

7-1-2012

# Silent Partners: Private Forces, Mercenaries, and International Humanitarian Law in the 21st Century

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## Recommended Citation

Steven R. Kochheiser, *Silent Partners: Private Forces, Mercenaries, and International Humanitarian Law in the 21st Century*, 2 U. Miami Nat'l Security & Armed Conflict L. Rev. 86 (2012)

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## ARTICLE

### Silent Partners: *Private Forces, Mercenaries, and International Humanitarian Law in the 21<sup>st</sup> Century*

Steven R. Kochheiser\*

#### ABSTRACT

In response to gritty accounts of firefights involving private forces like Blackwater in Iraq and Afghanistan, many legal scholars have addressed the rising use of private forces—or mercenaries—in the 21<sup>st</sup> century under international law. Remarkably, only a few have attempted to understand *why* these forces are so objectionable. This is not a new problem. Historically, attempts to control private forces by bringing them under international law have been utterly ineffective, such as Article 47 of Additional Protocol II to the Geneva Conventions. In *Silent Partners*, I propose utilizing the norm against mercenary use as a theoretical framework to understand at what point private forces become objectionable and then draft a provision of international humanitarian law to effectively control their use. Such a provision will encourage greater compliance with international law by these forces and reduce their negative externalities by ensuring legitimate control and attachment to a legitimate cause.

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## I. PRIVATE FORCES

Considered a “silent partner” by Congressional leaders, private contractors became more visible in 2004 when combating a fledgling insurgency by “racing around Iraq in armored cars” and even forming diplomatic alliances with local clans.<sup>1</sup> The extensive role of private force in the reconstruction of Iraq was graphically brought to the attention of the public and policymakers after four Blackwater employees were killed and their bodies mutilated by an angry crowd in Fallujah.<sup>2</sup> As these silent partners started to directly engage in intense firefights with insurgents, legal scholars began debating the status of these private forces under international law.<sup>3</sup>

By 2007, there were nearly 180,000 private contractors in Iraq, approximately 20-30,000 of which were armed, supporting 165,000 U.S. soldiers.<sup>4</sup> In September of that year, the controversy regarding the use of private contractors reached its pinnacle after Blackwater forces guarding a State Department convoy opened fire in Nisour Square in Baghdad and, according to an FBI investigation, killed fourteen civilians without cause.<sup>5</sup> As U.S. forces gradually withdraw from Iraq, an important legacy of this conflict and the broader War on Terror will undoubtedly be the controversial presence of private force on the battlefield. A critical component of this legacy is understanding the challenges faced when attempting to construe international humanitarian law (IHL) to deal with the growing role of private forces in international armed conflicts.

It is important to note at the outset that some disagreement exists regarding whether the current armed conflicts in Iraq and Afghanistan are of an international character. If a conflict is not of an international character, then only the minimum provisions of the Geneva Conventions Common Article 3 apply.<sup>6</sup> While the Department of Defense considers the Geneva Conventions to apply in their entirety to the conflicts in Iraq and Afghanistan as international armed conflicts pursuant to the Common Article 2, some scholars disagree with this view.<sup>7</sup> These scholars argue that after sovereignty was turned over to the governments of Iraq and Afghanistan, the occupations officially ended and the conflicts were no longer of an international character between two parties to the Geneva Conventions.<sup>8</sup> Rather, the conflicts in Iraq and Afghanistan now involve the United States aiding sovereign governments to fight a domestic insurgency, not another nation. Therefore, only the minimum provisions of Common Article 3 apply and possibly Additional Protocol II.<sup>9</sup>

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<sup>1</sup> David Barstow, *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES, Apr. 19, 2004, at A1, available at <http://www.nytimes.com/2004/04/19/world/security-companies-shadow-soldiers-in-iraq.html?pagewanted=all&src=pm> (quoting former Senate Armed Services Committee Chairman Jeff Warner as describing private security contracts as “silent partners in this struggle.”).

<sup>2</sup> Peter Singer, *Warriors for Hire in Iraq*, SALON.COM (Apr. 15, 2004), <http://archive.salon.com/news/feature/2004/04/15/warriors/print.html> (describing the general lack of awareness by the policymakers and even senior Pentagon officials of the growing role of private force in Iraq).

<sup>3</sup> Oliver R. Jones, *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, 24 CONN. J. INT’L L. 239, 241–42 (2009) (discussing the struggle by academics to deal with rising use of private forces in spite of a “vacuum of law that only serves to confirm accusations that international law is too weak to deal with the problem.”).

<sup>4</sup> Michael Hurst, *After Blackwater: A Mission-Focused Jurisdictional Regime for Private Military Contractors During Contingency Operations*, 76 GEO. WASH. L. REV. 1308, 1310 (2008).

<sup>5</sup> *Id.* at 1308–09; David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, at A1, available at <http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?pagewanted=all>.

<sup>6</sup> Ellen L. Frye, *Private Military Firms in the New World Order: How Redefining “Mercenary” Can Tame the “Dogs of War,”* 73 FORDHAM L. REV. 2607, 2625 (2005).

<sup>7</sup> See Captain Daniel P. Ridlon, *Contractors or Illegal Combatants? The Status of Armed Contractors in Iraq*, 62 A.F. L. REV. 199, 205 n.30 (2008) (discussing a Department of Defense General Counsel memorandum that concluded that the conflicts in Iraq and Afghanistan continued to remain international armed conflicts as ongoing hostilities are in the “transition, or stability operations” phase).

<sup>8</sup> *Id.*, at 204–07.

<sup>9</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609 (Additional Protocol II supplements the

One could certainly argue, however, that these conflicts retain their international character as the *de facto* occupations that followed the initial invasions and continue to persist uninterrupted with tens of thousands of foreign soldiers occupying both nations.<sup>10</sup> Still, scholars do not question the importance of considering the status of the private forces in Iraq and Afghanistan under the Geneva Conventions and IHL, as these forces are part of a “trend toward increasing privatization” that will undoubtedly be present in future international armed conflicts.<sup>11</sup> Thus, while the status of the conflicts in Iraq and Afghanistan under the Geneva Conventions is debatable, analyzing the use of private force in these conflicts is relevant when applying the theoretical framework of the norm against mercenarism to current IHL provisions as well as proposals that seek to ban or regulate the use of private force.<sup>12</sup>

The term “private force” encompasses what might traditionally be thought of as “mercenaries.”<sup>13</sup> The use of the term mercenary is problematic when used to describe modern private military and security firms due in part to its negative connotation, but more importantly because it is a legal term of art describing a group that may be subject to criminal sanctions.<sup>14</sup> Because this article will focus on these firms, the term “private force,” as described in Section II, will be used throughout. The term “mercenary” will only appear when used in a historical sense, predating its use as a legal term of art, and when used in IHL provisions or academic theories that provide a specific definition for the term.

## II. BENDING THE SPEAR: EMERGENCE OF THE PRIVATE MILITARY INDUSTRY AND THE NORM AGAINST MERCENARY USE TO DEFINE “MERCENARY”

Private force has maintained a controversial presence on the battlefield for millennia. Biblical references from the sixth century BC by Jeremiah described mercenaries in Egypt as “fattened calves” that “will turn and flee together, they will not stand their ground, for the day of disaster is coming upon them, the time for them to be punished.”<sup>15</sup> Over time, a norm against the use of private force evolved and it is said that “[f]or as long as there have been mercenaries, there has been a norm against mercenary use.”<sup>16</sup> Despite this norm against mercenarism, IHL has been ineffective in proscribing the use of these controversial forces. Definitions of mercenary conduct in IHL are inflexible and focus on the nationality and motivation of fighters as the two primary components.<sup>17</sup>

The modern private force industry emerged in the early 1990s after the downsizing of post-Cold War militaries created an increased supply of former soldiers and “disengagement from select zones of influence (particularly Africa)” increased the demand for private forces.<sup>18</sup> The use of private force

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protections provided by Common Article 3 in non-international armed conflicts. However, the application of Protocol II is restricted to armed conflicts between a contracting party’s armed forces and insurgent groups that are “under responsible command” and exercise control over part of the party’s territory from which it is able to launch military operations. While certain periods during the conflicts in Iraq and Afghanistan might satisfy this definition, neither the United States nor Iraq are parties to Protocol II and Afghanistan only recently acceded to Protocol II in 2009.) [hereinafter Protocol II]; Ridlon, *supra* note 7, at 206–07.

<sup>10</sup> Convention (III) relative to the Treatment of Prisoners of War, Geneva, art. 2, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva III] (stating that “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”).

<sup>11</sup> Ridlon, *supra* note 7, at 207.

<sup>12</sup> See 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, 221–22 (2008) (using the term “mercenarism” to generally describe the use of mercenaries).

<sup>13</sup> Ridlon, *supra* note 7, at 208–09.

<sup>14</sup> *Id.*

<sup>15</sup> *Jeremiah* 46:21 (New International Version).

<sup>16</sup> SARAH PERCY, *MERCENARIES: THE HISTORY OF A NORM IN INTERNATIONAL RELATIONS* 1 (2007).

<sup>17</sup> *Id.* at 52.

<sup>18</sup> Gaston, *supra* note 12, at 224 (stating that “[g]lobalization expanded opportunities for the growth of transnational business sectors like the private security industry, while neo-liberal trends toward outsourcing government functions to the private

allowed policymakers to avoid politically unpopular decisions, like instituting a draft, and to distance themselves from any mistakes made during a conflict.<sup>19</sup> The private force industry “seems to have largely succeeded in portraying itself as a new phenomenon to which the old rules regarding mercenaries do not apply.”<sup>20</sup> Thus, using the theoretical framework of the norm against mercenary use to analyze the modern emergence of private force is an important initial step before evaluating IHL provisions and proposals purporting to ban or regulate its use.

