitarian law and applies whenever IHL itself applies. Civilians are protected unless and until they directly participate in hostilities, although the precise contours of “direct participation” remain hazy.

C. RECENT ATTEMPTS AT CLASSIFICATION

The international community has struggled to determine the placement of PMSCs within the framework of IHL. PMSCs strain the binary principle of distinction due to the variable nature of their duties. One private contractor may seem distinctly civilian by providing “ash and trash” duties like maintaining planes or hauling garbage, while another may appear indisputably a combatant by carrying a gun and serving alongside active-duty Special Forces soldiers.⁶¹ How then does one fit a seemingly fluid group into a presumptive status? There have been two recent, large-scale efforts to address this question: one by the International Committee of the Red Cross, and the other by the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (“Mercenary Working Group”).

The ICRC, in conjunction with seventeen governments, produced the *Montreux Document*, which seeks to provide interpretive guidance on the legal obligations of States related to PMSCs in the absence of a clearly applicable treaty or provision.⁶² According to the document, regardless of their status under IHL (combatant or civilian), the personnel of PMSCs

⁶¹ See Schwartz, *supra* note 13 (describing different duties of U.S. contractors in the Middle East).

⁶² MONTREUX DOCUMENT, *supra* note 3, at Foreword.

must comply with international humanitarian law.⁶³ As far as their status, they are protected as civilians unless they fit one of three exceptions: (1) they are incorporated into the regular armed forces of a State, (2) they are members of organized armed forces, groups or units under a command responsible to the State, or (3) they otherwise lose their protections as determined by international humanitarian law.⁶⁴

The commentary accompanying the Montreux principles clarifies that the “members of organized armed forces” prong refers to the requirements of Article 4(A)(2) of the Third Geneva Convention.⁶⁵ In other words, PMSC personnel are not considered civilians if they are under responsible command, have a distinctive fixed sign, carry arms openly, and obey the laws of war.⁶⁶ According to the commentary, the third exception—otherwise lose their protection—refers to the concept of a “rebel soldier” in non-international armed conflict.⁶⁷ The commentary also elaborates that the status of PMSC personnel requires a case-by-case analysis and depends on the relevant contract and services, but that the “large majority of PMSC personnel” will likely be civilians.⁶⁸

To summarize the position of the *Montreux Document*, PMSC personnel are presumed to be civilians. Only if they are formally incorporated into armed forces, rigidly adhere to Article 4(A)(2), or act as rebel soldiers in a non-international armed conflict, will they be considered combatants.

⁶³ *Id.* at 14.

⁶⁴ *Id.*

⁶⁵ *Id.* cmt. at 36; *see also supra* note 34 and accompanying text.

⁶⁶ *See* MONTREUX DOCUMENT, *supra* note 3, cmt. at 36; *see also* Geneva Convention III, *supra* note 31, art. 4(A)(2).

⁶⁷ MONTREUX DOCUMENT, *supra* note 3, cmt. at 37.

⁶⁸ *Id.* cmt. at 36.

The Mercenary Working Group has drawn an even stricter line in favor of civilian status. The mandate extension of the Mercenary Working Group charged it with preparing a draft of international basic principles regulating private military and security companies.⁶⁹ The Mercenary Working Group recently fulfilled this mandate by preparing a draft Convention on Private Military and Security Companies (“PMSC Draft Convention”).⁷⁰ The U.N. Human Rights Council considered the PMSC Draft Convention and voted 32 to 12 to establish a working group to consider elaborating a legally binding instrument to regulate PMSCs, based on the PMSC Draft Convention.⁷¹

In the PMSC Draft Convention, the Mercenary Working Group has taken a broad “international law” approach and combines both human rights and humanitarian law in its proposed regulation of PMSCs.⁷² The PMSC Draft Convention focuses on regulation of PMSCs by State parties, requiring States to ensure that PMSCs respect international human rights and international humanitarian law.⁷³ Although the PMSC Draft Convention does not address the mechanics of how IHL should govern PMSC status, it does prohibit the use of force by PMSCs to, *inter alia*, overthrow a government, change borders of a State, target civilians, cause

⁶⁹ See Human Rights Council Res. 7/21, Mandate of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, ¶ 2(e), 7th Sess., A/HRC/RES/7/21 (Mar. 28, 2008).

⁷⁰ See PMSC DRAFT CONVENTION, *supra* note 8.

⁷¹ See Human Rights Council Res. 15/26, Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies, 15th Sess., U.N. Doc. A/HRC/RES/15/26 (Oct. 7, 2010).

⁷² See PMSC DRAFT CONVENTION, *supra* note 8, at PP 2 (recognizing the “principles and rules of international human rights and humanitarian law and their complementarity”).

⁷³ *Id.* arts. 4(2), 5(1), 7(1) & (2).

disproportionate harm, or provide training to accomplish any of the above.⁷⁴ It also prohibits PMSC personnel from engaging in

inherently State functions, including direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction, police powers, especially the powers of arrest or detention including the interrogation of detainees, and other functions that a State Party considers to be inherently State functions.⁷⁵

This restriction is very broad on permissible PMSC activities, as it essentially prohibits PMSC personnel from engaging in any combatant activities.⁷⁶ Moreover, by prohibiting direct participation in hostilities, the draft implicitly endorses the notion that PMSC personnel are civilians, not combatants.

Commentators also have weighed in as to the status of PMSC personnel under IHL. Applying the framework of international humanitarian law, they have uniformly concluded that the majority of PMSC personnel will fall under the category of civilian.⁷⁷ Based on the realities of the industry, the vast majority of contractors will be considered civilians because they are almost never formally incorporated⁷⁸ and will seldom meet all requirements of Article 4(A)(2).⁷⁹

⁷⁴ *Id.* art. 8.

⁷⁵ *Id.* art. 9.

⁷⁶ One commentator notes that at least one member of the Mercenary Working Group criticized the *Montreux Document* for recognizing de facto and legitimizing the PMSC industry, which may explain in part the much stricter regulation in the proposed PMSC Convention. See Nigel D. White, *The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group's Draft Convention*, 11 HUM. RTS. L. REV. 133, 135 (2011).

⁷⁷ See, e.g., Lindsey Cameron, *Private Military Companies: Their Status Under International Humanitarian Law and Its Impact on Their Regulation*, 88 INT'L REV. RED CROSS 573, 587 (2006); Emanuela-Chiara Gillard, *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, 88 INT'L REV. RED CROSS 525, 539 (2006).

