Professional Military Firms under International Law

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I. INTRODUCTION

On July 18, 2006, four employees of Triple Canopy, an American security-provision contract firm, embarked on the dangerous convoy route in downtown Baghdad colloquially known as "Route Irish." Their assignment was to escort an employee of the military-service provision firm KBR, Inc. from the Baghdad International Airport to the relative security of the Green Zone. According to statements made by three of the Triple Canopy employees, during the trip to the airport, the fourth contractor, who had previously commented that he “wanted to kill someone today,” opened fire on a presumably civilian truck that was approaching the contractor’s convoy at an unthreateningly low speed. The contractors made no effort to determine whether any civilians were injured in the incident, but proceeded to the airport to meet the arriving KBR executive.

On the return trip to the Green Zone, some of the Triple Canopy contractors noticed an ambulance at the scene of the earlier shooting; the same contractors claim that the employee that fired on the truck ordered them not to mention the incident to anyone. Furthermore, rather than stop to determine what damage had been caused in the previous incident, the convoy continued toward its destination at high speed.

Further along Route Irish, the convoy overtook a civilian taxi, which was traveling at “a normal speed” and was not “any danger” to the convoy.

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1 Steve Fainaru, Hired Guns are Wild Cards in Iraq War, Chi Trib 1 (Apr 16, 2007).
2 Id.
3 Id.
According to witnesses, the contractor involved in the earlier incident commented, “I’ve never shot anyone with my pistol before,” and proceeded to fire several shots into the taxi’s windshield. Although the members of the convoy were unable to tell whether the driver of the taxi—a man they described as “in his 60’s or 70’s”—was injured, one later recalled that the taxi came to an abrupt stop. Some of the contractors later heard that the cab driver had been killed.

At various points over the next several days, the three Triple Canopy contractors not responsible for the shootings came forward to their employer about the incidents. While Triple Canopy fired two of these men—in addition to the contractor accused of the shootings—for failing to report the incidents in a timely fashion and notified the United States military about the incident, no criminal charges have been brought in the case.

This incident—and numerous others like it—illustrates the confusing place that firms like Triple Canopy occupy within the law of armed conflict. Had the acts described above been committed by members of the American armed forces, the individuals involved could have been prosecuted for violations of both domestic military law and international law. Furthermore, if the attacks had been conducted with the knowledge and tacit or explicit approval of the soldiers’ superiors, those supervisors could have been tried for war crimes, as defined under Article 85 of the Protocol I Additional to the Geneva Conventions (“Protocol I”) and Article 8(2)(b)(i) of the Rome Statute of the International Criminal Court. Since the individuals responsible were the employees of a Professional Military Firm (“PMF”), however, the extent of their criminal liability was unclear. Although the United States has recently brought civilian contractors

4 Id.
6 Fainaru, Hired Guns, Chi Trib at 1 (cited in note 1).
7 10 USC § 918 (2006).
9 Protocol I (cited in note 8).
under the jurisdiction of the Uniform Code of Military Justice ("UCMJ"), their status under international treaty law remains uncertain. Protocol I and the Third Geneva Convention suggest four legal categories into which such contractors may fall: armed civilians, mercenaries, contractors accompanying the armed forces, or combatants subordinate to Parties to a conflict. This Article reviews each of these possibilities and concludes that, due to the language and history of these conventions, the evolution of warfare, and prudential reasons of state policy, only the last possible classification—that armed contractors are Party combatants for purposes of international law—is a reasonable interpretation of international law.

