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

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RETHINKING THE REGULATION OF PRIVATE
MILITARY AND SECURITY COMPANIES UNDER
INTERNATIONAL HUMANITARIAN LAW

*Joseph C. Hansen**

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INTRODUCTION

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

Presumptively treating the vast majority of PMSC personnel as civilians, although consistent with a general IHL presumption in favor of civilian status,⁴ is overinclusive 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

1. See Mohamad-Mahmoud Ould Mohamedou, *The Nature and Characteristics of Contemporary Armed Conflict*, reprinted in PROTECTING HUMAN DIGNITY IN ARMED CONFLICT: SPEECHES AND PROCEEDINGS OF THE CONFERENCE ON OCCASION OF THE 140TH ANNIVERSARY OF THE NETHERLANDS RED CROSS 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 also 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 private security company (“PSC”) Blackwater’s shootings in Nisour Square, Iraq, had resulted in at least fourteen unjustified civilian deaths).

3. See, e.g., INT’L COMM. OF THE RED CROSS & DIRECTORATE OF INT’L LAW (SWITZ.), 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].

4. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 50, 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 to be a civilian.”).

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 subclassification 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. This approach carves out from civilian status a category of PMSC personnel that engage in combatant-type activities.

Part I of this Article 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. Such an 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*

The recent and meteoric rise in the presence of PMSCs 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 how international humanitarian law governs 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 subclassifying PMSCs in favor of a general definition of private contractors engaged in security or military operations, broadly construed.⁸

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 200 PMSCs operate worldwide.¹¹ Governments increasingly have used

5. For a thorough examination of many facets of private military and private security companies (“PMSCs”), see generally 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* (Int’l Peace Operations Ass’n, Working Paper, 2002), available at <http://www.hoosier84.com/0725brookspmcregs.pdf>.

8. Such an approach is consistent with the International Committee of the Red Cross’s (“ICRC”) 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.* at 38 cmt. (“[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.”); *see also* Alexandre Faite, *Involvement of Private Contractors in Armed Conflict: Implications Under International Humanitarian Law*, 4 DEF. STUD. 166, 168–69 (2004) (discussing the recent rise of private military companies (“PMCs”) in modern war zones). Additionally, the United Nations 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.” Rep. of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-Determination, 15th Sess., art. 2(a), at 24, U.N. Doc. A/HRC/15/25, Annex, Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council (July 2, 2010) [hereinafter Rep. on the Use of Mercenaries & PMSC Draft Convention].

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

10. *See 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

PMSCs in situations of armed conflict.¹² For example, in the first Gulf War there was an estimated 1 contractor per 50 to 100 soldiers.¹³ In 2003, contractors accounted for up to thirty percent 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 forty-eight percent of US personnel in Iraq and fifty-seven percent in Afghanistan.¹⁵ At the start of 2011, the US Department of Defense was employing over 87,000 contractors in Afghanistan and over 70,000 in Iraq.¹⁶ In Afghanistan, those numbers represent a ratio of 84 contractors for every 100 soldiers.¹⁷ In Iraq, the ratio is even higher: 129 contractors for every 100 soldiers.¹⁸

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

(2010) (“Roughly 200 [PMCs] operate worldwide.”). *But see* Anthony Bianco & Stephanie Anderson Forest, *Outsourcing War: An Inside Look at Brown & Root, the Kingpin of America’s New Military-Industrial Complex*, *BUS. WK.*, Sept. 15, 2003, at 68 (placing the number of PMCs at ninety in 2002).

12. *See Mercenaries: The Baghdad Boom*, *ECONOMIST*, Mar. 25, 2004, at 55 (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 1000 guards); *see also* Joshua Lipton, *DynCorp Dynamite on New High*, *FORBES.COM* (June 7, 2007, 10:42 AM), http://www.forbes.com/2007/06/07/dyncorp-defense-military-markets-equity-cx_jl_0607markets12.html.

13. *See* Nelson D. Schwartz, *The Pentagon’s Private Army*, *FORTUNE*, Mar. 17, 2003, at 100.

14. *See* Bianco & Forest, *supra* note 11; *Mercenaries: The Baghdad Boom*, *supra* note 12.

15. *See* MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40764, DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS 5 (2009).