⁷⁸ See, e.g., Cameron, *supra* note 77, at 583 (stating that “the whole point of privatization is precisely the opposite” of formal incorporation); Schmitt, *supra* note 21, at 525 (concluding that PMSCs will almost never be formally incorporated into armed forces and that formal incorporation requires more than a contract); see also Gillard, *supra* note 77, at 533 (“[T]here are

There have been suggestions that PMSCs should be considered mercenaries under IHL.⁸⁰ Given the rigid six-part definition of mercenaries set forth in Protocol I, however, most commentators conclude that in nearly all circumstances, PMSC personnel will not constitute mercenaries (the clearest stumbling block is Protocol I Article 47(2)(a)'s requirement of being “specially recruited locally or abroad in order to fight in an armed conflict” because PMSCs rarely are contracted specifically to fight).⁸¹ Interestingly, although the Mercenary Working Group was tasked with drafting a treaty to regulate PMSCs, it similarly has concluded that most PMSCs do not fit the mercenary definition.⁸²

In sum, PMSCs now form an integral part of the landscape of armed conflict. Given the varied nature of their operations, their collocation within the regime of IHL can be described as uncomfortable at best. There is a general consensus that under the framework of international humanitarian law, the great majority of PMSC personnel will have civilian status. The ICRC has placed them presumptively on the civilian side of the combatant-civilian dichotomy. The Working Group effectively would confine PMSC personnel to civilian status by favoring the outright prohibition of any direct participation in hostilities. The next part examines whether

likely to be very few instances in which the staff of PMCs/PSCs are incorporated into the armed forces . . .”).

⁷⁹ See Daniel P. Ridlon, *Contractors or Illegal Combatants? The Status of Armed Contractors in Iraq*, 62 A.F. L. REV. 199, 248–49 (2008); Schmitt, *supra* note 21, at 527–31; see also Cameron, *supra* note 77, at 583; Gillard, *supra* note 77, at 534–36.

⁸⁰ See, e.g., Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT’L L.J. 1 (1999).

⁸¹ See Protocol I, *supra* note 4, art. 47(2)(a); MONTREUX DOCUMENT, *supra* note 3, cmt. at 40; Ebrahim, *supra* note 11; Faite, *supra* note 8, at 169; E. L. Gaston, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT’L L.J. 221, 232–33 (2008); Kevin H. Govern & Eric C. Bales, *Taking Shots at Private Military Firms: International Law Misses Its Mark (Again)*, 32 FORDHAM INT’L L.J. 55, 83 (2008); Ridlon, *supra* note 79, at 232.

⁸² See U.N. Human Rights Council, Rep. of the Working Group on the Use of Mercenaries, ¶ 38, U.N. Doc. A/HRC/15/25 (July 2, 2010) (“PMSC personnel cannot usually be considered to be mercenaries.”).

treating PMSC personnel as presumptively (or categorically) civilian is the optimal approach within the framework of international humanitarian law.

II. PRACTICAL AND LEGAL DEFICIENCIES

Presuming PMSC personnel to be civilians honors a general IHL principle of resolving doubt over status in favor of civilian.⁸³ Nonetheless, as this part demonstrates, there are substantial drawbacks with this global presumption in the context of PMSCs. First, if determining direct participation is inherently difficult, the problem is only exacerbated in the situation of PMSCs, leading to legal and practical inadequacies. Second, civilian status for certain PMSCs may have the perverse effect of leaving them unable to lawfully engage in response to predictable combat, effectively rendering unlawful any participation in hostilities.

A. DIFFICULTIES IN DETERMINING DIRECT PARTICIPATION

With civilian status, PMSC personnel are protected from attack unless and for such time as they take a direct part in hostilities.⁸⁴ Determining direct participation for any civilian is difficult; the ICRC crafted ten recommendations to determine direct participation, but the ninety pages of guidance attest to the residual ambiguity in applying the recommendations.⁸⁵ The inherent difficulties in determining civilian participation become heightened in the context of PMSC personnel, given the variable nature of their duties. The *Montreux* commentary provides examples of direct participation by contractors: guarding military bases against attacks from the enemy party, gathering tactical military intelligence, and operating weapons systems in a combat

⁸³ See Protocol I, *supra* note 4, art. 50.

⁸⁴ DIRECT PARTICIPATION, *supra* note 44, at 16; see also Govern & Bales, *supra* note 81, at 72 (“The legal fate of individual contractors turns entirely on what is meant by ‘direct participation’ in hostilities.”).

⁸⁵ DIRECT PARTICIPATION, *supra* note 44.

operation.⁸⁶ In contrast, direct participation does not include equipment maintenance, logistic services, guarding diplomatic missions or other civilian sites, or catering.⁸⁷ Nor does it include collection of intelligence of a non-tactical nature or purchasing, smuggling, manufacturing, or maintaining weapons and equipment outside specific military operations.⁸⁸

Yet, despite these neatly drawn categories, the distinctions can break down quickly. The ICRC recognizes as much and provides as an example the thin line “between the defence of military personnel and other military objectives against enemy attacks (direct participation in hostilities) and the protection of those same persons and objects against crime or violence unrelated to the hostilities (law enforcement/defence of self or others).”⁸⁹ This difference can become even fuzzier in the context of resisting attack by an outlawed resistance group, as the group teeters between combatant and civilian status; consequently, engaging with the group could constitute direct participation in hostilities or it could constitute a police operation apart from hostilities.⁹⁰ One can also imagine a thin line regarding collecting intelligence: what constitutes “non-tactical” intelligence? What if the intelligence later becomes tactically useful?⁹¹ Similarly, the distinction between military and civilian sites may be blurred where the site is not part of military infrastructure but is a legitimate military target.⁹² Additionally, while the ICRC

⁸⁶ MONTREUX DOCUMENT, *supra* note 3, cmt. at 37.

⁸⁷ *Id.* cmt. at 39.

⁸⁸ DIRECT PARTICIPATION, *supra* note 44, at 34–35. *But see* Faite, *supra* note 8, at 173 (“[I]t is arguable that private contractors involved in transportation of weapons and other military commodities, intelligence, strategic planning or procurement of arms, may lose the protection afforded to civilians. . .”).

⁸⁹ DIRECT PARTICIPATION, *supra* note 44, at 38.

⁹⁰ *See* Cameron, *supra* note 77, at 590.

⁹¹ *Cf.* Faite, *supra* note 8, at 173 (contending that any intelligence activity for the military constitutes direct participation).

⁹² *See id.* at 175 (highlighting the ambiguity between military and civilian sites); *see also* Anthony Dworkin, *Security Contractors in Iraq: Armed Guards or Private Soldiers?*, CRIMES OF WAR PROJECT, Apr. 20, 2004, <http://www.crimesofwar.org/onnews/news-security.html> (last

limits operating weapons to only constitute direct participation when done in a combat operation (which seems to imply some form of affirmative planning and engagement), another commentator considers it natural that PMSC forces directly participate in hostilities when they engage in defensive actions seeking to harm enemy personnel.⁹³ It also bears noting that fighting to attack and fighting to defend are legally insignificant distinctions in the IHL regime: both constitute direct participation.⁹⁴

Moreover, there is a clear temporal problem with determining direct participation of PMSC personnel. For example, Alexandre Faite, a legal advisor to the ICRC, points out that on duty contractors guarding military infrastructures may be directly participating whereas off duty contractors would not be.⁹⁵ As civilians are protected from attack when not directly participating in hostilities, a contractor's status could switch with the end of her 5:00 shift.