### A. THE NORM AGAINST MERCENARISM

Norms in international law result from a sense of constrained behavior or legal obligation that “is usually regarded as reaching the status of customary international law only when it is reflected by state practice and *opinio juris*, or the belief that a norm is accepted as law.”<sup>21</sup> The norm against mercenarism historically comprises two elements: concerns regarding legitimate control and the notion of martial honor connected to serving a cause.<sup>22</sup> Mercenaries are widely regarded as morally problematic because they operate outside the “legitimate, authoritative control” of a sovereign and because they are motivated by “selfish, financial reasons as opposed to ... some kind of larger conception of common good” or “cause.”<sup>23</sup> The two elements that comprise the norm against mercenarism are legitimate control and degree of attachment to a cause. These elements are the product of two gradual shifts away from the use of mercenaries.<sup>24</sup>

From the twelfth to seventeenth centuries, mercenaries were brought under “legitimate control” of sovereigns and thereby became less objectionable.<sup>25</sup> However, late in this same period and continuing into the nineteenth century, the rise of the nation-state cast mercenaries in an increasingly negative light. Many considered them to be immoral because they were not fighting for an “appropriate cause.”<sup>26</sup> It was generally believed that only citizens under control of and fighting for the state had the proper motivation to wage war.<sup>27</sup> Writing in the sixteenth century, Machiavelli described this attitudinal shift when he provided a normative analysis of mercenary use that illustrated both the legitimate control and appropriate cause elements. Machiavelli described the sovereign as fulfilling his duty to defend the state by using his own subjects in defense of the state as they are best motivated to fight for the common cause of the state.<sup>28</sup> He stated that “when arms have to be resorted to . . . then the prince ought to go in person and perform the duty of a captain; the republic has to send its citizens . . . [a]nd experience has shown princes and republics, single-handed, making the greatest progress, and mercenaries doing nothing except damage . . . .”<sup>29</sup> This view is indicative of the shift of both elements of the norm against mercenary use during the rise of the nation-state.

Despite the rise of nation-states and citizen armies, mercenaries continued to supplement militaries.<sup>30</sup> In the nineteenth century, however, the use of mercenaries suddenly went “out of style.”<sup>31</sup> Scholars struggle

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sector rationalized the outsourcing of military and security functions that previously had been guarded as the exclusive province of the state.”)

<sup>19</sup> Zoe Salzman, *Private Military Contractors and the Taint of a Mercenary Reputation*, 40 N.Y.U. J. INT’L L. & POL. 853, 869 (2008).

<sup>20</sup> *Id.* at 856.

<sup>21</sup> PERCY, *supra* note 16, at 18–19.

<sup>22</sup> *Id.* at 1.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 59, 65–66.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 66; *see also* Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT’L L. J. 1, 6 (1999) (discussing the ideology of the use of military force as the “preeminent cultural construction of ‘appropriate’ violence”).

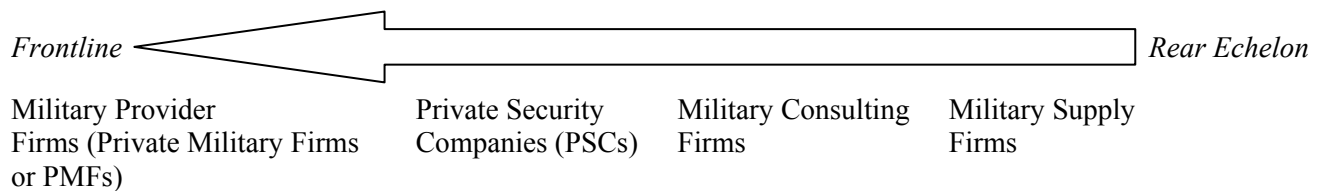
<sup>28</sup> NICOLO MACHIAVELLI, THE PRINCE, Chapter XII, *available at*: <http://www.fordham.edu/halsall/basis/machiavelli-prince.html>.

<sup>29</sup> *Id.*

<sup>30</sup> Michael Scheimer, *Separating Private Military Companies from Illegal Mercenaries in International Law*, 24 AM. U. INT’LL. REV. 609, 615 (2009).

with this phenomenon as up until that time “states had successfully *controlled* the mercenary problem.”<sup>32</sup> Greater control over mercenaries seemed to at least partially satisfy the legal obligation underlying the norm against mercenarism for legitimate control over force. Yet in spite of this control, a norm against mercenarism emerged.<sup>33</sup> During the period from the Crimean War to the 1960s, the norm against mercenarism was so absolute that the reemergence of mercenaries in multiple African civil wars following decolonization was extremely controversial and unsettling.<sup>34</sup> In response, numerous attempts were made under international law to limit or prohibit their use.<sup>35</sup> The absence of mercenaries during this period and the negative response to their return serves as evidence of the commonly shared sense that a legal obligation against mercenarism underlies this norm. To better understand how the norm against mercenarism might influence the application of IHL to private forces, one must first analyze the range of services and types of firms that have recently emerged.

### B. PETER SINGER’S “TIP OF THE SPEAR TYPOLOGY”



Many scholars rely on Peter Singer’s “tip of the spear typology” which provides a linear classification of firms in the private force industry according to their services.<sup>36</sup> This typology is helpful in understanding the broad range of services provided by modern private forces that range from frontline combat to rear echelon support and the variety of tasks in between. Singer divides all private force into the three broad sectors of military provider firms – more commonly referred to as private military firms (PMFs)<sup>37</sup> – military consulting firms, and military support firms.<sup>38</sup> PMFs generally have a “focus on the tactical environment” providing actual combat as well as direct command and control.<sup>39</sup> Executive Outcomes is an example of a PMF. It operated in Sierra Leone at the request of the government in 1995, providing a battalion of ground troops supported by artillery and air units that successfully outmaneuvered and defeated a rebel army invasion.<sup>40</sup> Military consulting firms, like MPRI, “provide advisory and training services” frequently employing a staff of former military officers.<sup>41</sup> MPRI (a wholly-owned subsidiary of L-3 Communications) operates many U.S. military officer training programs including the ROTC courses at hundreds of college campuses as well as training foreign

<sup>31</sup> Deborah Avant, *Mercenary to Citizen Armies: Explaining Change in the Practice of War*, INTERNATIONAL ORGANIZATION, Winter 2000 at 41.

<sup>32</sup> PERCY, *supra* note 16, at 94–95.

<sup>33</sup> *See id.* (arguing that “The long history of moral dislike of mercenaries, and attempts to control them, makes the nineteenth century shift away from mercenary armies even more puzzling”).

<sup>34</sup> *Id.* at 167.

<sup>35</sup> *Id.*

<sup>36</sup> PETER SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 90–98 (2008); *see* Jones, *supra* note 3, at 245 (describing Singer’s typology as “widely used and supported in existing literage as a method of dividing firms by the function they perform.”); Salzman, *supra* note 19, at 857 (discussing Singer’s breakdown of the types of firms of the private military industry); Richard Morgan, *Professional Military Firms Under International Law*, 9 CHI. J. INT’L L. 213, 217 (2008) (advocating relying on the more relevant distinction regarding whether a private firm has the “capability to engage in hostilities, either offensively or defensively).

<sup>37</sup> Gaston, *supra* note 12, at 224–25 (referring to military provider firms as private military firms).

<sup>38</sup> SINGER, *supra* note 36, at 90–98.

<sup>39</sup> *Id.* at 99–116.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 117–33.



militaries and security forces.<sup>42</sup> Singer notes that the line can become “quite fuzzy” between advising and implementing, citing the consulting firm Vinnell fighting alongside Saudi National Guard troops in combat during the first Gulf War.<sup>43</sup> Military support firms, like KBR (formerly a subsidiary of Halliburton), provide “non-lethal aid and assistance” such as logistical support, intelligence, and transportation.<sup>44</sup> KBR has been involved in a broad range of activities from building facilities for War on Terror detainees at Guantanamo Bay, Cuba to assisting in the dismantling of intercontinental ballistic missiles (ICBMs) in Russia.<sup>45</sup>

The “single unifying factor for the privatized military industry” in Singer’s analysis is that all firms at least provide “services that fall within the military domain.”<sup>46</sup> Singer admits that these categories are a “conceptual framework” as some firms will fall within one category while others will span several but may still have internal divisions that fit more comfortably into one category.<sup>47</sup> The visual aid of a spear is used to demonstrate the spectrum of private force from the “tip of the spear” front line forces to rear echelon support forces.<sup>48</sup> According to the spear visual aid, firms characterized as PMFs that provide direct combat functions sit at the “tip of the spear,” firms providing logistical support are located toward the “base of the spear,” and firms providing consultant services fall somewhere in the middle.<sup>49</sup> Private Security Companies (PSCs) are a notable addition to the spectrum, particularly following the conflicts in Iraq and Afghanistan.<sup>50</sup> PSCs seem to belong somewhere between PMFs and consulting firms as they provide services such as security protection, covert operations, and interrogation.<sup>51</sup> PSCs fill this area of the spectrum as they may not “engage in direct combat” but perform duties such as guarding military bases, embassies, checkpoints, or convoys that are “likely to draw fire.”<sup>52</sup>

While it is tempting to provide each new evolution of private force with a spot along the “tip of the spear” spectrum and draw a line where conduct is unacceptable as constituting mercenarism, this approach is insufficient. Such a distinction between types of private firms seems tenuous as even those providing traditionally rear echelon support sustained relatively high casualties in Iraq.<sup>53</sup> The dynamic nature of asymmetric warfare demonstrated that private forces could suddenly become objectionable even when their position along the spear does not change. For example, the firm Blackwater performed largely the same role of providing security throughout its time in Iraq; however, its presence eventually became unacceptable over the course of the conflict. At no point did Blackwater’s role shift any closer to the tip of the spear. Thus, to explain why the presence of Blackwater became objectionable in Iraq, the tip of the spear typology must be considered in conjunction with the norm against mercenarism to understand at what point firms like Blackwater and their activities become unacceptable as mercenarism.

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 95.

<sup>44</sup> *Id.* at 134–45.

<sup>45</sup> *Id.*

<sup>46</sup> SINGER, *supra* note 36, at 88.

<sup>47</sup> *Id.* at 90–93; *see also* Gaston, *supra* note 12, at 225 n.11 (describing the lines in Singer’s typology as “blurred,” making classification of a firm into any single category based on services difficult).

<sup>48</sup> SINGER, *supra* note 36, at 90–93.

<sup>49</sup> *Id.*; *see also* Gaston, *supra* note 12, at 225 n.11 (citing Singer’s “tip-of-the-spear” typology).

<sup>50</sup> Gaston, *supra* note 12, at 226.

<sup>51</sup> *See id.* at 226–28 (discussing PSCs emerging as a result of increased demand for their services in Iraq and Afghanistan in addition to more traditional PSC services in the 1990s to organizations such as the UN and NATO by protecting refugees or border monitoring).