16. *See* U.S. DEP’T OF DEF, CONTRACTOR SUPPORT OF U.S. OPERATIONS IN THE USCENCOM AREA OF RESPONSIBILITY, IRAQ, AND AFGHANISTAN (2011), *available at* http://www.acq.osd.mil/log/PS/docs/5A_paper/5A_Jan2011_final.doc [hereinafter USCENCOM CONTRACTORS].

17. *Id.*

18. *Id.*

19. *See* MONTREUX DOCUMENT, *supra* note 3, at 9; *see also Private Military and Security Companies: The Costs of Outsourcing War*, AMNESTY INT’L USA, <http://www.amnestyusa.org/our-work/issues/business-and-human-rights/private-military-and-security-companies> (last visited Jan. 12, 2012); *Q&A: Private Security in Iraq*,

engage directly in combat.²⁰ Others, although 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, providing convoy security, acting as security escorts of individuals traveling in unsecured areas in Iraq, and supplying personal security for high-ranking individuals.²⁴ They also perform the unarmed security 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 forces.²⁵ In Afghanistan, over 18,000 private security contractors hired by the US 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

BBC NEWS (May 27, 2004, 9:52 AM), 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 (Nov. 11, 2002, 3:56 PM), <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 also 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 (2005) (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 forty millimeter grenades, and resupplied its employees with its own helicopters).

22. BBC Q&A, *supra* note 19.

23. *Id.*

24. See JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 3 (2008).

25. *Id.*

26. USCENCOM CONTRACTORS, *supra* note 16.

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 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

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*, 87 INT'L REV. RED CROSS 175, 198 (2005) (listing as the very first rule of customary international humanitarian law ("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*.").

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 international humanitarian law).

30. As do many academic commentaries, for the sake of simplicity, this Article classifies IHL provisions on armed conflict into "international" and "internal" (or "noninternational"). 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).

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 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

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 Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277.

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

34. *Id.*

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, art. 50(1); see FRITS KALSHOVEN & LIESBETH ZEGVELD, INT'L COMM. OF THE RED CROSS, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 87 (3d ed. 2001) (describing the Protocol I distinction between combatants and civilians).

39. Protocol I, *supra* note 4, art. 50(1).

40. *Id.* art. 47(1).

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 that 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 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 noninternational 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

41. *Id.* art. 47(2); see 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 Armed Conflicts (Protocol II), 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 the conflict between “armed forces and dissident armed forces or other organized armed groups”).

44. Nils Melzer, Int’l Comm. of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT’L REV. RED CROSS 991, 1003 (2008); see 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 a case before the International Criminal Tribunal for the Former Yugoslavia 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).

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 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: “Organized 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 are

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. *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. INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949, at 619 (Yves Sandoz et al. eds., 1987).

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

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 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.⁵⁵ 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.⁵⁶

Following a large-scale endeavor to better clarify the concept, the ICRC released guidance on “direct participation in hostilities.”⁵⁷ Notwithstanding 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.⁵⁸ 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.”⁵⁹ 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.⁶⁰ The central fault line concerns whether the ICRC’s publication too heavily favors civilian protection at the expense of military efficiency and

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

55. See Boothby, *supra* note 54, at 759.

56. 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).

57. Melzer, *supra* note 44, at 991.

58. *Id.* at 995–96.

59. *Id.* at 996 (emphasis added).

60. See generally Forum, *Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 637 (2010) (containing four articles critiquing and one defending the ICRC’s approach).

necessity.⁶¹ This Article leaves to better hands the task of striking the proper balance between military necessity and civilian protection, but simply notes that satisfactorily defining “direct participation in hostilities” has proven to be an elusive target.

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.⁶² 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 ICRC, and the other by the United Nations (“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.⁶³ According to the document, regardless of their status under IHL (combatant or civilian), the personnel of PMSCs must comply with international humanitarian law.⁶⁴ As

61. See Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 6 (2010).

62. See Schwartz, *supra* note 13 (describing different duties of US contractors in the Middle East).

63. See Paul Seger & Philip Spoerri, *Foreword to MONTREUX DOCUMENT*, *supra* note 3, at 5.

64. *Id.* at 14.

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.⁶⁵

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.⁶⁶ 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.⁶⁷ According to the commentary, the third exception—otherwise lose their protection—refers to the concept of a “rebel soldier” in noninternational armed conflict.⁶⁸ 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.⁶⁹

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 noninternational armed conflict, will they be considered combatants.