The real problem with these indeterminacies is that they exist on a constant continuum: they stretch from the general nature of the activity (e.g., what kind of intelligence gathering?, guarding what kind of building?) to the specific circumstances of any given instance (e.g., on duty or off?, specific combat operation or not?). If the above examples were hypothetical variants on the fringe of PMSC behavior, then the gray area would only be implicated in a small subset of situations. These ambiguities, however, exist in a great variety of situations.⁹⁶ Indeed,

visited Mar. 3, 2011) (“The most difficult question posed by the role of contract security forces in Iraq may well be this: is the official use of security contractors to defend legitimate or predictable targets in the face of an organized uprising tantamount to having them engage in hostilities?”).

⁹³ See Ridlon, *supra* note 79, at 234.

⁹⁴ See Cameron, *supra* note 77, at 588 (citing Article 49.1 of Protocol I to the Geneva Conventions); Gillard, *supra* note 77, at 540.

⁹⁵ Faite, *supra* note 8, at 174–75.

⁹⁶ See, e.g., Ebrahim, *supra* note 11, at 187–88 (“Often, PMCs provide security for military, political, and corporate individuals and installations in states like Iraq and Afghanistan. Security and policing often entails counter-terrorism, counter-insurgency, and other special operations, in

for this reason, the ICRC states that the question of direct participation must be considered on a case-by-case basis (although it does not clarify who should be making the case-by-case determination).⁹⁷

The Mercenary Working Group’s PMSC Draft Convention favors a bright line in place of a presumption: PMSC personnel are prohibited from engaging in direct participation.⁹⁸ On its face, this approach appears simple. Unfortunately, it too suffers from serious defects. First and most to the point, as a practical matter, the presence of contractors in the theater of armed conflict is a reality.⁹⁹ As discussed directly above, PMSC personnel engage in a wide variety of activities that constitute direct participation. Prohibiting them outright from engaging in direct participation would require an enormous change in the way PMSCs are utilized; they would not be permitted to guard military personnel or infrastructure, gather intelligence of any tactical nature, or engage in defensive actions against an enemy.¹⁰⁰ Although this may be a laudable goal of the PMSC Draft Convention, the prospects of enacting such a shift in the utilization of PMSCs are daunting and likely unrealistic. Second, civilian status under IHL is fluid because civilians in areas of armed conflict sometimes do directly participate in hostilities. Categorically prohibiting PMSC personnel from directly participating could render unlawful any participation, even if the hostilities were brought to the PMSC personnel, rather than the other way around. Such

which firms possess large scale military capabilities. Although they are formally positioned as security forces targeting criminal elements, they occasionally engage in activities that resemble traditional combat, due to the nature and scope of international security threats.”)

⁹⁷ DIRECT PARTICIPATION, *supra* note 44, at 42 (stating that due consideration must be given to the circumstances of each case); *cf.* MONTREUX DOCUMENT, *supra* note 3, at 14, 36 (suggesting determination of PMSC personnel status on a case-by-case basis).

⁹⁸ PMSC DRAFT CONVENTION, *supra* note 8, art. 9.

⁹⁹ *See, e.g.*, Gillard, *supra* note 77, at 526 (“[T]he past years have witnessed a significant growth in the involvement of PMCs/PSCs in security and military functions in situations of armed conflict.”).

¹⁰⁰ *Cf.* Ridlon, *supra* note 79, at 234.

defensive encounters are commonplace.¹⁰¹ Third, the prohibition hits the same theoretical wall: what is direct participation? PMSCs can avoid engaging in direct participation only if they know what it is.

Ultimately, both approaches rely on determining what constitutes direct participation. Yet if a multiyear and large scale effort by the ICRC and leading scholars to define direct participation still leaves ambiguity and dissenters, how can parties involved in armed conflict know when PMSC personnel are directly participating in hostilities?

International humanitarian law seeks to regulate the behavior of parties engaged in armed conflict,¹⁰² and this uncertainty surrounding direct participation presents at least two clear problems. First, status affects legal entitlements: civilians directly participating in hostilities do not receive the benefits of combatant status.¹⁰³ High levels of ambiguity and uncertainty surrounding direct participation therefore make it difficult for PMSCs to comply with IHL.¹⁰⁴ Second, making the assumption that other parties engaged in an armed conflict seek to comply with the law of war, how do they determine whether PMSC personnel are directly participating in hostilities? In other words, how can they know whether they can lawfully target the contractors? Even if the opposing combatants seek to abide by the law of war, there may be no principled way for them to determine PMSC personnel's status and in some instances they could likely attack PMSC personnel lawfully, claiming direct participation in hostilities. At bottom,

¹⁰¹ *See id.* at 234 (“The activities which the armed PMFs in Iraq carry out, though defensive in nature, lead to engagements with elements of the insurgency.”).

¹⁰² *Cf.* KALSHOVEN & ZEGVELD, *supra* note 38, at 12 (describing the broad purpose of IHL as aiming “to restrain the parties to an armed conflict . . . and to provide essential protection to those most directly affected”).

¹⁰³ *See, e.g.,* Schmitt, *supra* note 21, at 519–22 (detailing the potential consequences for civilians directly participating in hostilities).

¹⁰⁴ *See* Dworkin, *supra* note 92 (“[I]t remains troubling that the United States is putting people into conflict situations whose training, rules of engagement and legal accountability are unclear.”).

relying on direct participation to determine the status of PMSC personnel becomes a rigid exercise of formalism: in a great variety of situations only through a difficult (and subjective) post hoc legal determination can parties to a conflict know the status of PMSC personnel. Such a result provides no workable standard for any party involved in armed conflict.

B. ILLEGAL COMBATANTS?

Beyond the indeterminacy of “direct participation,” there is a major theoretical drawback to broadly grouping as civilians PMSC personnel: as civilians, they have no right to engage in hostilities so any participation would constitute unprivileged belligerency (or, in the Bush parlance, unlawful enemy combatancy).¹⁰⁵ There are two sides to the same coin of unprivileged belligerency: one involves participation in hostilities, and the other concerns the consequences of being captured and chargeable as an unprivileged belligerent.

The true benefit of civilian status is protection from attack;¹⁰⁶ however, PMSCs frequently operate in areas where attacks by non-State actors unconcerned with the regime of IHL are predictable.¹⁰⁷ According to the ICRC, “[T]heir proximity to the armed forces and other military objectives may expose them more than other civilians to the dangers arising from

¹⁰⁵ *See id.* (stating that direct participation in hostilities by contractors would be legally analogous to al-Qaeda actions on an Afghanistan battlefield); Faite, *supra* note 8, at 173–74 (“[I]t is striking that detainees in Guantanamo were denied both prisoner of war status and the protection of the Fourth Geneva Convention on the basis of what could be a daily bread-and-butter for private contractors in Iraq: direct participation in the hostilities of individuals that are not members of the armed forces of a party to the conflict.”); Ridlon, *supra* note 79, at 233 (“If PMF personnel took part in hostilities, they would not only lose their protection and become viable targets, but they also would become illegal combatants.”).