<sup>52</sup> *Id.*

<sup>53</sup> *See* David Ivanovich, *Contract Deaths Up 17 Percent Across Iraq in 2007*, HOUS. CHRON., Feb. 9, 2008, <http://www.chron.com/disp/story.mpl/front/5528613.html> (stating that ninety-seven KBR workers had died in Iraq by the end of 2007 and at least 1,123 contractors had died as well, according to Department of Labor statistics).

### C. BENDING THE SPEAR: DEFINING MODERN PRIVATE FORCE IN ACCORDANCE WITH THE NORM AGAINST MERCENARISM

Some firms that provide “tip of the spear” services are acceptable when operating under legitimate control and serving a proper cause, but are objectionable when the control element shifts.<sup>54</sup> Blackwater engaged in a particularly intense and highly controversial firefight with an Iraqi crowd in Najaf alongside Coalition forces to defend a Coalition Provisional Authority (CPA) headquarters in April 2004.<sup>55</sup> Yet, the firm continued to play an active role in Iraq until the Nisour Square incident in Baghdad in September 2007.<sup>56</sup> Its role then diminished following Iraqi demands that the firm leave and the State department refused to renew its contract.<sup>57</sup> The norm against mercenarism would explain why Blackwater forces engaging in a firefight alongside Coalition forces to defend a Coalition installation was less objectionable than Blackwater forces engaging in a firefight alone to defend a Coalition convoy. While the firm was performing the same role as a PSC during both incidents, the apparent lack of legitimate control and accountability during the Nisour Square incident made Blackwater’s conduct objectionable as mercenarism.

The shortfall of most IHL definitions of mercenarism is that they ignore “[t]he element of accountability [as] the tacit standard that underlies the international antipathy for mercenary activity and truly determines mercenary status.”<sup>58</sup> While accountability is important, the norm also prohibits force not justified by attachment to a cause.<sup>59</sup> Thus, a definition of mercenarism needs to encompass the legal obligation that private force must fall within a specific range on the spectrum of both legitimate control and attachment to a cause.

Sarah Percy provides the “Spectrum of Private Violence” based on the norm against mercenarism with “Legitimate control” as the y-axis and “Degree of attachment to a cause” as the x-axis.<sup>60</sup> This approach helps predict what private force might be proscribed pursuant to the norm against mercenarism rather than Singer’s linear classification based on the services that private forces provide. The norm-based spectrum evolves with time and prevents private firms from engineering their functions or even names to escape accountability as a private actor.

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<sup>54</sup> See JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY* 195 (2007) (describing the United States news headlines debating the use of private forces after Blackwater, private contractors, had a large involvement in Fallujah and Najaf).

<sup>55</sup> *Id.* at 186–96 (describing the firefight in detail, including Blackwater contractors directing Coalition forces as well as directly fighting insurgents).

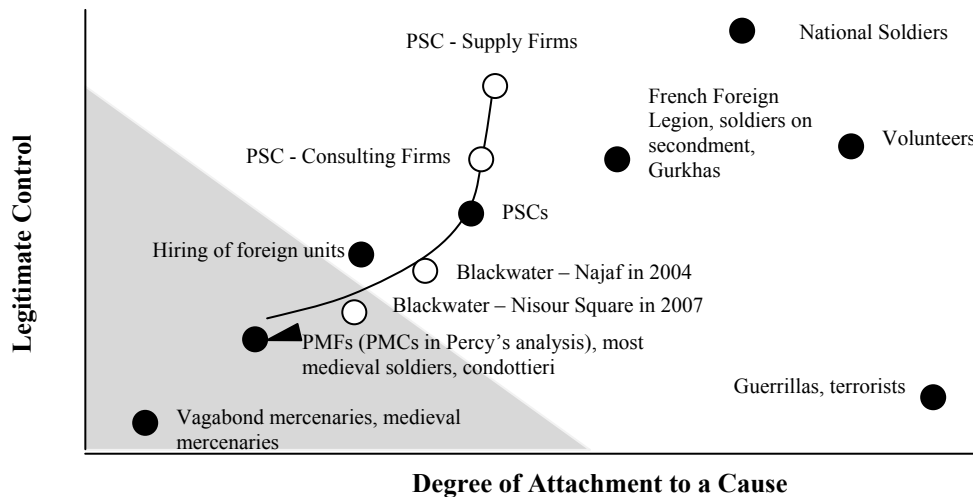
<sup>56</sup> See Hurst, *supra* note 4, at 1308–09 (describing the Nisour Square incident).

<sup>57</sup> *Id.*; see Johnston & Broder, *supra* note 5, at A1 (addressing the investigation into Blackwater’s actions in Nisour Square); James Risen & Timothy Williams, *U.S. Looks for Blackwater Replacement in Iraq*, N.Y. TIMES, Jan. 30, 2009, at A8, available at <http://www.nytimes.com/2009/01/30/world/middleeast/30blackwater.html> (discussing Iraq’s refusal to grant Blackwater a license to operate within the country, forcing the State Department to seek a new security firm).

<sup>58</sup> Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT’L L. 75, 122 (1998).

<sup>59</sup> *Id.* at 121–22.

<sup>60</sup> PERCY, *supra* note 16, at 59.



Modified version of Sarah Percy's *Spectrum of Private Violence*.<sup>61</sup> White-circle points and the "bent spear" were added by the author. Shaded-area, also added, signifies conduct generally considered mercenarism.

Locating a firm and its activities on Percy's norm-based spectrum first requires defining mercenaries in accordance with their motivation to fight for a cause, "encapsulat[ing] both the idea that mercenaries are external to a conflict and that they fight for financial gain, and furthermore recognizes that foreigners can fight without being considered mercenaries[.]"<sup>62</sup> Whether motivated by religious, ideological, or ethnic causes, foreigners fighting for more than a financial gain receive some recognition of legitimacy under this definition.<sup>63</sup> The second element of "legitimate control" then ensures fighters remain "under the control of the entity which is understood to have the legitimate right to wage war" resulting in sanctions for misbehavior and other aspects of control.<sup>64</sup> Thus, entities exhibiting no legitimate control and only fighting for personal gain serve as the clearest example of mercenaries.<sup>65</sup>

The tip of the spear typology is useful when applied to Percy's spectrum as it aids in expanding the scope of modern private force analyzed in accordance with the norm against mercenarism. Percy's analysis focuses on historic uses of private force from the Middle Ages to the present day, but tends to combine most forms of modern private force into the categories of PSCs and PMFs.<sup>66</sup> This approach does not distinguish PSCs from more support oriented private supply firms or consulting firms.<sup>67</sup> Such a distinction is important as PMFs have largely disappeared from the international stage while the market for PSCs is growing rapidly.<sup>68</sup> Thus, a spear more fully populated with modern variations in private force provides for a more thorough analysis of when these become objectionable pursuant to the norm against mercenarism.

Supply and consulting firms do not present the same control concerns as PSCs as they tend to be unarmed and their services are directed by a state party to the conflict.<sup>69</sup> Both sets of firms are still generally

<sup>61</sup> PERCY, *supra* note 16, Figure 2.1.

<sup>62</sup> *Id.* at 54.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 57.

<sup>65</sup> *See id.* at 59 (explaining through reference to the diagram that those who fight only for themselves are placed in the lowest corner of the diagram).

<sup>66</sup> *See id.* at 58–64 (Noting that Percy refers to PMFs as Private Military Companies or PMCs. Percy's use of the term Private Military Company is essentially the same as Private Military Firm as defined above and will be used throughout for consistency.).

<sup>67</sup> *See id.* at 60–61, 225 (noting PSCs offer similar services as PMFs, or PMCs, such as military advice, training, and guarding facilities but differentiating PSCs from PMFs based on their unwillingness to engage in combat and higher degree of state control).

<sup>68</sup> *See id.* at 225 (attributing the disappearance of PMFs to pressures from the norm against mercenarism).

<sup>69</sup> SINGER, *supra* note 36, at 95–97 (explaining that employees of consulting firms may not engage in combat, but their knowledge and training can be equally as important).

motivated by the same cause as the forces they support.<sup>70</sup> PSCs guarding a military base or diplomatic convoy do present some control concerns as they are armed and operate with a degree of tactical independence.<sup>71</sup> As this independence increases, however, PSCs tend to become more objectionable. For example, when Blackwater contractors engaged in the Najaf firefight, it did so, arguably, under greater control of the Coalition and for the purpose of defending the Coalition headquarters as they fought alongside Coalition soldiers.<sup>72</sup> However, when Blackwater engaged in the Nisour Square incident, killing Iraqi citizens without cause, it did so apart from Coalition forces and undermined the cause of the Coalition to defend Iraqi citizens and strengthen the Iraqi government.<sup>73</sup> While Blackwater's security role in Iraq did not change significantly, the lack of control and attachment to an appropriate cause did shift. Thus, when the tip of the spear typology is applied to Percy's norm-based spectrum, the elements of legitimate control and degree of attachment to a cause seem to bend the spear.

While no bright line standard is provided using Percy's spectrum, the legal obligation imposed by the norm on the use of modern private forces is more predictable. The spectrum illustrates the range of behavior by modern private forces prohibited by the norm against mercenarism and demonstrates the difficulty in precisely defining what behavior is prohibited by the norm. Incorporating the legal obligation underlying this norm into positive law poses a significant challenge and explains the ineffectiveness of recent attempts to prohibit or regulate mercenarism in IHL.

### III. PRIVATE FORCE UNDER IHL

Although early IHL provisions such as The Hague Conventions and the Geneva Conventions of 1949 contained no express mention of mercenaries or private forces, they can be interpreted as applying to private force.<sup>74</sup> Later IHL provisions like Additional Protocol I purport to directly regulate private force, however, these provisions are controversial and difficult to apply primarily due to their definitions of "mercenary."<sup>75</sup> One expert is quoted as stating that "any mercenary who cannot exclude himself from this definition [under Article 47, Additional Protocol I of the Geneva Conventions 1977 defining mercenaries] . . . deserves to be shot – and his lawyer with him!"<sup>76</sup> Treaties and conventions that attempt to regulate mercenaries "operate on a flawed definition of the concept[,]” failing to consider developments over time and address the fundamental problems of mercenaries.<sup>77</sup> The norm against mercenary use along with its historical context enables one to analyze these provisions and determine their potential impact, if any, on the use of private force in the twenty-first century.