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.⁷⁰ The Mercenary Working Group recently fulfilled this mandate by preparing a draft Convention on Private Military and Security Companies (“PMSC Draft

65. *Id.*

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

67. *See* Montreux Document, *supra* note 3, at 36 cmt.; *see also* Geneva Convention III, *supra* note 31, art. 4(A)(2).

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

69. *Id.* at 36 cmt.

70. *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., U.N. Doc. A/HRC/RES/7/21 (Mar. 28, 2008).

Convention”).⁷¹ The UN Human Rights Council considered the PMSC Draft Convention and voted thirty-two to twelve to establish a working group to consider elaborating a legally binding instrument to regulate PMSCs, based on the PMSC Draft Convention.⁷²

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.⁷³ 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.⁷⁴ 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 disproportionate harm, or provide training to accomplish any of the above.⁷⁵ 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.⁷⁶

This restriction is very broad on permissible PMSC activities, as it essentially prohibits PMSC personnel from

71. *See* Rep. on the Use of Mercenaries & PMSC Draft Convention, *supra* note 8.

72. *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, ¶ 4, at 2, 15th Sess., U.N. Doc. A/HRC/RES/15/26 (Oct. 7, 2010).

73. *See* Rep. on the Use of Mercenaries & PMSC Draft Convention, *supra* note 8, Annex ¶ PP 2, at 21 (recognizing the “principles and rules of international human rights and humanitarian law and their complementarity”).

74. *Id.* Annex art. 4(2), at 26; *id.* Annex art. 5(1), at 27; *id.* Annex arts. 7(1)–(2), at 28.

75. *Id.* Annex art. 8, at 28–29.

76. *Id.* Annex art. 9, at 29.

engaging in any combatant activities.⁷⁷ Moreover, by prohibiting direct participation in hostilities, the Draft Convention 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.⁷⁸ Based on the realities of the industry, the vast majority of contractors will be considered civilians because they are almost never formally incorporated⁷⁹ and will seldom meet all requirements of Article 4(A)(2).⁸⁰

There have been suggestions that PMSCs should be considered mercenaries under IHL.⁸¹ 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.⁸² The clearest

77. 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 HUMAN RIGHTS L. REV. 133, 135 (2011).

78. 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).

79. See, e.g., Cameron, *supra* note 78, 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 78, at 533 ("[T]here are likely to be very few instances in which the staff of PMCs/PSCs are incorporated into the armed forces . . .").

80. 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 78, at 583–85; Gillard, *supra* note 78, at 534–36.

81. 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, 17–26 (1999).

82. See, e.g., MONTREUX DOCUMENT, *supra* note 3, at 40 cmt.; see also, e.g., Ebrahim, *supra* note 11, at 210–12; Faite, *supra* note 8, at 169–70; 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 80, at 232.

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.⁸³ 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.⁸⁴

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 Mercenary 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 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.⁸⁵ 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.

83. Protocol I, *supra* note 4, art. 47(2)(a).

84. See Rep. on the Use of Mercenaries & PMSC Draft Convention, *supra* note 8, ¶ 38 ("PMSC personnel cannot usually be considered to be mercenaries . . .").

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

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.⁸⁶ 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.⁸⁷ 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 operation.⁸⁸ In contrast, direct participation does not include equipment maintenance, logistic services, guarding diplomatic missions or other civilian sites, or catering.⁸⁹ Nor does it include collection of intelligence of a nontactical nature or purchasing, smuggling, manufacturing, or maintaining weapons and equipment outside specific military operations.⁹⁰

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).”⁹¹ This difference can become even fuzzier in the context of resisting attack by an outlawed resistance group, since such groups teeter between combatant and civilian status;

86. See Melzer, *supra* note 44, at 995; 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.”).

87. Melzer, *supra* note 44, at 995–96.

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

89. *Id.* at 39 cmt.

90. Melzer, *supra* note 44, at 1008. *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 . . .”).

91. Melzer, *supra* note 44, at 1010.

consequently, engaging with the group could constitute direct participation in hostilities or it could constitute a police operation apart from hostilities.⁹² One can also imagine a thin line regarding collecting intelligence: What constitutes “nontactical” intelligence? What if the intelligence later becomes tactically useful?⁹³ 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.⁹⁴ Additionally, while the ICRC limits operating weapons to constitute direct participation only 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.⁹⁵ It also bears noting that fighting to attack and fighting to defend are legally insignificant distinctions in the IHL regime: both constitute direct participation.⁹⁶

Moreover, there is a clear temporal problem with determining direct participation of PMSC personnel. For example, Alexandre Faite, a legal advisor to the ICRC, highlights that on-duty contractors guarding military infrastructures may be directly participating, whereas off-duty contractors are not.⁹⁷ As civilians are protected from attack when not directly participating in hostilities, a contractor’s status could switch from combatant to civilian with the end of her five o’clock shift.