¹⁰⁶ *See, e.g.,* Karma Nabulsi, *Evolving Conceptions of Civilians and Belligerents: One Hundred Years After the Hague Peace Conferences*, in *CIVILIANS IN WAR* 9, 18 (Simon Chesterman ed., 2001) (describing the post-World War II normative shift towards protecting civilians).

¹⁰⁷ *See* Dworkin, *supra* note 92 (“Iraqi militias have routinely targeted supply convoys, and have also targeted other sites guarded by private security contractors, notably regional offices of the Coalition Provisional Authority. Although these are civilian not military buildings, they have nevertheless been regularly attacked by Iraqi insurgents as part of a military campaign. They are predictable if not lawful targets.”).

military operations, including the risk of incidental death or injury.”¹⁰⁸ In light of their proximity to sites of attack, it seems that PMSC personnel face a Catch-22: they are obligated contractually to face potential attack but by returning fire would be directly participating in hostilities unlawfully. This concern is somewhat mitigated by the doctrine of self defense, but its scope and application are highly circumstance-dependent and do not reach to all situations.¹⁰⁹

Beyond the theoretical prohibition of participating in hostilities lies a very tangible consequence: if captured, unlawful combatants do not receive prisoner-of-war status. Indeed, they may even be tried for the simple act of participation, regardless of whether it violated international humanitarian law.¹¹⁰ One could contend that by agreeing to operate in conflict areas for substantial amounts of money,¹¹¹ PMSC personnel have consented to this risk. Consenting to potentially face hostile fire, however, should not be conflated with consenting to commit acts of unprivileged belligerency. It is highly doubtful that individuals joining PMSCs intend to consent to facing prosecution under the laws of war simply for guarding a military objective or returning hostile fire.

Less formally, there is also a striking sub-current of double standards. The United States has taken the position in its military commissions system at Guantánamo Bay that any act taken by an “unlawful combatant” can violate the law of war.¹¹² A civilian contractor directly

¹⁰⁸ DIRECT PARTICIPATION, *supra* note 44, at 38.

¹⁰⁹ See Ridlon, *supra* note 79, at 237–48.

¹¹⁰ See Gillard, *supra* note 77, at 531, 541. *But see* Schmitt, *supra* note 21, at 520–21 (contending that the better position is that only the acts underlying the unlawful participation are triable).

¹¹¹ See Laura A. Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 N.Y.U. J. INT’L L. & POL. 355, 375–76 (2010) (describing how contractors earn several multiples of a military member’s salary).

¹¹² See Joseph C. Hansen, Note, *Murder and the Military Commissions: Prohibiting the Executive’s Unauthorized Expansion of Jurisdiction*, 93 MINN. L. REV. 1871, 1182–83 (2009) (detailing how the Manual for Military Commissions criminalizes any action taken by an “unlawful combatant” as a violation of the law of war).

participating in hostilities, however, would also be an unlawful combatant. Yet—to indulge a little hyperbole—civilian contractors employed by the United States who have directly participated in hostilities do not number among the ranks of the detainees at Guantánamo. As one commentator diplomatically observes, “[V]oluntarily creating a pool of ‘good’ but potentially ‘unlawful combatants’ while simultaneously condemning other (non-private sector) civilian participants in hostilities verges on hypocrisy.”¹¹³ International humanitarian law provides a framework designed to regulate the conduct of all involved in armed conflict; it is therefore an untenable position to condemn (and even criminalize) the direct participation of certain civilian actors while condoning (and even contracting) the participation of others.

There is, therefore, a glaring problem. PMSCs now figure prominently in the landscape of armed conflict. The broad consensus is that the majority of their personnel have civilian status. This assessment of their formal status is undoubtedly correct under international humanitarian law. Yet this status is plagued by practical problems: many PMSC personnel directly participate in hostilities (some continuously, others frequently, and some occasionally), which is unlawful behavior for civilians. Rather than enjoy the benefits of civilian status, PMSC personnel who directly participate will suffer the perverse result of engaging in unlawful behavior. And even if they seek to comply with the strictures of IHL, they may not be able to, as determining direct participation is decidedly difficult.¹¹⁴ The same goes for other parties, who may be unable to distinguish PMSC personnel from soldiers.¹¹⁵

¹¹³ Cameron, *supra* note 77, at 594.

¹¹⁴ *Cf. id.* at 589 (“[T]he determination [of] whether a person actually does directly participate in hostilities does not necessarily depend on whether that person intended to do so.”).

¹¹⁵ Michael Schmitt provides a sobering anecdote of a courtyard full of military and PMSC personnel in Iraq, none of whom can identify to which companies or armies the others belong because “they all look so alike, there’s no way to tell.” Schmitt, *supra* note 21, at 530–31 n.7.

The result is baffling: correctly categorizing the great majority of PMSC personnel under international humanitarian law as civilian provides all sides involved in an armed conflict with no workable standards by which to regulate their behavior.

III. CATEGORICAL COMBAT FUNCTIONS

Analytically and practically it therefore makes sense to consider some PMSC personnel to be combatants rather than civilians: the chances they directly participate in hostilities are high and the chances their civilian status will protect them are low. Reversing the presumption from treating their status as generally civilian to generally combatant, however, suffers from basic defects under international humanitarian law. First, considering PMSCs to be presumptively combatants essentially disregards the framework of IHL because most PMSC personnel do not fit the technical requirements for combatant status set forth in humanitarian treaties.¹¹⁶ Second, it flips the problem of considering them to be presumptively civilians, as either approach is over-inclusive: many contractors do not engage in combatant activities, but are instead simply support personnel. Accordingly, the solution to the underlying problems of treating the majority of PMSC personnel as having civilian status cannot be to simply reclassify them as presumptively combatants.

Recognizing the balance that must be struck between the competing tensions of the binary principle of distinction in IHL and the multi-faceted duties of PMSC personnel, this part suggests a principled line that can be drawn *within* PMSCs to better regulate their placement under international humanitarian law. Rather than melding international humanitarian law to fit private military and security companies, this part proposes molding PMSCs to fit IHL: PMSC personnel contracted to engage specifically in the type of activity that constitutes direct

¹¹⁶ See generally *supra* Part I.C.

participation in hostilities should be categorically presumed to be members of organized armed forces and should be required to abide by the requirements of Article 4(A)(2) of the Third Geneva Convention. To provide a workable line of distinction, this part proposes the terminology of “contractor combatant activities,” a new sub-classification within PMSCs. States that hire PMSCs to perform “contractor combatant activities” should be required by treaty to mandate contractually that the PMSCs meet the combatant requirements of Article 4(A)(2) of the Third Geneva Convention. This part first delineates how this approach would work, and then examines the benefits that would result to all sides in an armed conflict.