#### A. HAGUE CONVENTIONS

The first attempt to incorporate private force into IHL is found in Article 4 of the Hague Conventions, stating: "Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral

<sup>70</sup> PERCY, *supra* note 16, at 61.

<sup>71</sup> *See id.* (explaining that while PCS's are under state control, they are not under popular control and are often criticized for being "poorly monitored and under regulated").

<sup>72</sup> *See generally* Scahill, *supra* note 54 (describing the Najaf battle, the lack of military command, and Blackwater's defense of the Coalition headquarters).

<sup>73</sup> *See* Risen & Williams, *supra* note 57 (describing the Nisour Square incident as "one of the bloodiest" involving Blackwater and explaining that it "stoked anger and resentment among Iraqis").

<sup>74</sup> Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in the Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, 75 U.N.T.S. 31, available at <http://www.icrc.org/ihl.nsf> [hereinafter Hague Conventions]; *see* Kevin Govern & Eric Bales, *Taking Shots at Private Military Firms: International Law Misses its Mark (Again)*, 32 FORDHAM INT'L L.J. 55, 68 (2008) (describing this convention as the "first attempt to codify customary international law on the use of mercenaries").

<sup>75</sup> *See* Geoffrey Best, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS 328, 374–75 n.83 (1980) (explaining that the definition of mercenary is constructed narrowly and therefore it applies to "hardly anyone").

<sup>76</sup> *Id.*

<sup>77</sup> Ryan M. Scoville, *Toward an Accountability-Based Definition of "Mercenary,"* 37 GEO. J. INT'L L. 541 (2006).

Power to assist the belligerents.”<sup>78</sup> Read in conjunction with Article 6,<sup>79</sup> a state also has no affirmative obligation to prevent individuals from leaving or passing through its territory to join the conflict as a private fighter.<sup>80</sup> Thus, the Hague Conventions provide no direct restriction on the use of private force by parties to a conflict or the participation by individual private fighters, only providing an obligation for neutral states regarding recruitment and organization. Whether this is an affirmative obligation to prevent recruitment or organization within the neutral state or merely to refrain from these activities is debatable. Some scholars reject any obligation by neutral states other than refraining from “the establishment of a wholly-owned PMF corporation by a nation’s government,”<sup>81</sup> while others interpret this as an obligation to prevent the “organization or staging activities” of private forces within its borders.<sup>82</sup> Although these provisions have largely been overshadowed by the subsequent Geneva Conventions, it is significant to note that the Hague Conventions impose virtually no limitation on individual or state combatants.<sup>83</sup>

## B. GENEVA CONVENTIONS OF 1949

None of the four Geneva Conventions directly address private force.<sup>84</sup> Some scholars argue that this silence, particularly with respect to Geneva III, should be interpreted as refusing to recognize private fighters as lawful combatants thereby denying them prisoner of war status.<sup>85</sup> However, “[m]ost agree that the Conventions’ drafters intended to treat [private fighters] no differently than other combatants.”<sup>86</sup> Geneva III clearly does not criminalize “mercenary activity” or private force, but would still seem to require states to hold members of a private force accountable for breaches of IHL.<sup>87</sup>

Several provisions may even establish grounds for providing prisoner of war status to members of private forces. Article 4(A)(1) provides prisoner of war status to members of armed forces of a party to the conflict, so if private forces are incorporated into these armed forces, which is unlikely, they are covered by this provision.<sup>88</sup> Article 4(A)(2) also provides prisoner of war status for members of militias or volunteer corps that are “commanded by a person responsible for his subordinates . . . [that have] a fixed distinctive sign recognizable at a distance . . . [that carry] arms openly . . . [and that conduct] their operation in accordance with the law and customs of war.”<sup>89</sup> A fifth requirement includes a *de facto* link “with the state for which the group is fighting.”<sup>90</sup> Those meeting these qualifications are considered “legal combatants,” entitled to receive the protections of prisoner of war status if captured.<sup>91</sup> Some argue application of this provision to modern private forces is contrary to Geneva III’s “historical purpose” to support “partisan fighting by ‘remnants of a defeated force or groups to

<sup>78</sup> Hague Conventions, *supra* note 74, art. 4.

<sup>79</sup> *Id.* art. 6 (“The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.”).

<sup>80</sup> Major Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 20–21 (2003); *see also* PERCY, *supra* note 16, at 197 (discussing the rejection of a proposal to incorporate a ban of mercenary use reportedly failed due to concerns of violating individuals’ freedom of movement).

<sup>81</sup> Govern & Bales, *supra* note 74, at 69.

<sup>82</sup> Milliard, *supra* note 80, at 24.

<sup>83</sup> *Id.* (explaining that the Hague Conventions order a state to prevent domestic mercenary activity but does not require completely outlawing mercenarism).

<sup>84</sup> Geneva III, *supra* note 10, art. 4.

<sup>85</sup> Milliard, *supra* note 80, at 25.

<sup>86</sup> *Id.*

<sup>87</sup> Frye, *supra* note 6, at 2625; *see* Milliard, *supra* note 80, at 25 (explaining that state parties were still required “to hold mercenaries accountable for combatant actions amounting to grave breaches of the Conventions’ provisions”).

<sup>88</sup> Louise Doswald-Beck, *PMCs Under International Humanitarian Law*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 118 (Simon Chesterman & Chia Lehnardt eds., 2007).

<sup>89</sup> Geneva III, *supra* note 10, art. 4(A)(2).

<sup>90</sup> Doswald-Beck, *supra* note 88, at 118–19.

<sup>91</sup> Ridlon, *supra* note 7, at 219.

liberate an occupied territory.”<sup>92</sup> This argument is supported by the commentary accompanying Geneva III that specifically excluded from the definition of “partisan,” groups like the “Great Companies” that “devastated France in the fourteenth century, during the peaceful periods of the Hundred Years War.”<sup>93</sup> Despite concerns that private firms operating in Iraq may not be able to claim status as “lawful combatants,” some scholars advocate extending protections to them under IHL as a matter of public policy to avoid creating a “disincentive” for those firms to observe IHL provisions in return.<sup>94</sup>

Following a very thorough analysis of Article 4(A)(2), one JAG officer concluded that most private firms operating in Iraq would likely not meet the definition of militias or volunteer corps.<sup>95</sup> Although some private security forces “carry arms openly,” their status is “questionable” due to their command structure and failure to wear distinctive symbols or emblems that would help “differentiate” them from the civilian population.<sup>96</sup> While failing to wear a distinctive symbol is easily corrected, scholars are divided regarding whether the corporate structure of modern private forces is sufficient to meet the requirements of Article 4(A)(2).<sup>97</sup> Thus, Article 4(A)(2) does not appear to provide prisoner of war status for most modern private forces.

Article 4(A)(4) provides civilians accompanying armed forces with prisoner of war status to the extent that they fill traditional civilian roles such as war correspondents or supply contractors, operate under the authorization of the armed forces, and are issued an identification card.<sup>98</sup> Although civilians in this category are not legal combatants, they may still receive prisoner of war status but they are not entitled to receive combatant privilege.<sup>99</sup> Combatant privilege generally relieves combatants from criminal responsibility for lawful acts of war such as killing enemy soldiers in battle. Without this privilege, private forces may be held criminally liable for directly participating in hostilities.<sup>100</sup> Private contractors that merely provide a service to the military and are “not expected to fight” will typically qualify under this provision, but those that are expected to fight would likely not benefit from its protection.<sup>101</sup> This provision would seem to include firms at the “base of the spear” like KBR that provide logistical support while disqualifying PSCs like Blackwater and other firms nearer the “tip of the spear” as it is anticipated that they will engage in combat. Another limitation on private firms in Iraq is that only a limited number of contractors accompany the armed forces while the vast majority accompanies other government agencies or even other contractors.<sup>102</sup>

An obvious explanation for the omission of private forces from the 1949 Geneva Conventions is that they were largely absent from international conflict at the time of drafting. Members of the private forces in

<sup>92</sup> Govern & Bales, *supra* note 74, at 71 (quoting Lindsey Cameron, *Private Military Companies and Their Status Under International Humanitarian Law*, 88 INT’L REV. RED CROSS 573, 586 (2006), available at [http://www.icrc.org/eng/assets/files/other/irrc\\_863\\_cameron.pdf](http://www.icrc.org/eng/assets/files/other/irrc_863_cameron.pdf)).

<sup>93</sup> Govern & Bales, *supra* note 74, at 71 (quoting Int’l Comm. Of the Red Cross, *Commentary on Geneva Convention III Relative to the Treatment of Prisoners of War*, 63 (1960), available at <http://www.icrc.org/IHL.nsf/WebList?ReadForm&id=375&t=com>).

<sup>94</sup> Govern & Bales, *supra* note 74, at 71 (quoting Lindsey Cameron, *Private Military Companies and Their Status Under International Humanitarian Law*, 88 INT’L REV. RED CROSS 573, 586 (2006), available at [http://www.icrc.org/eng/assets/files/other/irrc\\_863\\_cameron.pdf](http://www.icrc.org/eng/assets/files/other/irrc_863_cameron.pdf)).

<sup>95</sup> Ridlon, *supra* note 7, at 228.

<sup>96</sup> *Id.*

<sup>97</sup> *See id.* at 225–26 (explaining that meeting the requirements of wearing distinctive symbols can be difficult because military personnel wear many different types of clothing and in order to satisfy article 4, the uniforms would have to be “sufficiently standardized”).

<sup>98</sup> Geneva III, *supra* note 10, art. 4(A)(4) (“Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy . . . Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany . . .”).

<sup>99</sup> Ridlon, *supra* note 7, at 228, 243.

<sup>100</sup> *Id.*

<sup>101</sup> Doswald-Beck, *supra* note 88, at 124.