The real problem with these indeterminacies is that they exist on a constant continuum: they stretch from the general

92. See Cameron, *supra* note 78, at 589–90.

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

94. 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> (“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?”).

95. See MONTREUX DOCUMENT, *supra* note 3, at 37 cmt.; Ridlon, *supra* note 80, at 234.

96. See Cameron, *supra* note 78, at 588 (citing Article 49 of Protocol I to the Geneva Conventions); Gillard, *supra* note 78, at 540.

97. See Faite, *supra* note 8, at 174–75.

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.⁹⁸ Indeed, 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.⁹⁹

The Mercenary Working Group's PMSC Draft Convention favors a bright line in place of a presumption, prohibiting PMSC personnel from engaging in direct participation.¹⁰⁰ On its face, this approach appears simple. Unfortunately, it too suffers from serious defects. First, as a practical matter, the presence of contractors in the theater of armed conflict is a reality.¹⁰¹ As discussed, 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.¹⁰² Although this may be a laudable

98. 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 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.” (footnotes omitted)).

99. See Melzer, *supra* note 44, at 1013 (stating that due consideration must be given to the circumstances of each case); see also MONTREUX DOCUMENT, *supra* note 3, ¶ 24, at 14, 36 cmt. (suggesting a determination of PMSC personnel status on a case-by-case basis).

100. See Rep. on the Use of Mercenaries & PMSC Draft Convention, *supra* note 8, Annex art. 9, at 29.

101. See, e.g., Gillard, *supra* note 78, 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.”).

102. Cf. Ridlon, *supra* note 80, at 234 (discussing activities of private contractor personnel in Iraq and describing the likelihood that they will engage in confrontation with enemy forces).

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 direct participation could render unlawful any participation, even if the hostilities were brought to the PMSC personnel, rather than the other way around. Such defensive encounters are commonplace.¹⁰³ 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 has failed to resolve ambiguity (even if intentionally so), 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.¹⁰⁴ This uncertainty surrounding the exact meaning of “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.¹⁰⁵ High levels of ambiguity and uncertainty surrounding direct participation therefore make it difficult for PMSCs to comply with IHL.¹⁰⁶ Second, assuming 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

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

104. *See* 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”).

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

106. *See* Dworkin, *supra* note 94 (“[I]t remains troubling that the United States is putting people into conflict situations whose training, rules of engagement and legal accountability are unclear.”).

can lawfully target such 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 attack PMSC personnel lawfully, claiming direct participation in hostilities. At bottom, relying on direct participation to determine the status of PMSC personnel becomes a rigid exercise of formalism: in a great variety of situations, it is only through a difficult (and subjective) post hoc legal determination that parties to a conflict learn 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 classifying PMSC personnel as civilians: civilians have no right to engage in hostilities, so any participation would constitute unprivileged belligerency (or, in the Bush parlance, "unlawful enemy combatancy").¹⁰⁷ 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;¹⁰⁸ however, PMSCs frequently operate in areas where attacks by non-State actors unconcerned with the regime of IHL are predictable.¹⁰⁹ According to the ICRC: "[T]heir proximity to

107. *See id.* (stating that direct participation in hostilities by contractors would be legally analogous to Al Qaeda actions on an Afghanistan battlefield); Ridlon, *supra* note 80, 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."); *cf.* Faite, *supra* note 8, at 174 ("[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.").

108. *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).

109. *See* Dworkin, *supra* note 94 ("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

the armed forces and other military objectives may expose them more than other civilians to the dangers arising from military operations, including the risk of incidental death or injury.”¹¹⁰ In light of their proximity to sites of attack, it seems that PMSC personnel face a Catch-22: they are obligated contractually to defend against potential attack, but upon returning fire are directly participating in hostilities unlawfully. This concern is somewhat mitigated by the doctrine of self-defense, but its scope and application are highly dependent on circumstance and do not reach to all situations.¹¹¹

Beyond the theoretical prohibition of participating in hostilities lies a very tangible consequence: if captured, unlawful combatants do not receive prisoner-of-war status.¹¹² Indeed, they may even be tried for the simple act of participation, regardless of whether it violated international humanitarian law.¹¹³ One could contend that by agreeing to operate in conflict areas for substantial amounts of money,¹¹⁴ 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 subcurrent 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.¹¹⁵ A

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.”).