A. “CONTRACTOR COMBATANT ACTIVITIES”

Article 4(A)(2) of the Third Geneva Convention, applicable in international armed conflict, requires that members of other militias must “belong” to a party involved in the conflict and must fulfill the following conditions in order to receive combatant status: be under responsible command, have a distinctive fixed sign, carry arms openly, and obey the laws of war.¹¹⁷ In comparison, in non-international armed conflict, the ICRC clarified that determining membership in an organized armed group is a purely functional inquiry: “[T]he decisive criterion . . . is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.”¹¹⁸ PMSC personnel assuming support functions would not qualify, but those whose duties constitute continuous participation would.¹¹⁹

The inquiry in international armed conflict is strictly formal, and in non-international armed conflict it is functional. Even in non-international armed conflict, however, the functional inquiry turns upon determination of direct participation, which as examined above, can be

¹¹⁷ See Geneva Convention III, *supra* note 31, art. 4(A)(2).

¹¹⁸ DIRECT PARTICIPATION, *supra* note 44, at 34.

¹¹⁹ *Id.* at 34–35; see also Melzer, *supra* note 37, at 890–91 (explaining that a private contractor hired to defend a military objective assumes a continuous combat function).

extremely ambiguous in the context of PMSCs. These approaches suffer from different weaknesses. The formal inquiry as an analytical matter undermines the general functional approach of IHL by prioritizing strict requirements over the reality of PMSC duties.¹²⁰ The functional non-international armed conflict inquiry seems unworkable as a practical matter.¹²¹

Instead of either approach, governments employing PMSCs should combine the better aspects of each. If PMSC personnel are hired to engage in a specific list of actions that constitute direct participation in hostilities (detailed below as “contractor combatant activities”), they should be presumed to be organized armed forces and should be required to comply with the requirements of Article 4(A)(2). The legal placement of these actions into the combatant box and out of the civilian box resolves the indeterminacies of construing direct participation: if PMSCs are contracted to engage in any of these actions, they will be considered combatants in the conflict. This section first defines “contractor combatant activities” and then details how the shift in regulation would be implemented.

1. Defining “Contractor Combatant Activities”

Before entering a conflict zone (one where the government has authorized the use of force), if PMSC personnel are hired to engage in pre-specified activities (“contractor combatant activities”), then they should be regulated as organized armed forces. The first piece of making this approach workable is to define the “contractor combatant activities.”

It is useful to begin by examining recent governmental attempts to constrict the role of PMSCs in armed conflict. Consider a proposed U.S. Senate bill, the Stop Outsourcing Security

¹²⁰ The formal versus functional interpretation of IHL is a value judgment that varies depending on the commentator. This author believes that to remain relevant, IHL must be interpreted functionally. *Cf.* Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1759–65 (2009) (describing the spectrum of interpretations of IHL in light of terrorism).

¹²¹ *See supra* Part II.A.

Act, which has withered on the vine twice in the Subcommittee on Armed Services.¹²² The bill would require the transition away from the use of all private contractors “for mission critical or emergency functions . . . in all conflict zones in which Congress has authorized the use of force.”¹²³ The bill defines those functions as “activities for which continued performance is considered essential to support combat systems and operations” or whose interruption would significantly affect a military operation.¹²⁴ Such activities include protective services, security advice and planning, military and police training, repair and maintenance for weapons systems, prison administration, interrogation, and intelligence.¹²⁵ The definition in the Outsourcing Security bill is too broad for purposes of IHL as it goes well beyond direct participation in hostilities.¹²⁶ Nonetheless, it provides an example of separating the work performed by PMSCs into different categories.

Another source of guidance is the United States Department of Defense’s attempts to determine the work that private contractors should not perform. The United States uses the concept of an “inherently governmental function” to indicate what services the government should not outsource.¹²⁷ Along these lines, the U.S. Department of Defense recently listed the following activities as ones that contractors should not perform: exercising command authority; conducting combat authorized by the government; pursuing certain types of security operations; handling, determining, and caring for POWs, internees, terrorists, and criminals; directing and

¹²² See Stop Outsourcing Security Act, S. 3203, 111th Cong. (2010); Stop Outsourcing Security Act, S. 2398, 110th Cong. (2007).

¹²³ Stop Outsourcing Security Act, § 5(a)(1), S. 3203, 111th Cong. (2010).

¹²⁴ *Id.* § 3(1)(A).

¹²⁵ *Id.* § 3(1)(B).

¹²⁶ Compare S. 3203, 111th Cong. § 3(1)(A), with MONTREUX DOCUMENT, *supra* note 3, cmt. at 39.

¹²⁷ See Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16188-02 (Mar. 31, 2010) (setting forth a policy letter by the U.S. Office of Management and Budget seeking input on its proposed definition).

controlling intelligence interrogations; and administering certain detention facilities.¹²⁸ The impermissible security operations, which are highly detailed, include, *inter alia*, providing security in direct support of combat; operating in environments with a high likelihood of hostile fire; and moving resources through a hostile area as part of an offensive operation.¹²⁹ Additionally, contractors should not perform duties critical to combat operations, such as supply and maintenance of strategic weapon systems and other high level technological functions.¹³⁰ The U.S. Congress has also stated its “sense” that interrogation of any type of detainee is an inherently governmental function.¹³¹

Drawing from the ICRC’s examples, activities performed by PMSCs that constitute direct participation in hostilities include security of military infrastructure, gathering any intelligence for the military, and the use of weapons in combat operations.¹³² Commentators also have highlighted activities that constitute direct participation, including protection of personnel and military assets; staffing of checkpoints; interrogating suspects or prisoners; gathering tactical intelligence; participating in operations to rescue military personnel; engaging in tactical planning of operations; operating weapons systems; and, of course, participating in combat operations.¹³³

Building from these sources, it is possible to provide a pre-specified list of activities that would constitute contractor combatant activities:

¹²⁸ U.S. DEPT. OF DEFENSE, INSTRUCTION 1100.22: POLICY AND PROCEDURES FOR DETERMINING WORKFORCE MIX (Apr. 12, 2010).

¹²⁹ *Id.* at 19–20.

¹³⁰ *Id.* at 26.

¹³¹ Duncan Hunter National Defense Authorization Act, Pub. L. 110-417, § 1057, 122 Stat. 4611 (2008).

¹³² *See supra* notes 86–88 and accompanying text.

¹³³ *See, e.g.,* Faite, *supra* note 8, at 173; Gillard, *supra* note 77, at 526; Schmitt, *supra* note 21, at 536–45.