Furthermore, this Article argues that the United States has several incentives to advocate a classification of armed contractors as members of the armed forces. First, due to the extension of UCMJ jurisdiction to armed contractors during contingency operations, the United States may be responsible for the acts of PMFs in its employ under the international law of state responsibility. Because of this, it is necessary for the United States to clarify the responsibilities and rights of PMFs in order to prevent military commanders and civilian leadership from facing accusations of war crimes. Additionally, while the United States currently holds a relative monopoly on both the provision and consumption of PMF services, there is no reason why other states may not begin to use such forces in manners inconsistent with American objectives. Thus, it is in the best interest of the United States to use its dominant market position to establish an international norm of state responsibility and to use its international clout either to codify such a norm into a treaty regime or to advocate the norm as a part of customary international law. To that end, this Article will propose draft language for an international agreement on the use of PMFs by state actors and suggest possible methods by which the norm of state responsibility could be promoted as customary international law.

II. PROFESSIONAL MILITARY FIRMS DEFINED

Before a proper determination can be made of where security firms like Triple Canopy and competitors such as Blackwater, HART, DynCorp, ArmorGroup, and Control Risks Group ("CRG") fit into international law, some distinctions must be made. As Peter Singer has noted, "[t]he firms that participate in the military industry neither look alike nor do they even serve the same markets." To this end, Singer has identified three categories into which

what he terms PMFs\textsuperscript{13} fall: military support firms, which provide their clients with “logistics, intelligence, technical support, supply, and transportation”;\textsuperscript{14} military consulting firms, which “provide advisory and training services integral to the operation and restructuring of a client’s armed forces”;\textsuperscript{15} and military provider firms, which are “defined by their focus on the tactical environment.”\textsuperscript{16}

As Singer rightly notes, these terms cannot always be applied with precision to all firms in the military services market—some firms may exhibit characteristics of more than one classification at any given time. However, Singer’s framework, by classifying according to major services provided, misses an important distinction for the purposes of the international law of armed conflict: whether PMFs engage in the use of force. While Singer’s paradigmatic “military provider firm”—the now-defunct Executive Outcomes—is defined by its willingness to directly engage in combat operations,\textsuperscript{17} it is also very likely that the personnel of a “military support firm” or “military consulting firm” will need to engage in the use of force should they come under attack while performing their services. The use of arms for self-defense purposes, of course, does not necessarily define an individual as a “combatant” under international law. Whether an act is conducted in self-defense or as a combatant subject to the law of armed conflict is a context-specific question. For example, it would be inappropriate for a contractor hired to perform laundry services to be considered a combatant when that contractor uses a gun to avoid a sexual assault. There is something qualitatively different, however, about a contractor whose primary job is to provide armed protection in a combat zone. Thus, for the purposes of this Article, Singer’s term PMF will be used, albeit in the more narrow sense of denoting firms that have the capacity to engage in hostilities, either offensively or defensively, with appropriate caveats where such a definition is too inclusive in scope.

III. FOUR POSSIBLE CLASSIFICATIONS UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT

Although legal theorists have sought at least since the time of the eighteenth-century legal theorist Emerich de Vattel to differentiate between those who may participate in warfare and those who should be exempted,\textsuperscript{18} the

\textsuperscript{13} Id at 91.
\textsuperscript{14} Id at 97.
\textsuperscript{15} Id at 95.
\textsuperscript{16} Id at 92.
\textsuperscript{17} See id at 106–15.
\textsuperscript{18} L.C. Green, \textit{The Contemporary Law of Armed Conflict} 100 (Manchester 1993).
modern legal definition of a belligerent may be traced to the Project of an
International Declaration Concerning the Laws and Customs of War, adopted at
the Brussels Conference convened by Czar Alexander II of Russia in 1874.\textsuperscript{19}
While some minor distinctions have been made due to changes in the nature of
warfare,\textsuperscript{20} the rules established by that conference informed the definition of
belligerent adopted by most international conventions for the next century. In
particular, the influence of the Brussels Conference can be seen in the Hague
Regulations of 1907 and the Third Geneva Convention of 1947, both of which
adopt the Brussels Conference definition of belligerents almost verbatim.\textsuperscript{21} Thus,
international law may be said to speak—in theory, if not in practice—with a high
degree of continuity on the question of who is and is not a legal combatant in
international warfare.