110. Melzer, *supra* note 44, at 1010.

111. See Ridlon, *supra* note 80, at 237–48.

112. See *id.* at 219.

113. See Gillard, *supra* note 78, at 531, 541. *But see* Schmitt, *supra* note 21, at 520–21 (contending that “the better position is that only the acts underlying direct participation are punishable”).

114. 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 reports of contractors earning several multiples of a military member’s salary).

115. See Joseph C. Hansen, Note, *Murder and the Military Commissions: Prohibiting the Executive’s Unauthorized Expansion of Jurisdiction*, 93 MINN. L. REV. 1871, 1882–83 (2009) (detailing how the Manual for Military Commissions criminalizes any action taken by an “unlawful combatant” as a violation of the law of war).

civilian contractor directly participating in hostilities, however, would also be an unlawful combatant.¹¹⁶ 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 observed, “voluntarily creating a pool of ‘good’ but potentially ‘unlawful combatants’ while simultaneously condemning other (non-private sector) civilian participants in hostilities verges on hypocrisy.”¹¹⁷ 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. Even if they seek to comply with the strictures of IHL, they may not be able to, as determining direct participation is decidedly difficult.¹¹⁸ The same goes for other parties who may be unable to distinguish PMSC personnel from soldiers.¹¹⁹

The result is baffling: correctly categorizing the great majority of PMSC personnel under international humanitarian

116. See Ridlon, *supra* note 80, at 233.

117. Cameron, *supra* note 78, at 594.

118. 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.”).

119. Michael Schmitt recounts 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.77.

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.¹²⁰ Second, it flips the problem of considering them to be presumptively civilians, as either approach (presumptively combatant or presumptively civilian) is overinclusive: 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 multifaceted 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 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, Part III proposes the terminology of “contractor combatant activities,” a new subclassification within PMSCs. States that hire PMSCs to perform “contractor

120. See *supra* Part I.C.

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.¹²¹ In comparison, in noninternational 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.”¹²² PMSC personnel assuming support functions would not qualify, but those whose duties constitute continuous participation would.¹²³

The inquiry in international armed conflict is strictly formal, and in noninternational armed conflict it is functional. Even in noninternational armed conflict, however, the functional inquiry turns upon a determination of “direct participation,” which, as examined above, can be 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.¹²⁴ The functional noninternational armed conflict inquiry seems unworkable as a practical matter.¹²⁵

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

122. Melzer, *supra* note 44, at 1007.

123. *Id.* at 1007–08; see Melzer, *supra* note 37, at 890–91 (explaining that a private contractor hired to defend a military objective assumes a continuous combat function).

124. The formal versus functional interpretation of IHL is a value judgment that varies depending on the commentator. To remain relevant, IHL must be interpreted functionally. Cf. Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of*

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”

If PMSC personnel are hired to engage in prespecified activities (“contractor combatant activities”) before entering a conflict zone (one where the government has authorized the use of force), 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 US Senate bill, the Stop Outsourcing Security Act, which has withered on the vine twice in the Subcommittee on Armed Services.¹²⁶ The bill would require the “transition away from the use of private contractors for mission critical or emergency essential functions . . . in all conflict zones in which Congress has authorized the use of force.”¹²⁷ The bill defines those functions as “activities for which continued performance is considered essential to support combat systems and operational activities” or whose interruption “would

War, 95 VA. L. REV. 1745, 1759–65 (2009) (describing the spectrum of interpretations of IHL in light of terrorism and the US war on terror).

125. *See supra* Part II.A (analyzing the difficulties of determining which actions are considered direct participation, and demonstrating how such a determination frequently can be reached only after a post hoc legal analysis).

126. *See* Stop Outsourcing Security Act of 2010, S. 3023, 111th Cong.; Stop Outsourcing Security Act of 2007, S. 2398, 110th Cong.