- Participation in combat operations;
- Security in direct support of combat operations;
- Security of military infrastructure or checkpoints;
- Security of military personnel;
- Supply and maintenance of strategic weapon systems;
- Interrogation of detainees or prisoners;
- Military intelligence gathering; and
- Tactical planning of operations.

This list may not be comprehensive and could be modified to cover additional duties that would constitute direct participation in hostilities. Again, this list of activities relates to the actions for which PMSCs *are contracted*. PMSCs hired to perform civilian tasks (those which do not fall under the rubric of contractor combatant activities) may still find themselves directly participating in hostilities, but should not be considered to have been hired to perform contractor combatant activities.

It bears noting that some of the above activities (such as participation in combat operations) should be considered inherently governmental functions, and it may be the case that a government cannot legitimately delegate such responsibility to a private actor.¹³⁴ For example, as Professor Nigel White observes, the Mercenary Working Group approaches regulating PMSCs with the view that “inherently governmental or state functions . . . should not be delegated or outsourced,” which is “a view that might not be shared by all governments, especially those with the most aggressive approaches to privatization.”¹³⁵ The reality, however, is that PMSCs are engaging in these activities.¹³⁶ Additionally, as examined in the section that

¹³⁴ Cf. MONTREUX DOCUMENT, *supra* note 3, at 14 (detailing that violations of IHL committed by PMSCs may be attributable to States if the PMSC was contracted to “carry out functions normally conducted by organs of the State”); Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-To-Be-Met Challenges for Law and Economics*, 96 CORNELL L. REV. 749, 772 (2011) (explaining broadly the concept of “inherently governmental functions” as those that cannot be permissibly delegated to private actors).

¹³⁵ See White, *supra* note 76, at 137.

¹³⁶ See *supra* notes 19–26 and accompanying text.

follows, because this proposal suggests treating PMSCs hired to perform contractor combatant activities as Article 4(A)(2) parties to the conflict, they would “belong” to the contracting State. Accordingly, if a government contracts a PMSC to engage in an inherently governmental function, under the strictures of IHL the PMSC would form part of the government’s forces.¹³⁷ There remain serious legal and normative questions over whether governments ever legitimately can hire PMSCs to engage in inherently governmental functions, but in light of the fact that they currently do, this proposal at least would provide an accountability “hook” between a PMSC and a contracting State. It may also, to some extent, mitigate concerns regarding the over-privatization of the use of force by directly linking private companies to contracting States. It merits emphasizing, therefore, that the above list of contractor combatant activities details activities that constitute direct participation in hostilities, not those that permissibly should be performed by PMSCs.

2. Implementation

Once defined, the next task is to delineate the mechanics. The first piece is to determine who should regulate and how regulation should be encouraged or enforced.

This proposal—like those of the ICRC and the UN Mercenary Working Group—recommends government-level regulation.¹³⁸ One commentator notes that focusing exclusively on government-level, or “formal,” regulation may not bring realistic regulatory results, and

¹³⁷ See, e.g., MONTREUX DOCUMENT, *supra* note 3, at 14 (contracting State liable for violations of IHL committed by members of organized armed forces).

¹³⁸ See PMSC DRAFT CONVENTION, *supra* note 8, art. 12 (“Each State Party shall develop and adopt national legislation to adequately and effectively regulate the activities of PMSCs.”); White, *supra* note 76, at 133 (“The international law obligations identified, and good practices proposed in the Montreux Document are mainly applicable to states.”).

suggests encouraging regulation by industry associations.¹³⁹ This point is well-taken, as the commentator notes that States often are not willing or able to effectively regulate PMSCs.¹⁴⁰ The concern, however, is not with the theory of governments regulating PMSCs, but with the reality of their unwillingness or inability to effectively do so.¹⁴¹ Among the potential regulators (industry, States, and international organizations), States remain best positioned to regulate PMSCs, as the entities that actually authorize, regulate, and contract them.¹⁴² While recognizing that additional levels of regulation by other actors may enhance the results of formal regulation, this paper endorses formal State-level regulation as the single best approach towards providing effective regulation.

To address the concern of States' unwillingness or inability to regulate PMSCs, there must be an incentive or mechanism to encourage or require States to regulate them. The two basic possibilities are to either incentivize States to unilaterally regulate PMSCs or to require them to do so through a binding treaty. Given the extant problems involving States' use of PMSCs alongside PMSC prevalence in theaters of conflict, it seems overly optimistic to simply incentivize unilateral State regulation by highlighting the benefits of more coherent regulation. An additional problem with unilateral State recognition is that international humanitarian law aims to regulate the conduct of all parties to a conflict. If one State unilaterally considers certain contractors as having combatant status, there is no guarantee that other States would recognize that status.

¹³⁹ Surabhi Ranganathan, *Between Complicity and Irrelevance? Industry Associations and the Challenge of Regulating Private Security Contractors*, 41 GEO. J. INT'L L. 303 (2010).

¹⁴⁰ *Id.* at 305.

¹⁴¹ Indeed, although calling for additional regulation by industry associations, Surabhi Ranganathan recognizes that States are the best situated to regulate PMSCs. *See id.* at 305–06.

¹⁴² *See White, supra note 76*, at 143 (“[E]ffective control and accountability of PMSCs is dependent on a system of national regulation and enforcement.”).

The better method is to require government regulation of PMSCs through international treaty, notwithstanding the difficulties in drafting, adopting, and ratifying any law of war treaty. Treaties have the power to bind ratifying States, and are of particular importance in governing the law of war, given the need for equal application of law among parties to a conflict.¹⁴³ The current draft treaty proposed by the Mercenary Working Group would categorically prohibit contractors from engaging in direct participation. This article’s proposal takes a fundamentally different approach by recognizing and attempting to regulate the direct participation of PMSCs in hostilities, rather than seeking to prohibit it. The PMSC Draft Convention, therefore, is an unlikely candidate to incorporate this proposal. Nonetheless, this article contends that it is more sensible to coherently regulate the direct participation in hostilities of PMSCs than to prohibit them outright from participating directly. Whether through a modification to the Mercenary Working Group’s draft treaty or a different treaty proposal, it is by way of “hard law” international treaty that governments should be required to regulate PMSCs.

The treaty provision must distinguish *which* governments are to regulate PMSCs. The PMSC Draft Convention distinguishes among home States (States where the PMSC are registered or incorporated), contracting States (States that directly contract with PMSCs for their services), States of operation, and third States (all other States).¹⁴⁴ The *Montreux Document* distinguishes similarly among contracting States, territorial States (States on whose territory PMSCs operate), home States, and all other States.¹⁴⁵ This suggested treaty provision would focus specifically on contracting States. It is contracting States that actually hire PMSCs and

¹⁴³ See, e.g., Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT’L L.J. 163, 165 (2011) (“The current system of the laws of war . . . builds on the principle of the equal application of the law—the uniform and generic treatment of all belligerents on the battlefield according to the same rules and principles.”).

¹⁴⁴ PMSC DRAFT CONVENTION, *supra* note 8, art. 2.