<sup>102</sup> Ridlon, *supra* note 7, at 228–29.

existence at the time were typically incorporated into state armed forces, satisfying both the legitimate control and cause elements of the norm against mercenary use.<sup>103</sup> The use of private force would soon make an explosive reemergence in decolonized Africa, threatening other values such as national liberation and self-determination by supporting both legitimate governments and factions during coups.<sup>104</sup> The result was a reaction to defend these values by creating a legal prohibition against mercenary use. The belief emerged that mercenary use “correlate[s] with human rights abuses, threatens state sovereignty, and contributes to various forms of international criminal activity.”<sup>105</sup> This view failed to recognize that these negative externalities are “only secondary manifestations of the fundamental problem . . . [that] they are not state-accountable actors.”<sup>106</sup> Additional Protocol I exemplifies this negative reaction to the reemergence of private forces by depriving those defined as “mercenary” of the protections provided by combatant and prisoner of war status. However, Additional Protocol I fails to effectively address the underlying concerns regarding lack of legitimate control and improper cause.

### C. ADDITIONAL PROTOCOL I OF 1977

Additional Protocol I, drafted after the reemergence of private force, complements the Geneva Conventions that were drafted at a time when private forces were largely not present on the world stage. Nevertheless, the two must be analyzed together.<sup>107</sup> It is important to note that Protocol I has not been ratified by India, Indonesia, Iran, Israel, Pakistan, Turkey, and the United States, although Afghanistan recently acceded to Protocol I in 2009 and Iraq in 2010.<sup>108</sup> While provisions of Protocol I may be construed to apply to private forces, Article 47 in particular bans the use of mercenaries altogether.<sup>109</sup> Thus, despite its potentially significant implications for private forces, Protocol I has not yet been ratified by several states that either export or employ private force.

Provisions in Protocol I that define armed forces and provide them with prisoner of war status may be construed to include some private forces. Protocol I Article 43 defines “armed forces” and removes the distinction in Geneva III Article 4 between regular armed forces and other armed groups such as volunteer corps or militias while Article 44 provides prisoner of war status to these forces.<sup>110</sup> Some scholars argue that for private forces to receive prisoner of war status under Protocol I Article 44, the party to the conflict must exercise some form of responsibility over the private forces, such as criminal jurisdiction, or even formally incorporate the private forces into the party’s armed forces’ chain of command.<sup>111</sup> While many private forces might not satisfy such a narrow interpretation, contractors for the U.S. Defense Department in Iraq are subject to the Uniform Code of Military Justice as well as federal court jurisdiction and would still seem to qualify for the protections of Article 44.<sup>112</sup> A broader interpretation views Article 43 as a fusion of Geneva III Article 4(A)(1) and (2), merely requiring a “factual link” to the party of the conflict to receive combatant

<sup>103</sup> See Govern & Bales, *supra* note 74, at 70 (discussing mercenaries incorporated into state armed forces at time of 1949 Geneva Convention).

<sup>104</sup> PERCY, *supra* note 16, at 183–85.

<sup>105</sup> Scoville, *supra* note 77, at 544–45.

<sup>106</sup> *Id.*

<sup>107</sup> Govern & Bales, *supra* note 74, at 70.

<sup>108</sup> Doswald-Beck, *supra* note 88, at 118 n.7; see also News Release, Afghanistan Accedes to Additional Protocols I and II in Historic Step to Limit Wartime Suffering, I.C.R.C. News Release 129/09 (Jun. 24, 2009) (discussing Afghanistan’s accession to Protocols I and II).

<sup>109</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 47, Jun. 8, 1977, 1125 U.N.T.S. 3, available at <http://www.icrc.org/ihl.nsf> [hereinafter Protocol I].

<sup>110</sup> Doswald-Beck, *supra* note 88, at 120.

<sup>111</sup> *Id.* at 120–21.

<sup>112</sup> Scheimer, *supra* note 30, at 620; see also 10 U.S.C.S. § 802(a)(10) (2009) (“In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.”); see generally *Military Extraterritorial Jurisdiction Act (MEJA) of 2000*, 18 U.S.C.S. § 3261–67 (2009) (describing military procedure in response to criminal action committed by people accompanying, or under the employment of, the Armed Forces outside the United States).

status.<sup>113</sup> The requirement in Article 43 that armed forces be “responsible” to the party to the conflict could present problems for such an interpretation, particularly for private forces that are from a different state and likely outside civil and criminal jurisdiction.<sup>114</sup> Although some private forces might qualify for prisoner of war status under Articles 43 and 44, it is Article 47 that most directly addresses private forces and mercenarism.

Article 47 provides significant consequences for those defined as “mercenaries” and may even have attained status as customary international law, reaching those conflicts between states that are not parties to Protocol I.<sup>115</sup> Under Article 47, those defined as mercenaries lose their combatant status as well as the right to treatment as prisoners of war and can potentially face criminal sanctions for their conduct.<sup>116</sup> Article 47 is titled “Mercenaries” and states:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
  - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
  - (b) does, in fact, take a direct part in the hostilities;
  - (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
  - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
  - (e) is not a member of the armed forces of a Party to the conflict; and
  - (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.<sup>117</sup>

This definition of “mercenary,” however, is very difficult to apply as each element must be met, including the particularly subjective element of motivation.<sup>118</sup> The motivation element is considered “practically unworkable” and “reflects a profound belief that it is wrong to be motivated by money rather than an appropriate cause, and that an inappropriate motivation is what makes a mercenary.”<sup>119</sup> Scholars have discovered numerous alleged weaknesses in the Article 47 definition of “mercenary.” For example, Article 47(2)(a) would not seem to apply to the firms operating in Iraq that are recruited not to fight but rather to provide security.<sup>120</sup> Others argue that this provision is designed to exempt permanently incorporated foreign services like the French Foreign Legion or Nepalese Gurkhas and not private firms that only enter into contracts for a term of several years.<sup>121</sup> One scholar explains that these apparent loopholes and weaknesses of Article 47 are merely evidence of the “strongly influential” but difficult to translate norm against mercenarism.<sup>122</sup> Although the motivation element in Article 47(2)(c) was very likely

<sup>113</sup> Doswald-Beck, *supra* note 88, at 121.

<sup>114</sup> *Id.* at 120–21 (stating that most private forces would be liable for breach of contract to the contracting state, establishing at least some responsibility).

<sup>115</sup> See Protocol I, *supra* note 109, art. 47.

<sup>116</sup> See *Id.* (establishing rights and criminal sanctions for mercenaries).

<sup>117</sup> *Id.*

<sup>118</sup> Govern & Bales, *supra* note 74, at 83.

<sup>119</sup> PERCY, *supra* note 16, at 179.

<sup>120</sup> Govern & Bales, *supra* note 74, at 84.

<sup>121</sup> Salzman, *supra* note 19, at 880–81.

<sup>122</sup> PERCY, *supra* note 16, at 170.



to be problematic, it was included because the drafters believed it “was the defining characteristic of a mercenary.”<sup>123</sup> Rather than merely regulating mercenary conduct under IHL, the drafters undertook the much more difficult task of regulating mercenaries based on their status and motivation.<sup>124</sup>

In fact, Article 47 seems out of place in Protocol I, “which is predicated on the idea that fighters should not be discriminated against on the basis of their motivation [and that IHL] ought to be universal and apply to all those in a theatre of war.”<sup>125</sup> This discrimination based on status is even clearer considering the potential disparate treatment of mercenaries compared to that of other non-state fighters like terrorists. Article 45 provides the presumption that those taking part in hostilities are prisoners of war until their status is determined otherwise by a tribunal.<sup>126</sup> Arguably, members of al Qaeda qualify for prisoner of war status upon capture and until tried while private forces like Blackwater risk immediate and arbitrary classification as mercenaries. Although mercenaries are still entitled to a fair trial prior to any punishment along with the fundamental guarantees provided in Article 75, this potential difference in treatment between terrorists and private contractors is indicative of the relative severity of Article 47.<sup>127</sup> Thus, despite Article 47’s possible status as customary international law, its vagueness and the subjectivity inherent in the determination of proper motivation means that it fails to establish a well-defined and effective principle of IHL that is sufficient for regulating the use of modern private forces.

Although Protocol I has not been ratified by some states that export or employ private force like the United States, the International Committee of the Red Cross (ICRC) has determined that Article 47 has reached status as customary international law. The ICRC’s *Customary International Humanitarian Law*, “intended to articulate and justify the rules of customary [IHL]”<sup>128</sup> has determined that: “Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status.”<sup>129</sup> Although the ICRC Report is not dispositive of customary international law, the authors identify numerous military manuals, including that of Israel, which is not a party to Protocol I, supporting the deprivation of prisoner of war status for mercenaries while noting protests from the United States.<sup>130</sup> But the authors carefully narrow this deprivation of status under customary international law to only those individuals who meet the definition of “mercenary” in Protocol I.<sup>131</sup> Some scholars question this deprivation of status as a “significant departure from customary international law, which traditionally gave ‘mercenaries the same status as the members of the belligerent force for which they were fighting.’”<sup>132</sup> They argue that “Protocol I singled out mercenaries based on a seemingly visceral reaction against their use during two decades in post-colonial Africa” rather than a codification of customary international law.<sup>133</sup> The ICRC Report recognizes that Article 47

<sup>123</sup> *Id.* at 178.

<sup>124</sup> *Id.* at 178–79.

<sup>125</sup> *Id.* at 178.

<sup>126</sup> Protocol I, *supra* note 109, art. 45; *see also id.* art. 46 (providing that spies are also not provided with prisoner of war status).

<sup>127</sup> JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 393–94 (2005) [hereinafter ICRC Report] (providing that states may also choose to provide mercenaries with prisoner of war status).

<sup>128</sup> Leah Nicholls, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law*, 17 *DUKE J. COMP. & INT’L L.* 223–25 (2006) (“Customary law is an ‘international custom, as evidence of a general practice accepted as law,’ resulting from ‘a general and consistent practice of states followed by them from a sense of legal obligation.’ Thus, a principle is considered customary law if many states across the world feel legally obliged to follow that principle. This sense of legal obligation is commonly referred to as *opinio juris*.” (quoting Statute of the International Court of Justice art. 38(b), June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993) and (quoting Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987)).

<sup>129</sup> ICRC Report, *supra* note 127, at 393–94.

<sup>130</sup> *Id.* at 391–92.

<sup>131</sup> *Id.* at 393.

<sup>132</sup> Milliard, *supra* note 80, at 35–36 (quoting H.C. Burmester, *The Recruitment and Use of Mercenaries in Armed Conflict*, 72 *AM. J. INT’L L.* 37, 55 (1978)).