127. S. 3023 § 5(a)(1).

significantly affect . . . a military operation.”¹²⁸ Such activities include protective services, security advice and planning, military and police training, repair and maintenance for weapons systems, prison administration, interrogation, and intelligence.¹²⁹ The definition in the Outsourcing Security bill is too broad for purposes of IHL, as it goes well beyond direct participation in hostilities.¹³⁰ Nonetheless, it provides an example of separating the work performed by PMSCs into different categories.

Another source of guidance is the US 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.¹³¹ Along these lines, the 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 controlling intelligence interrogations; and administering certain detention facilities.¹³² 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.¹³³ Additionally, contractors should not “perform[] duties critical to combat operations,” such as supply and maintenance of strategic

128. *Id.* § 3(1)(A).

129. *Id.* § 3(1)(B).

130. Compare S. 3023 § 3(1)(A) (defining PMSC direct participation to include essential “support [for] combat systems and operational activities”), with MONTREUX DOCUMENT, *supra* note 3, at 39 cmt. (noting that PMSCs are considered civilians where they provide “support functions”).

131. See Notice of Proposed Policy Letter on Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16188-02 (Mar. 31, 2010) (providing notice of a policy letter by the US Office of Management and Budget with regard to work that must be reserved for performance by federal government employees and seeking input on its proposed definition of “inherently governmental function”).

132. U.S. DEP’T OF DEFENSE, INSTRUCTION NO. 1100.22: POLICY AND PROCEDURES FOR DETERMINING WORKFORCE MIX 17-23 (2010).

133. *Id.* at 19-20.

weapon systems and other high level technological functions.¹³⁴ The US Congress has also stated its “sense” that interrogation of any type of detainee is an inherently governmental function.¹³⁵

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.¹³⁶ 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.¹³⁷

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

- 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

134. *Id.* at 26.

135. Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 1057(1), 122 Stat. 4356, 4611 (2008).

136. See Melzer, *supra* note 44, at 1017 n.96, 1032; MONTREUX DOCUMENT, *supra* note 3, at 37 cmt.; see also *supra* notes 86–88 and accompanying text.

137. See, e.g., Faite, *supra* note 8, at 173–74; Gillard, *supra* note 78, at 526; Schmitt, *supra* note 21, at 536–45.

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.¹³⁸ 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. This is . . . a view that might not be shared by all governments, especially those with the most aggressive approaches to privatisation.”¹³⁹ The reality, however, is that PMSCs are engaging in these activities.¹⁴⁰ Additionally, as examined in the following Section, 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.¹⁴¹ There remain serious legal and normative questions over whether governments 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 overprivatization 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

138. See, e.g., MONTREUX DOCUMENT, *supra* note 3, at 12 (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).

139. See White, *supra* note 77, at 137.

140. See *supra* notes 19–26 and accompanying text (describing the type of activities that PMSCs engage in today).

141. See, e.g., MONTREUX DOCUMENT, *supra* note 3, at 12 (stating that contracting States are liable for violations of IHL committed by members of organized armed forces).

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 Mercenary Working Group—recommends government-level regulation.¹⁴² One commentator notes that focusing exclusively on government-level, or “formal,” regulation may not bring realistic regulatory results, and suggests encouraging regulation by industry associations.¹⁴³ This point is well-taken, as the commentator explains that States often are not willing or able to effectively regulate PMSCs.¹⁴⁴ 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.¹⁴⁵ Among the potential regulators (industry, States, and international organizations), States, as entities that actually authorize, regulate, and contract PMSCs, remain best-positioned to regulate them.¹⁴⁶ While recognizing that additional levels of regulation by other actors may enhance the results of formal regulation, this Article endorses formal State-level regulation as the single best approach towards providing effective regulation.

To address the concern of State unwillingness or inability to regulate PMSCs, there must be an incentive or mechanism to encourage or require State regulation. The two basic

142. See Rep. on the Use of Mercenaries & PMSC Draft Convention, *supra* note 8, Annex art. 12, at 30 (“Each State Party shall develop and adopt national legislation to adequately and effectively regulate the activities of PMSCs.”); White, *supra* note 77, at 135 (“The international law obligations identified, and good practices proposed in the Montreux Document are mainly applicable to states . . .”). See generally MONTREUX DOCUMENT, *supra* note 3.

143. Surabhi Ranganathan, *Between Complicity and Irrelevance? Industry Associations and the Challenge of Regulating Private Security Contractors*, 41 GEO. J. INT’L L. 303, 305–06 (2010).