¹⁴⁵ MONTREUX DOCUMENT, *supra* note 3, at 11–14.

therefore have the most immediate control and responsibility over their presence and actions.¹⁴⁶ Perhaps for this reason, the *Montreux Document* provides the most detailed regulations for contracting States.¹⁴⁷ Additionally, host States are likely to be experiencing situations of conflict or post-conflict weakness, and home States likely have less incentives to regulate their own companies. Contracting States, in comparison, decide to hire PMSCs and pay them for their services. Without contracting States, PMSCs would not be present in situations of armed conflict. Contracting States also have a contractual relationship with PMSCs, which, as discussed below, provides a clearer nexus for purposes of international humanitarian law between the private company and the State. Imposing treaty-level obligations on contracting States is therefore the most direct, and potentially effective, method to regulate PMSCs.

The treaty provision would address both international and non-international armed conflict. In international armed conflict, the provision would require governments that employ PMSCs to engage in “contractor combatant activities” to insert a contractual provision requiring compliance with Article 4(A)(2). In non-international armed conflict, the treaty provision would recognize that in non-international armed conflict, hiring PMSCs to perform contractor combatant activities would be tantamount to ascribing them a continuous combat function as organized armed forces. Under IHL, States employing PMSCs to perform contractor combatant activities would not need to require compliance with Article 4(A)(2) (because Article 4 applies in situations of international, not non-international, armed conflict). Nonetheless, it would be better normatively if the treaty provision affirmatively required governments employing PMSCs to

¹⁴⁶ Cf. Ridlon, *supra* note 79, at 252 (noting that the United States could be held liable for the unlawful participation by contractors in hostilities); White, *supra* note 76, at 147 (“Given that it is the contracting state that is responsible for the presence of PMSCs on the territory of another state, it would be incongruous for it not to have due diligence obligations when both the home and host state do.”).

¹⁴⁷ See MONTREUX DOCUMENT, *supra* note 3, at 11–12.

perform contractor combatant activities in non-international conflict to comply with Article 4(A)(2). As examined in the next section, the compliance of PMSCs performing contractor combatant activities with Article 4(A)(2) results in numerous benefits. These benefits would be realized in any situation of armed conflict, whether international or non-international.

Accordingly, although the treaty should at least require compliance with Article 4(A)(2) in situations of international armed conflict, additionally requiring compliance in internal armed conflict would bring benefits during any conflict sufficient to fall within the province of IHL.

This proposal would be functional, both as a practical matter and under international humanitarian law. The practical burdens of mandating compliance with the requirements of Article 4(A)(2) are not inordinate. Most PMSC personnel already meet two of the four requirements: they are under responsible command and they carry arms openly.¹⁴⁸ The two requirements that the majority of personnel arguably do not meet are those of wearing a distinctive fixed sign and obeying the laws of war.¹⁴⁹ Although many PMSC personnel do not currently wear a distinctive fixed sign,¹⁵⁰ requiring them to do so would be simple: if a PMSC took a contract to engage in contractor combatant activities, the PMSC would need to provide its personnel with a distinctive uniform. Obeying the laws of war could be more difficult.

Practically, in light of the current realities of the industry and its employees, there is good reason to doubt the ability of some PMSC personnel to abide by the laws of war.¹⁵¹ Nonetheless, as a matter of international humanitarian law, requiring PMSCs to comply with Article 4(A)(2)

¹⁴⁸ See Geneva Convention III, *supra* note 31, art. 4(A)(2); Gillard, *supra* note 77, at 535; Ridlon, *supra* note 79, at 248–49; Schmitt, *supra* note 21, at 527–31.

¹⁴⁹ See Gillard, *supra* note 77, at 535; Ridlon, *supra* note 79, at 248–49; Schmitt, *supra* note 21, at 527–31.

¹⁵⁰ See, e.g., Gillard, *supra* note 77, at 535 (“[PMSC personnel] wear a variety of attire, ranging from military uniform-like camouflage gear . . . to civilian attire . . .”).

¹⁵¹ See generally Dickinson, *supra* note 111 (providing a fascinating yet unnerving examination of the organizational structure and institutional culture of PMSCs).

would need to be done by contracting governments.¹⁵² By contractually mandating law-of-war compliance, the chances that PMSCs abide by the laws of war increase, which would be a definite improvement over the state of the industry today.¹⁵³ Contracting States also could require evidence of past compliance or current training programs before awarding a bid to a PMSC.

Contractually mandating compliance with Article 4(A)(2) would also fulfill the Article’s prefatory requirement that the “other militia” “belong” to a Party to the conflict.¹⁵⁴ There would be a contractual relationship for the PMSC to perform combatant activities on behalf of a Party to the conflict (the government). The Party, through the contract, would also require the PMSC to abide by the laws of war. This direct contractual relationship should be sufficient to meet the “belong” requirement.¹⁵⁵

In sum, governments employing PMSCs to engage in contractor combatant activities should be required by treaty to contractually obligate those companies to fulfill the requirements of Article 4(A)(2) (definitely for situations of international armed conflict and ideally also in non-international armed conflict). Defining contractor combatant activities and requiring compliance are both feasible. The next section examines the benefits that would accrue as a

¹⁵² Note that the *Montreux Document* provides guidance for contracting States, which includes ensuring “that PMSCs that they contract and their personnel are aware of their [IHL] obligations and trained accordingly.” MONTREUX DOCUMENT, *supra* note 3, at 11.

¹⁵³ See Dickinson, *supra* note 111, at 380 (“[T]he employees of these companies seem to lack a strong sense of even what the applicable laws and norms are, let alone have any great commitment to them.”).

¹⁵⁴ See Geneva Convention III, *supra* note 31, art. 4(A)(2).

¹⁵⁵ Cf. Gillard, *supra* note 77, at 534 (detailing the “belong” requirement as requiring a “*de facto* relationship” or, in the words of the International Tribunal for the Former Yugoslavia, a “relationship of dependence and allegiance to these irregulars *vis-à-vis* that party to the conflict” (quoting Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶¶ 93–94 (July 15, 1999))).

result of recasting the status of some PMSC personnel as combatant, rather than as presumptively civilian.

B. BENEFITS

There are both practical and theoretical benefits to this approach. The practical benefits are numerous. For one, PMSCs would be able to comply more easily with the law of armed conflict: they would know at the commencement of a contract what kind of duties would constitute combat functions and could bid for or avoid such contracts accordingly. Moreover, this approach assuages the issues identified above with relying on direct participation by providing clarity on the front end. Because PMSC personnel hired to perform contractor combatant activities would be wearing distinctive fixed signs, all sides in the conflict would be able to recognize them as combatants. It would also be easier for parties in the conflict to differentiate among contractors hired to be combatants and contractors hired to be civilians. Additionally, PMSCs receiving contracts for such assignments would be required to abide by the law of war. Blackwater, for instance, used illegal exploding bullets¹⁵⁶—as a militia under Article 4(A)(2), it would have been clearly forbidden from using such ammunition. There would also be a stronger mechanism to ensure accountability, as the companies would have a contractual obligation to abide by the law of war. Even if obstacles remain to prosecuting individuals directly under the law of war, States would have a breach of contract claim against PMSCs that failed to comply with the laws of war.¹⁵⁷

¹⁵⁶ See Stop Outsourcing Security Act, S. 3203, 111th Cong. § 2(18) (2010) (congressional findings).