<sup>133</sup> *Id.* at 38 (“Regarding moral legitimacy and foreign intervention, however, it may be unfair to characterize mercenaries as fighting with unclean hands vis-a-vis local guerillas and national armies.”).

was a response to mercenary involvement in Africa and that it since has “lost much of its meaning because the [Protocol I] definition . . . is very restrictive” and that recently “mercenaries have been less stigmatized.”<sup>134</sup> Still, even if Article 47 has reached customary law status, its narrow definition is very difficult to apply to modern private forces.

#### D. THE CRIME OF MERCENARISM: ORGANIZATION OF AFRICAN UNITY AND UNITED NATIONS

Similar to Protocol I, the Convention of the Organization of African Unity (OAU) for the Elimination of Mercenarism in Africa<sup>135</sup> and the UN International Convention Against the Recruitment, Use, Financing and Training of Mercenaries<sup>136</sup> sought to regulate the status of mercenaries rather than address the underlying normative concerns. These provisions were also responses to the controversial reemergence of private force in post-colonial Africa.<sup>137</sup> Although the implications of these provisions are limited due to their regional nature or limited ratification, they are significant as they establish the crime of mercenarism and could have significant consequences for an individual captured within the nations and regions in which the provisions are effective.<sup>138</sup>

Although the OAU Convention is one of the strongest conventions regarding private force, it has been largely disregarded as a “Cold War relic,” particularly for the lack of enforcement mechanisms and its failure to anticipate or restrict the hiring of private forces by African state governments seeking to maintain sovereignty.<sup>139</sup> The OAU Convention criminalizes being a mercenary and denies mercenaries the status as lawful combatants or prisoners of war.<sup>140</sup> In addition, it suffers from a weak legal framework due to an inadequate definition and loopholes for mercenaries that operate on the behalf of African governments.<sup>141</sup> Thus, it would have even been difficult to enforce against the private firm Executive Outcomes that operated under contract for the government of Sierra Leone in 1995.

The UN Convention is significant because it also criminalizes the act of being a mercenary and establishes that mercenaries are not entitled to prisoner of war status.<sup>142</sup> This convention represents an “elaborate hybrid of a mercenary definition . . . from predecessors of questionable legal lineage” including Article 47 of Additional Protocol I and the OAU Convention.<sup>143</sup> Growing out of these provisions and UN Resolutions seeking to defend the norms of national liberation and self-determination,<sup>144</sup> the UN Convention was drafted in 1989 but did not receive the required twenty-two state ratification until 2001 and still lacks support from most western states.<sup>145</sup> It is criticized as offering merely “an amalgamation of legal concepts

<sup>134</sup> ICRC Report, *supra* note 127, at 393–94.

<sup>135</sup> Convention of the OAU for the Elimination of Mercenarism in Africa, Jul. 3, 1977, O.A.U. Doc. CM/433/Rev. L. Annex 1 (1972) [hereinafter OAU Convention], available at <http://www.icrc.org/ihl.nsf>.

<sup>136</sup> International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, G.A. Res. 44/34, U.N. Doc. A/RES/44/34 (Dec. 4, 1989) [hereinafter Convention Against Recruitment].

<sup>137</sup> See PERCY, *supra* note 16, at 167 (explaining how the role of mercenaries in Africa in the 1960’s contributed to international law mercenary law regulations).

<sup>138</sup> Doswald-Beck, *supra* note 88, at 123.

<sup>139</sup> Abdel-Fatau Musah & J. ‘Kayode Fayemi, *Africa in Search of Security: Mercenaries and Conflicts—An Overview*, in MERCENARIES: AN AFRICAN SECURITY DILEMMA 34–36 (Abdel-Fatau Musah & J. ‘Kayode Fayemi eds., 2000) (citing mercenary use by the governments of Angola, Congo, and Sierra Leone).

<sup>140</sup> Milliard, *supra* note 80, at 53–54.

<sup>141</sup> See *id.* at 55–56 (discussing how a private soldier, fighting for profit and serving in a mercenary group, can escape prosecution as a mercenary because he contracts to fight for an OAU state).

<sup>142</sup> See Doswald-Beck, *supra* note 88, at 122 (explaining that PMC’s that are captured and denied POW status risk being tried for mercenarism).

<sup>143</sup> Milliard, *supra* note 80, at 58.

<sup>144</sup> See Frye, *supra* note 6, at 2626 (discussing five resolutions on sovereignty and the use of mercenaries adopted by the U.N. General Assembly).

<sup>145</sup> *Id.* at 2631; see PERCY, *supra* note 16 at 194–202 (describing the fear among Western states that: 1) the U.N. Convention would require states to arbitrarily restrict movement of their citizens, possibly in violation of human rights; and 2) they would be held responsible for their citizens’ actions abroad absolutely, despite practical concerns and customary law that private individuals, not states, are typically responsible for their actions abroad).

found in the OAU Mercenary Convention and Article 47.<sup>146</sup> The UN Convention uses a similar definition of mercenary as that found in Protocol I, but it also adds a second more expansive definition that sanctions a person for participating in an “act of violence” rather than participating in an armed conflict.<sup>147</sup> This is significant as many private firms operate in states with no international armed conflict.<sup>148</sup> This requirement is qualified however, by the act of violence being aimed at “[o]verthrowing a government” or “[u]ndermining the territorial integrity of a State,” which would likely eliminate many private firms operating in Iraq or Afghanistan seeking to protect the government and territorial integrity of the state in which they operate.<sup>149</sup> The second definition also requires that the person be motivated by “private gain” and “prompted by the promise or payment of material compensation.”<sup>150</sup> While this requirement is easier to satisfy than proving “excess” compensation relative to armed forces as required in Article 47, the second definition also exempts those sent on official duty by a state, allowing for those contracted by a state agency to escape the definition.<sup>151</sup> Thus, attempts by both the UN and OAU to criminalize mercenarism fail to include the operations of modern private forces in the states that are parties to these conventions. Despite the failure of the UN and OAU provisions to effectively criminalize the operations of private forces, it is important to consider the implications for members of private forces that might fail to qualify for prisoner of war status under IHL.

### E. CAPTURED PRIVATE FORCES NOT QUALIFYING FOR POW STATUS

If a member of a private force is captured and determined to not qualify for prisoner of war status, they qualify for protection under the Fourth Geneva Convention of 1949 (Geneva IV) as civilians.<sup>152</sup> Geneva IV provides “protected persons” status to those who do not qualify for prisoner of war status and are from neutral or co-belligerent states with normal diplomatic representation.<sup>153</sup> Those who fall outside Geneva IV and without prisoner of war status would “still have the benefit of fundamental customary rules relating to the prohibition of torture, inhumane treatment, and hostage-taking, as well as the right to a fair trial.”<sup>154</sup> Although those who qualify under Geneva IV as “protected persons” qualify for registration and visitation with the International Committee of the Red Cross as well as correspondence with family, they are not combatants and may be tried for violations of domestic law, such as murder, committed during the conflict.<sup>155</sup> They may also be interned without trial “if the security of the Detaining Power makes it absolutely necessary” while remaining subject to human rights law, but they must be released “as soon as the reasons which necessitated his internment no longer exist.”<sup>156</sup> Thus, if members of private forces do not qualify for prisoner of war status, Geneva IV does provide some protection while in captivity despite potentially facing trial and punishment for their conduct in the conflict.

<sup>146</sup> Milliard, *supra* note 80, at 56–57.

<sup>147</sup> Scheimer, *supra* note 30, at 629–30.

<sup>148</sup> *Id.* at 630 (“The U.N. convention’s broader coverage of acts of violence, instead of just armed conflicts, would cover PMC’s because PMCs often provide security and support in countries not currently engaged in international armed conflict.”).

<sup>149</sup> UN Convention Against Recruitment, *supra* note 136, art. 1(2)(a)(i)–(ii); *see id.* at 630 (“Overall, the second definition in the U.N. Convention has broader language that could apply to PMCs where Article 47 does not, but in the end, the requirement that mercenary actions must involve undermining a government limits the entire definition.”).

<sup>150</sup> UN Convention Against Recruitment, *supra* note 136, art. 1(2)(b).

<sup>151</sup> *See* Scheimer, *supra* note 30, at 630–31 (comparing the U.N. Convention to Article 47).

<sup>152</sup> Convention Relative to the Protection of Civilian Person in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV], available at <http://www.unhcr.org/refworld/docid/3ae6b36d2.html>; *See* Doswald-Beck, *supra* note 88, at 125 (“Those that do not benefit from POW status under the Third Geneva Convention are protected by the Fourth Geneva Convention of 1949 unless they are nationals of a neutral state or a co-belligerent state that has normal diplomatic representation in the state in whose hands they are.”).

<sup>153</sup> Doswald-Beck, *supra* note 88, at 125 n. 37 (discussing that those captured citizens from states with diplomatic representation would be protected by their home state).

<sup>154</sup> *Id.* at 125 n. 38 (discussing that these rights are codified in Article 75 of Protocol I).

<sup>155</sup> *Id.* at 125–26.

<sup>156</sup> *Id.* at 126 (quoting Geneva IV arts. 42 and 132–33).

## F. ATTACKING PRIVATE FORCES

Although private forces that qualify as combatants may clearly be attacked, the legality of attacking private forces that qualify as civilians is debatable.<sup>157</sup> According to Protocol I Article 51 (3), “[c]ivilians shall enjoy protection [from attack] unless and for such time as they take part in hostilities.”<sup>158</sup> A civilian’s “mere participation in the war effort is not meant to be included” in the taking part in hostilities.<sup>159</sup> While interpretations may vary regarding what constitutes taking part in the hostilities, one scholar would prefer to narrow the definition to only direct acts of violence against civilians as the purpose is to “avoid deliberate attacks on civilians.”<sup>160</sup> One scenario that might satisfy this narrow definition would seem to include collateral damage to a civilian private contractor resulting from an attack on military equipment on which the contractor is working.