Such continuity, while certainly helpful in creating norms of conduct in
traditional international warfare between two state parties, becomes troublesome
when untraditional or asymmetric forms of warfare\textsuperscript{22} not envisioned by
Alexander II and his contemporaries are employed. The difficulty of trying to fit
emerging combat roles into traditional classification has appeared most recently
in the efforts of the various branches of the United States government to define
"enemy combatants" and the legal rights thereof within the context of
operations against terrorist organizations and rogue states.\textsuperscript{23}

Like international terrorist organizations, PMFs are a product of the
modern era. As Singer notes, while mercenaries and armed forces-for-hire are by
no means new,\textsuperscript{24} the corporatization of military service is a relatively recent
phenomenon.\textsuperscript{25} Considering this, classifications of combatants conceived well

\textsuperscript{19} Brussels Conference of 1874, art 9–11, reprinted in Schindler and Toman, eds, \textit{The Laws of Armed
Conflict} at 28–29 (cited in note 8).

\textsuperscript{20} See International Committee of the Red Cross, \textit{Commentary on the Additional Protocols of 8 June
(stating that the distinction between combatants and non-combatants within a state’s armed
forces, as proclaimed in the Brussels Conference and the Hague Regulations of 1907, no longer
exists).

\textsuperscript{21} See Hague Convention Respecting the Laws and Customs of War on Land (1907), 36 Stat 2277,
ch 1, art 1, reprinted in Schindler and Toman, eds, \textit{The Laws of Armed Conflict} at 75 (cited in note 8)
("Hague Convention’’); Convention (II) Relative to the Treatment of Prisoners of War (1949),
art 4, 6 UST 3316, reprinted in Schindler and Toman, eds, \textit{The Laws of Armed Conflict} at 430–31
(cited in note 8) ("Third Geneva Convention’’).

\textsuperscript{22} See generally Thomas X. Hammes, \textit{Insurgency: Modern Warfare Evolves into a Fourth Generation},
available online at <http://www.ndu.edu/inss/stforum/SF214/SF214.pdf> (visited Apr 5,
2008).


\textsuperscript{25} Id at 45.
over a century ago may be ill-suited to address the emerging phenomenon of heavily-armed contractors engaging in the use of force on behalf of corporate employers, who in turn are sanctioned by—if not in the employment of—nation-states. Nonetheless, the prominence of the Hague Conventions, Geneva Conventions, and Protocol I\(^26\) has placed those instruments at the center of a large body of customary international humanitarian law.\(^27\) Thus, while attempting to define the rights and obligations of a new class of belligerent according to long-established rules may be less than ideal, it may be the most practical.

Four possible classifications for PMFs appear plausible under the Third Geneva Convention and Protocol I: (1) armed civilians under Articles 50 and 51 of Protocol I; (2) mercenaries under Article 47 of Protocol I; (3) accompanying supply contractors under Article 4A(4) of the Third Geneva Convention; or (4) members of the armed forces or militias under Articles 4A(1) and (2) of the Third Geneva Convention and Article 43 of Protocol I. Each of these possibilities will be considered in turn.

A. ARMED CIVILIANS

The first possible interpretation of the laws of armed conflict is that members of PMFs are civilians, albeit ones who take up arms. According to Article 50 of Protocol I, a civilian is “any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3), and (6) of the Third Geneva Convention and in Article 43 of this Protocol.”\(^28\) Furthermore, “in case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”\(^29\) In reviewing the four exemptions from civilian status listed in Protocol I’s definition, Article 4A(1) excludes members of the armed forces of a Party to a conflict; 4A(2) likewise exempts members of militias and members of other volunteer corps, and 4A(3) excludes the armed forces of powers not recognized by the Detaining Power.\(^30\) The final exception, Article 4A(6)—the so-called levées en masse—includes “[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading

\(^{26}\) As of January 21, 2008, 194 countries were parties to the Geneva Conventions I–IV, and 167 countries were parties to Protocol I. See International Committee of the Red Cross, States Party to the Main Treaties, available online at <http://www.cicr.org/eng/partypcp> (visited Apr 5, 2008).