¹⁵⁷ Similarly, the PMSC Draft Convention “generally envisages that such remedies [for violations of IHL and human rights] will be found in the national systems of the contracting parties.” White, *supra* note 76, at 148.

This proposal also fits theoretically within existing international humanitarian law. First, by complying with Article 4(A)(2), PMSC personnel would receive the benefits of combatant status.¹⁵⁸ By the same token, they would avoid the potential for high levels of unprivileged belligerency. There is a strong argument that certain PMSCs would benefit more from the lawful ability to engage in hostilities than the lawful protection of civilian status. This assertion is especially true in situations in which the other side may lack the incentives or capability to abide by the laws of war and respect civilian status. Rather than needing legal protection before any attack, PMSCs might prefer legal protection for responding to an attack. A practical concern may be that granting PMSCs the legal entitlement to shoot would be unwise, especially in light of such incidents as the Nisour Square massacre.¹⁵⁹ Status as a belligerent, however, only grants the combatant the right to lawfully engage in hostilities pursuant to international humanitarian law.¹⁶⁰ Consequently, PMSC personnel would be obligated to abide by IHL in the same way that other parties to the conflict would be, which, unsurprisingly, would not allow them to lawfully open fire on a plaza of civilians.

Second, Article 4(A)(2) deals with groups, not individuals.¹⁶¹ As a result, PMSCs hired to perform contractor combatant activities should be examined at the company level, not the individual level.¹⁶² This distinction would allow for a categorical approach to determining combatant status at the moment of employing some PMSCs, rather than requiring a difficult post

¹⁵⁸ Cf. Ridlon, *supra* note 79, at 250.

¹⁵⁹ See, e.g., Johnston & Broder, *supra* note 2 (describing the Blackwater killing of seventeen civilians).

¹⁶⁰ See, e.g., David Glazier, *Playing by the Rules: Combating al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 999 (2009) (describing the aspects of “the combatant’s privilege”).

¹⁶¹ See Cameron, *supra* note 77, at 583; Schmitt, *supra* note 21, at 527.

¹⁶² Cf. Gillard, *supra* note 77, at 534–36 (examining the Article 4(A)(2) requirements as they would apply to companies).

hoc determination of direct participation at the individual level in every single case. Accordingly, for PMSCs hired to perform contractor combatant activities, there would be no need to split such hairs as whether the contractor was on duty.¹⁶³

Third, placing PMSCs under Article 4(A)(2) fits the framework of IHL. Article 4(A)(2) broadly covers “militias,” which would not include government employees.¹⁶⁴ It is intuitively a logical place to classify an organized group hired to participate directly in hostilities on the behalf of a party to the conflict, when that group does not fit the definition of a mercenary. Although one commentator highlights the historical purpose of Article 4(A)(2) as being at odds with placing PMSCs within it, the same commentator recognizes that “there is no obligation to restrict the interpretation of Article 4(A)(2) to its historical purpose.”¹⁶⁵ Indeed, given the limited number of treaties regulating armed conflict, it makes more sense to read Article 4(A)(2) functionally, rather than historically, in order to regulate a new presence in the theater of armed conflict.

Finally, such an approach would not eliminate the approach espoused in the *Montreux Document*. Many contractors would still be considered civilians and would still fall under the direct participation determination. This approach seeks instead to modify the ICRC’s position by placing a category of PMSCs—those hired to perform contractor combatant activities—presumptively onto the combatant side.

The strongest potential disadvantages to this approach are practical. States may be unable or unwilling to regulate PMSCs. Private military and security companies also are often politically powerful, and many operate multi-nationally, rendering effective State-level

¹⁶³ See *supra* note 95 and accompanying text.

¹⁶⁴ See Schmitt, *supra* note 21, at 527.

¹⁶⁵ Cameron, *supra* note 77, at 586.

regulation difficult.¹⁶⁶ A treaty provision may be difficult to draft, adopt, and ratify. Nonetheless, any suggested regulation of PMSCs will encounter similar practical difficulties. Additionally, this proposal chooses to regulate the existence of PMSCs in situations of armed conflict (an approach consistent with the *Montreux Document*, which has garnered significant governmental approval¹⁶⁷), rather than to prohibit broadly the scope of their participation (the position the Mercenary Working Group espouses in the PMSC Draft Convention). It is therefore a more likely candidate to achieve governmental acceptance and recognition, especially by countries in which the PMSC industry already is established.¹⁶⁸ This proposal aims not to solve all the problems resulting from the prevalence of PMSCs in situations of armed conflict, but rather to suggest a more nuanced and coherent form of regulating them under international humanitarian law.

CONCLUSION

In conclusion, private military and security companies strain the combatant-civilian dichotomy under international humanitarian law. In light of the ambiguity over their status, the general consensus is that the great majority of PMSC personnel should be presumed civilians. Consequently, they receive protection unless and until they directly participate in hostilities. The problems are that contractors regularly engage in activities that amount to direct participation,

¹⁶⁶ See, e.g., Stephanie M. Hurst, Note, “Trade in Force”: *The Need for Effective Regulation of Private Military and Security Companies*, 84 S. CAL. L. REV. 447, 450–51 (2011).

¹⁶⁷ Thirty-six States currently support the *Montreux Document*. See Swiss Federal Department of Foreign Affairs, *Participating States of the Montreux Document*, <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html> (last visited June 23, 2011).

¹⁶⁸ See White, *supra* note 76, at 139 (noting that trying to prohibit the outsourcing of force may be futile because “it may be that the horse has bolted in some countries, especially ones [like] the US and the UK, where the PMSC industry is well-developed and influential”).

direct participation provides an ephemeral line in a field where clear boundaries are necessary, and direct participation by civilian contractors in hostilities constitutes unprivileged belligerency.

Accordingly, a more practical and analytically satisfactory approach is to craft a list of “contractor combatant activities,” which identifies contractor activities that constitute direct participation in hostilities. If contracting States hire PMSCs to engage in contractor combatant activities, through a treaty provision the PMSC personnel will be presumed combatants and contracting States must ensure that such contractors abide by the requirements of Article 4(A)(2). The treaty provision would require compliance in international armed conflict and, ideally, in non-international armed conflict as well. This approach provides a workable line by which to more cleanly sever PMSC activities within the principle of distinction, and to allow for more effective regulation of their inevitable presence on and around the battlefield.