Since the emergence of private forces in recent conflicts, two documents – the ICRC’s Interpretative Guidance on the Notion of Direct Participation in Hostilities and the Montreux Document – have specifically considered the legality of attacking private force. The ICRC’s Interpretative Guidance recommends that:

Private contractors and employees of a party to an armed conflict who are civilians are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Their activities or location may, however, expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities.<sup>161</sup>

The ICRC’s Interpretative Guidance had initially focused on private forces, seeking “to define the legal status of contractors and to create systems whereby they can be held accountable for abuses they commit.”<sup>162</sup> However, the development of status of force agreements (like the one entered into between the United States and Iraq in 2008) and “best practices” for private force use suggested by the ICRC- and Swiss-sponsored Montreux Document led to a focus on “irregular” forces like Hamas and Hezbollah which had become a greater concern.<sup>163</sup> Under the Montreux Document – entered into by seventeen states in 2008 including the United States, United Kingdom, China, Iraq, Sierra Leone, Afghanistan, and South Africa – the status of private forces “is to be determined by International Humanitarian Law on a case-by-case basis, with particular regard to the nature and circumstances of the functions in which they are involved.”<sup>164</sup> Private forces, however, are presumed to be protected “as civilians under IHL unless they are incorporated into the regular armed forces of a state or are members of organized armed forces” and, “[a]s with other civilians under IHL . . . [private forces] may not be the object of attack, unless and for such time as they directly participate in hostilities.”<sup>165</sup> Thus, under both documents, private forces may only be targeted to the extent that they are directly participating in hostilities. A case-by-case analysis, however, would likely be required to determine whether attacks on private forces that qualify as civilians were appropriate under IHL.

<sup>157</sup> *Id.* at 127–28.

<sup>158</sup> Protocol I, *supra* note 109, art. 51(3).

<sup>159</sup> Doswald-Beck, *supra* note 88, at 128.

<sup>160</sup> *Id.* at 128–29 (discussing the legality of attacking civilians involved in logistical support or serving as guards).

<sup>161</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 872 INT’L REV. OF THE RED CROSS 991, 995 (2009) (Direct Participation in hostilities is defined as “specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.”) *available at*, <http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm>.

<sup>162</sup> Michael Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC. J. 5, 10 (2010).

<sup>163</sup> *Id.* at 10–11 (2010); Permanent Representative of Switzerland, Letter dated Oct. 2, 2008 from the Permanent Representative of Switzerland addressed to the Secretary-General of the Security Council, U.N. Doc. A/63/467-S/2008/636 (Oct. 6, 2008) [hereinafter Montreux Document].

<sup>164</sup> Jamie A. Williamson, *Challenges of Twenty-First Century Conflicts: A Look at Direct Participation in Hostilities*, 20 DUKE J. COMP. & INT’L L. 457, 465 (2010).

<sup>165</sup> *Id.*

## IV. PROPOSALS FOR REFORM

Just as the emergence of private forces in Africa in the 1960s resulted in numerous proposals and provisions attempting to utilize IHL to proscribe mercenarism, the prevalence of private forces in Africa in the 1990s and recently in Iraq and Afghanistan has resulted in a variety of proposals from scholars to regulate or even ban private force. All of these proposals reflect the influence of the norm against mercenarism and the desire to exert legitimate control over private forces and restrict their use to an appropriate cause.<sup>166</sup> Due to the transnational and mobile nature of private forces, purely domestic regulations tend to run into enforcement or jurisdictional issues and may result in a “race to the bottom” when domestic regulations of one state exceed those offered by another, causing a firm to relocate.<sup>167</sup> Just as many American corporations seek incorporation in Delaware, private forces would seek the most advantageous and least regulated jurisdiction. For this reason, a coordinated international response to regulate private force is required. If and when any attempt to regulate private force is undertaken, support from the United States – not only as a superpower but also as major a client and employer of private force – is critical to avoid undermining the scheme in a similar fashion to those included in Protocol I and the UN Convention.<sup>168</sup> Thus, while proposals to extend International Criminal Court (ICC) jurisdiction or to create a licensing scheme to regulate private force are reasonable, an IHL provision that seeks to regulate private force in accordance with the norm against mercenarism is the only proposal that is likely to ultimately succeed.

### A. ICC JURISDICTION

One proposal is to provide the ICC with jurisdiction over the crime of mercenarism, specifically under Article 5(d) of the Rome Statute as a “crime of aggression.”<sup>169</sup> The jurisdiction of the ICC is derived from the consent of its treaty members, a list that does not include the United States.<sup>170</sup> Until recently, no “crime of aggression” was defined in the Rome Statute, which must first be amended for the crime to be included in the Court’s jurisdiction.<sup>171</sup> In June 2010, delegates from state parties and non-state parties to the Rome Statute met in Kampala, Uganda for the Review Conference of the Rome Statute and approved an amendment defining the crime of aggression and its jurisdiction.<sup>172</sup> It defined the crime of aggression as the “planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression . . . .”<sup>173</sup> One such act is

<sup>166</sup> PERCY, *supra* note 16, at 195 (explaining the rationale behind the U.N. Convention as an almost universal condemnation of mercenaries).

<sup>167</sup> Gaston, *supra* note 12, at 241; *see also* Milliard, *supra* note 80, at 84 (comparing firm movement to jurisdictions with less regulation to the gravitating of U.S. corporations to Delaware and shipping firms to Panama).

<sup>168</sup> *See* Scheimer, *supra* note 30, at 643–44 (describing the weakened impact of international conventions due to an absence of U.S. support for regulating private force); *see also* Press Release, Security Council, U.N. Experts Visit the U.S. to Discuss Use of Private Military and Security Contractors, U.N. Press Release (July 17, 2009), *available at* <http://www.unhcr.ch/hurricane/hurricane.nsf/0/68E03AFA0761EEB2C12575F6002DEC30> (“It is crucial that the U.S. Government, as a major client of these companies, demonstrates its commitment to ensure full accountability of private military and security contractors for any possible violations of international human rights and humanitarian law.”).

<sup>169</sup> Milliard, *supra* note 80, at 66–67; *see* Rome Statute of the International Criminal Court art. 5(1)(d), Jul. 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute] art. 5(1)(d) (“The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes . . . The crime of aggression.”) *available at* <http://www.icrc.org/ihl.nsf/FULL/585>.

<sup>170</sup> Craig S. Jordan, *Who Will Guard the Guards? The Accountability of Private Military Contractors in Areas of Armed Conflict*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 309, 331 (2009).

<sup>171</sup> Milliard, *supra* note 80, at 67; *see* Rome Statute, *supra* note 148, art. 5(2) (“The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.”).

<sup>172</sup> David Scheffer, *State Parties Approve New Crimes for International Criminal Court*, ASIL INSIGHT, June 22, 2010, *available at* <http://www.asil.org/files/insight100622pdf.pdf>.

<sup>173</sup> Review Conference of the Rome Statute, Kampala, Uganda, May 31 – June 11, 2010, The Crime of Aggression, ¶ 2, art. 8bis(1) RC/11, Annex I (June 11, 2010) [hereinafter Kampala Amendment].

specifically identified as “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”<sup>174</sup> Although the ICC will not be able to exercise jurisdiction over this crime until at least the year 2017 or one year after ratification by thirty State parties, whichever is later, scholars have already noted the significant long-term impact of this provision.<sup>175</sup>

The drafters of the Kampala Amendment looked to General Assembly Resolution 3314, which similarly defines aggression as “state – but not individual – participation in the use of force by militarily organized unofficial groups, such as mercenaries, ‘which carry out acts of armed force against another state.’”<sup>176</sup> Notably, no definition of “mercenary” is provided, so the Court would likely consider the UN Mercenary Convention, “which delineates states’ responsibilities and makes it a crime for any person to recruit, use, finance, or train ‘mercenaries, as defined’” therefore extending jurisdiction to state actors, including individuals acting in an official capacity.<sup>177</sup> Although the UN Mercenary Convention would provide a readily available framework for the ICC, the lack of broad ratification and failure to adequately define “mercenary” in accordance with the norm against mercenary use seriously undermines its authority. The obvious problems remain of extending jurisdiction to citizens of states that are not parties to the Rome Statute such as the United States, Russia, China, India, and Indonesia.

The Kampala Amendment does not provide the Court with jurisdiction over the crime of aggression when committed by a national of a non-party State or on a non-party State’s territory.<sup>178</sup> Also, the Kampala Amendment allows a State party to choose not to accept the Court’s jurisdiction for this crime, excluding its nationals and territory from the Court’s jurisdiction for this crime.<sup>179</sup> However, the United Nations Security Council may still refer any crime of aggression to the Court, thus bringing the crime within the Court’s jurisdiction.<sup>180</sup> Because many states that export or employ private force are not parties to the Rome Statute or may choose to not accept the Court’s jurisdiction for the crime of aggression, some scholars have attempted to craft theories that would extend the Court’s jurisdiction for this crime.<sup>181</sup> One theory of extending jurisdiction to non-party State nationals includes the concept that “all states may exercise criminal jurisdiction over certain crimes if the crime is considered ‘prejudicial to the interest of the international community as a whole.’”<sup>182</sup> Regardless of the validity of this theory based on “collective values” shared by the international community that results in “universal jurisdiction,” such a view has never been applied to private forces.<sup>183</sup> For these reasons, any attempt to use the ICC to regulate private force will be undermined by jurisdictional issues and an inadequate criminal provision to apply to those who might come before the court.

<sup>174</sup> *Id.* art. 8bis(2)(g).

<sup>175</sup> *Id.* art. 15bis(2)–(3); see Scheffer, *supra* note 172 (explaining that the new agreement’s ratification procedure may cause jurisdictional issues over crimes of aggression).

<sup>176</sup> Milliard, *supra* note 80, at 68; Kampala Amendment, *supra* note 152 art. 8bis(2) (“Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression[.]”).

<sup>177</sup> Milliard, *supra* note 80, at 68–69.

<sup>178</sup> Kampala Amendment, *supra* note 173 art. 15bis(5).

<sup>179</sup> *Id.* art. 15bis(4); see also Scheffer, *supra* note 172 (explaining that the Court does not have jurisdiction when a non-party State commits a crime of aggression).

<sup>180</sup> Scheffer, *supra* note 172.

<sup>181</sup> See Jordan, *supra* note 170, at 332 (explaining how some scholars have hypothesized that anti-terrorism laws may allow the court to exercise jurisdiction over non-party nationals).

<sup>182</sup> *Id.* at 332–33 (discussing objections by the United States to extension of jurisdiction over non-party nationals).