144. *Id.* at 305.

145. Indeed, although calling for additional regulation by industry associations, Surabhi Ranganathan recognizes that States are best-situated to regulate PMSCs. See *id.* at 305–06, 309.

146. See White, *supra* note 77, at 143 (“[E]ffective control and accountability of PMSCs is dependent on a system of national regulation and enforcement.”).

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 State 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. 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.¹⁴⁷ The current draft treaty proposed by the Mercenary Working Group would categorically prohibit contractors from engaging in direct participation.¹⁴⁸ 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 establish a blanket prohibition on direct participation. Whether through a modification to the Mercenary Working Group's draft treaty or a different treaty proposal, it is by way of "hard law" in the form of an 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 PMSCs are

147. 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.").

148. Rep. on the Use of Mercenaries & PMSC Draft Convention, *supra* note 8, Annex art. 2(i), at 25.

registered or incorporated), contracting States (States that directly contract with PMSCs for their services), States of operations (in which PMSCs operate), and third States (all other States).¹⁴⁹ The Montreux Document distinguishes similarly among contracting States, territorial States (States on whose territory PMSCs operate), home States, and all other States.¹⁵⁰ This suggested treaty provision would focus specifically on contracting States. It is contracting States that actually hire PMSCs and therefore have the most immediate control and responsibility over their presence and actions.¹⁵¹ Perhaps for this reason, the Montreux Document provides the most detailed regulations for contracting States.¹⁵² Additionally, host States are likely to be experiencing situations of conflict or postconflict 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 most effective, method to regulate PMSCs.

The treaty provision would address both international and noninternational 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 noninternational armed conflict, the treaty provision would recognize that hiring PMSCs to perform contractor combatant activities would be tantamount to ascribing them a continuous combat function as organized

149. *Id.* Annex art. 2(j)–(m), at 25.

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

151. *Cf.* Ridlon, *supra* note 80, at 252 (noting that the United States could be held liable for the unlawful participation by contractors in hostilities); White, *supra* note 77, 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.”).

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

armed forces. Under IHL, States employing PMSCs to perform contractor combatant activities in situations of noninternational armed conflict would not need to require compliance with Article 4(A)(2) because Article 4 applies only in situations of international armed conflict. Nonetheless, it would be normatively better if the treaty provision affirmatively required governments employing PMSCs to perform contractor combatant activities in noninternational conflict to comply with Article 4(A)(2). As examined in the next Section, the compliance of PMSCs performing contractor combatant activities within the meaning of Article 4(A)(2) results in numerous benefits. These benefits would be realized in any situation of armed conflict, whether international or noninternational. 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.¹⁵³ 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.¹⁵⁴ Although many PMSC personnel do not currently wear a distinctive fixed sign,¹⁵⁵ requiring them to do so

153. See Geneva Convention III, *supra* note 31, art. 4(A)(2)(a), (c); Gillard, *supra* note 78, at 535; Ridlon, *supra* note 80, at 248–49; Schmitt, *supra* note 21, at 527–31.

154. See Gillard, *supra* note 78, at 535 (determining that PMSC personnel wear a variety of attire making them difficult to identify, and that although there have not been reports of systemic violations of the laws of war, there have been instances in which companies have been accused of serious violations); Schmitt, *supra* note 21, at 527–31 (reaching a similar conclusion to Gillard); *cf.* Ridlon, *supra* note 80, at 227, 248–49 (observing that although PMSC fail to distinguish themselves as required by the Convention, it is difficult to discern whether personnel would comply with the law of war: “Most of the requirements [of the laws and customs of war] . . . would likely be met by the PMFs so long as their rules of engagement were not flagrantly illegal and so long as their personnel act with restraint”).

155. See, *e.g.*, Gillard, *supra* note 78, at 535 (“[PMSC personnel] wear a variety of attire, ranging from military uniform-like camouflage gear . . . to civilian attire . . .”).

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.¹⁵⁶ Nonetheless, as a matter of international humanitarian law, requiring PMSCs to comply with Article 4(A)(2) would need to be done by contracting governments.¹⁵⁷ Contractually mandating law-of-war compliance would increase the chances that PMSCs abide by the laws of war, which would be a definite improvement over the state of the industry today.¹⁵⁸ 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.¹⁵⁹ There would be a contractual relationship for the PMSC to perform combatant activities on behalf of a Party to the conflict (the government). 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.¹⁶⁰

156. See generally Dickinson, *supra* note 114 (providing a fascinating yet unnerving examination of the organizational structure and institutional culture of PMSCs).