<sup>183</sup> *Id.* at 333.

## B. LICENSING SCHEME

Another approach toward regulation of private force is the establishment of an international licensing scheme that would license and then regulate private forces.<sup>184</sup> Any such attempts, however, would likely be undermined by the lack of funding and consensus among states. This system would “distinguish legitimate [private forces] from the lone mercenary,” attaching a stigma to those firms that fail to become licensed as well as to those that hire unlicensed contractors.<sup>185</sup> If enacted, such a scheme might have some influence on private forces with major states or large corporate clients seeking to avoid this stigma and lead the industry as a whole toward higher standards of conduct.<sup>186</sup> While stigma may be an effective disincentive for those considering the prospect of bypassing regulation, the success of licensing schemes will ultimately depend upon oversight and enforcement mechanisms that require valuable resources to maintain.<sup>187</sup> One scholar argues that it is “unrealistic” to even consider implementation of a “large and expensive” international regime similar to the International Civil Aviation Organization (ICAO).<sup>188</sup> For this reason, inadequate funding will likely be a significant hurdle for any international licensing scheme to effectively regulate private force.

Domestic politics would also present a major hurdle for a private force licensing proposal, resulting in a failure to reach a consensus among states. The difficulty of establishing a licensing or regulatory scheme involves reaching a consensus in light of the “highly divergent interests” among those advocating for a highly restrictive regime and the business interests of private forces in client or host states such as the United States or Great Britain.<sup>189</sup> Client and host states of private force will likely not support a restrictive regulatory regime due to the strength and influence of politically powerful private force clients – both in corporations and government – as well as industry interest groups.<sup>190</sup> Conversely, states that have ratified the UN Mercenary Convention or the OAU Convention where the norm against mercenarism is strongest, will likely seek to impose a very restrictive licensing or regulatory scheme, if they even approve of a plan that openly permits the use of private force at all.<sup>191</sup> States influenced by these two divergent interests are unlikely to compromise to establish and implement a functional regulatory regime or even gather sufficient funding for such an expensive venture.<sup>192</sup> As a result, a lack of funding and consensus among states would likely undermine any attempt to establish a licensing scheme for private force.

## C. IHL PROVISION

An IHL provision that seeks to regulate private force and incorporate a definition based on the norm against mercenarism is the proposal most likely to regulate private force successfully. Some scholars have promoted an IHL provision “that openly recognizes the practice of outsourcing to [private forces] for what it

<sup>184</sup> Scheimer, *supra* note 30, at 642–43.

<sup>185</sup> *Id.*

<sup>186</sup> *See id.* (explaining that under the licensing scheme countries could choose to hire illegal PMC’s but they would risk “becoming tainted” and “the stigma of being unaccredited would have an impact on their global business”).

<sup>187</sup> Andrew Bearpark & Sabrina Schulz, *The Future of the Market*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 245, 245 (Simon Chesterman & Chia Lehnardt eds., 2007).

<sup>188</sup> *Id.* at 243–44 (stating that “no grouping of global powers will be willing to invest large amounts of money and manpower in the creation and maintenance of a major regulatory body.”).

<sup>189</sup> *Id.* at 245; *see also* Gaston, *surpa* note 12, at 243 (discussing inconsistencies among states such as the United States and United Kingdom seeking to regulate private force while states like South Africa seek to ban them).

<sup>190</sup> *See* INTERNATIONAL STABILITY OPERATIONS ASSOCIATION, [\(http://www.ipoaworld.org/eng/\(non-profit trade association that engages in advocacy on behalf private security industry, lobbying legislatures in the United States, Europe, and Africa as well as maintaining contact with international organizations such as the UN, NATO, and African Union\)\)](http://www.ipoaworld.org/eng/(non-profit+trade+association+that+engages+in+advocacy+on+behalf+private+security+industry,+lobbying+legislatures+in+the+United+States,+Europe,+and+Africa+as+well+as+maintaining+contact+with+international+organizations+such+as+the+UN,+NATO,+and+African+Union)) (last visited Sep. 30, 2011).

<sup>191</sup> *See* PERCY, *supra* note 16, at 218, 220 (describing the norm against mercenary use as a “puritanical norm” or one that causes international actors to make “an unreflective condemnation without attention to the facts”).

<sup>192</sup> Bearpark & Schulz, *supra* note 187, at 245 (explaining that the licensing process would be extremely difficult due to diverse interests among “the stakeholders”).

is – a strategic tactic of warfare – and requires states to develop accountability and control mechanisms that can address some of the threats posed by modern [private forces].”<sup>193</sup> Such an IHL provision would require “states that [use] nonstate actors as complements to military operations to establish oversight and control mechanisms that would ensure their compliance with international and domestic laws to the extent possible.”<sup>194</sup> By addressing the underlying sense of legal obligation that states only utilize private force under legitimate control and when attached to an appropriate cause, this IHL provision would likely receive greater international support and ensure that the use of private force does not become objectionable.<sup>195</sup> On the modified version of Percy’s norm-based spectrum of private force, this IHL provision would seem to permit uses of private force in the white area and ban those in the gray area as mercenarism.<sup>196</sup> Although a visual depiction of the norm against mercenarism is not exact and is subject to regional variations in the strength of the norm, the flexible application of this IHL provision would fall roughly along these lines. States would have the flexibility to address greater concerns regarding private forces in their region and other states could regulate the use of private force while still complying with IHL.<sup>197</sup> Because the permitted uses of private force in an IHL provision would be exercised under some form of legitimate control and with an elevated degree of attachment to an appropriate cause, they would be less objectionable and encourage greater compliance with IHL.

Improving private force compliance with other IHL provisions by private forces would reduce the degree to which private force is objectionable. An IHL provision regulating private force would likely provide private forces with combatant status and the right to treatment as prisoners of war. Providing this status would incentivize private forces to comply with IHL as they would also benefit from its protections.<sup>198</sup> The additional degree of oversight by armed forces or a government agency would provide an enforcement mechanism to ensure IHL compliance by private forces. The effect of greater compliance with IHL would further improve the acceptance of private forces under greater control as a legitimate use of force. Despite the potential benefits of an IHL provision regulating private force, substantial obstacles still remain that might impede ratification and implementation.

Although the same divergent interests that might impede the establishment of an international licensing scheme would also be present during the crafting of an IHL provision regulating private force, successful implementation is still possible. An IHL provision regulating private forces provides states with the “flexibility to oversee and regulate the unique contracting, outsourcing, and registration requirements of their own domestic laws.”<sup>199</sup> While some states will still be able to place significant restrictions on private force under domestic law, major exporters of private force like the United States have already taken steps toward establishing regulation that asserts greater control over private forces.<sup>200</sup> This demonstrates the potential for broad support of an IHL provision that addresses the divergent interests regarding the use of private force by allowing flexible state implementation. The ICRC-sponsored Montreux Document was joined in 2008 by seventeen states – including the United States, United Kingdom, Iraq, and Afghanistan – further indicating that a consensus exists to apply IHL to private forces as well as use IHL to control private

<sup>193</sup> Gaston, *supra* note 12, at 240.

<sup>194</sup> *Id.* at 243.

<sup>195</sup> *Id.* at 243 (discussing the possibility that control and oversight of private force may eliminate some of the inconsistencies and disagreement).

<sup>196</sup> See SCAHILL *supra* note 54, at 230–31.

<sup>197</sup> See Gaston, *supra* note 12, at 243 (explaining that the oversight procedure “would ensure that states take a more collective approach toward the global PMSC problem . . . but still allow states a degree of flexibility”).

<sup>198</sup> See Govern & Bales, *supra* note 74, at 71 (cautioning that denying these protections, like prison of war status, might “create a disincentive to continued observance of humanitarian law . . .”).

<sup>199</sup> Gaston, *supra* note 12, at 243.

<sup>200</sup> Scheimer, *supra* note 30, at 620; see also 10 U.S.C.S. § 802(a)(10) (“In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.”); see also 18 U.S.C.S. § 3261-67 (*Military Extraterritorial Jurisdiction Act*).



forces in accordance with the norm against mercenary use.<sup>201</sup> Although some might argue that state implementation of IHL provisions involving controversial or politically sensitive issues is frequently weak, “an IHL provision [regulating private force] may still be useful in driving the issue, solidifying emerging norms, and coordinating state approaches.”<sup>202</sup> At the very least, an IHL provision would establish that private force is permissible as long as it is utilized in accordance with the norm against mercenarism. Still, implementation might not be as weak as previous IHL provisions. A movement toward regulation – rather than an outright ban – in Iraq and Afghanistan demonstrates a willingness by states in which private forces operate to recognize the legitimate uses of private force and allow their continued operation with greater accountability.<sup>203</sup> Thus, although ratification and implementation concerns still exist, an IHL provision that addresses the underlying concerns of the norm against mercenarism presents the proposal most likely to ensure successful regulation of private force.

## V. CONCLUSION

Because private forces are likely to maintain a critical role as “silent partners” to the parties in armed conflicts of the twenty-first century, an IHL provision is needed that defines “mercenary” in accordance with the norm against mercenarism and regulates the conduct of private forces in accordance with the norm. Of the existing IHL provisions and the many additional proposals offered by scholars that seek to regulate or ban mercenarism, few address the normative concerns underlying these provisions and proposals. The ineffective definitions of “mercenary” in Protocol I, the UN Convention, and the OAU Convention reflect misguided state attempts to ban the characteristics of private force perceived to be objectionable as mercenarism. The more effective answer lies in creating an IHL provision addressing this problem.

For an IHL provision to effectively regulate the use of private force and ban mercenarism, it must ensure legitimate control is exerted over private force and that private force is only utilized when it is attached to some appropriate cause. This IHL provision would therefore permit the use of Blackwater forces in Najaf in 2004, but would find the conduct in Nisour Square in 2007 objectionable and require that the private fighters be held accountable by the United States. Thus, an IHL provision based on the norm against mercenarism, rather than a linear classification of private force or a narrow definition, is the most likely proposal to receive broad international support and to effectively regulate modern private force.

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<sup>201</sup> Montreux Document, *supra* note 163.

<sup>202</sup> Gaston, *supra* note 12, at 244.

<sup>203</sup> *See id.* at 242. (explaining how PMSCs have some accountability to abide by regulations).