157. See MONTREUX DOCUMENT, *supra* note 3, at 11 (indicating that contracting States have an obligation to "ensure that PMSCs that they contract and their personnel are aware of their [IHL] obligations and trained accordingly").

158. See, e.g., Dickinson, *supra* note 114, 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.").

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

160. See Gillard, *supra* note 78, at 534 (asserting that "a contract to perform certain services on behalf of a state party to a conflict" easily meets this requirement); *cf. id.* (detailing the "belong" requirement as requiring a "*de facto* relationship" (quoting INT'L COMM. OF THE RED CROSS, COMMENTARY: III, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 57 (Jean S. Pictet ed., A.P. de Henry trans., 1960)); see also *id.* (noting that the provision requires, in the words of the International Tribunal for the Former Yugoslavia, a "relationship of dependence and allegiance of these irregulars *vis-à-vis* that party to the conflict" (quoting Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶¶ 93-94 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999))).

In sum, treaty provisions should require governments employing PMSCs to engage in contractor combatant activities 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 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 bullets¹⁶¹—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

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

contract claim against PMSCs that failed to comply with the laws of war.¹⁶²

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.¹⁶³ By the same token, they would avoid the potential for high levels of unprivileged belligerency because they would have the lawful ability to directly participate in hostilities. There is also a strong argument that certain PMSCs would benefit more from the lawful ability to engage in hostilities than from the 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 (civilian) protection before any attack, PMSCs might prefer legal (combatant) 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.¹⁶⁴ Status as a belligerent, however, only grants the combatant the right to lawfully engage in hostilities pursuant to international humanitarian law.¹⁶⁵ Consequently, PMSC personnel would be obligated to abide by IHL in the same way as other parties to the conflict, 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.¹⁶⁶ As a result, PMSCs hired to perform contractor

162. 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 77, at 148; *see id.* at 143 (explaining that because “effective control and accountability of PMSCs” demands “national regulation The Draft Convention requires state parties to ‘establish a comprehensive domestic regime of regulation and oversight over the activities in its territory of PMSCs’”).

163. *See* Ridlon, *supra* note 80, at 250 (observing that Article 4(A)(2) classifies noncomplying parties as civilians, a classification that brings with it the risk of being considered illegal combatants under the Conventions).

164. *See* Johnston & Broder, *supra* note 2 (describing how Blackwater security personnel shot and killed seventeen Iraqi civilians at Nisour Square).

165. *See, e.g.*, David Glazier, *Playing by the Rules: Combating al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 999–1000 (2009) (describing “the combatant privilege”).

166. *See* Cameron, *supra* note 78, at 583; Schmitt, *supra* note 21, at 527.

combatant activities should be examined at the company level, not the individual level.¹⁶⁷ 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 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 over issues such as whether the contractor was on-duty.¹⁶⁸

Third, placing PMSCs under Article 4(A)(2) is consistent with the IHL framework. Article 4(A)(2) broadly covers “militias,” which does not include government employees.¹⁶⁹ It is an intuitively logical classification of 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.”¹⁷⁰ 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 method 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 multinationally, rendering effective

167. See Gillard, *supra* note 78, at 535 (examining the Article 4(A)(2) requirements as they would apply to companies).

168. See *supra* note 97 and accompanying text.

169. See Geneva Convention III, *supra* note 31, art. 4(A)(2); Schmitt, *supra* note 21, at 527.

170. See Cameron, *supra* note 78, at 586.

State-level regulation difficult.¹⁷¹ 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 approval),¹⁷² 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 more likely to achieve governmental acceptance and recognition, especially by countries in which the PMSC industry already is established.¹⁷³ 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

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. Yet there are serious deficiencies with this categorization: contractors regularly engage in activities that amount to direct participation, 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.

171. 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).

172. Thirty-eight States currently support the Montreux Document. See *Participating States of the Montreux Document*, SWISS FED. DEP’T FOREIGN AFF., <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html> (last updated Dec. 6, 2011).

173. See White, *supra* note 77, at 139 (noting that trying to prohibit the outsourcing of security services may be futile because “it may be that the horse has bolted in some countries, especially . . . the US and the UK, where the PMSC industry is well-developed and influential”).

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