\(^{27}\) As of July 1, 1987, forty-nine countries had signed, ratified, or assented to the Hague Conventions of 1907. See Hague Convention (cited in note 21).

\(^{28}\) Protocol I, art 50 at 650 (cited in note 8).

\(^{29}\) Id.

\(^{30}\) Third Geneva Convention, art 4A(1), (2), and (3) at 430–31 (cited in note 21).
forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.”

To these exceptions must be added the restrictions of Article 51(3), which states, “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” This Article, combined with the levées en masse exception, suggests that any persons taking up arms in combat may lose their status as civilians. A distinction must be made, however, between levées en masse and those who take up arms against the Occupying Power after occupation has occurred. While the former merit prisoner-of-war status under the Third Geneva Convention, the latter do not. Once a “territory is invaded . . . a levée en masse is no longer legitimate.” Any civilians continuing under arms are considered “marauders or bandits and may be tried as such if captured by the adverse party.” This distinction seems to suggest that individuals who take up arms in the narrow circumstances of defense against an invading power are legitimate combatants, while those who take up arms subsequent to occupation may be considered criminals.

This distinction has important consequences when applied to PMFs; it appears unlikely that contractors could be considered part of levées en masse, since there is little that is “spontaneous” about their decision to take up arms. Thus, if the civilian classification is applied to PMFs, they would be without the protections of the Geneva Convention. If, then, a contractor engages in hostilities, this would be considered a criminal act in violation of the penal laws of the territory, and he could be prosecuted by either the domestic authority or the Occupying Power under the authorities granted by the Fourth Geneva Convention.

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31 Id at 431.
32 Protocol I, art 51(3) at 651 (cited in note 8).
33 Green, Contemporary Law at 105 (cited in note 18).
34 L. Oppenheim, 2 International Law: Disputes, War and Neutrality 258 (H. Lauterpacht, ed) (Longmans Green 7th ed 1952). It appears that Oppenheim considers invasion and occupation as being synonymous. In practice, however, a legal occupation may not occur until some time after an invasion takes place. For example, whereas the US invasion of Germany began in early March 1945, see Peter Young, A Short History of World War II 1939–1945 393–99 (1966), the legal occupation of Germany arguably began with the issuing of the Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers on June 5, 1945, available online at <http://www.yale.edu/lawweb/avalon/wwii/ger01.htm> (visited Apr 5, 2008). For present purposes, I shall consider the law to mean that levées en masse become illegitimate once a territory has been legally occupied.
35 Green, Contemporary Law at 105 (cited in note 18).
The classification of PMFs as civilians may be ideal in certain situations, such as when they have been hired by private entities for security purposes during invasions and occupations. In such circumstances, it seems appropriate to subject PMFs—like any private, armed security guards in territories not engaged in armed conflict—to civilian criminal law. Civilian classification becomes more problematic, however, when armed contractors are used for the strategic and tactical objectives of Parties to a conflict. In such cases, treating the violent acts of armed contractors conducted in the course of their employment as criminal is inequitable when regular armed forces committing identical acts may be immune from prosecution. Therefore, when PMFs are in the employ of Parties to a conflict, another classification must be used.

B. MERCENARIES

A second possible classification of PMFs under the laws of armed conflict is that of being mercenaries. Intuitively, individuals who are not members of the armed forces of a state or revolutionary group, yet are paid to engage in combat, would seem to fit the colloquial definition of “mercenary” perfectly. The international legal definition of this term, however, is far less clear. The most basic definition, used by eleven states of the former Soviet Union, simply defines mercenaries according to their desire for private gain without further elaboration. This definition is clearly problematic, since it focuses on the intent, rather than the actions of the person in question.

While the definition adopted by former Soviet states is perhaps too unclear, the definition promulgated in Protocol I is almost certainly too precise. Article 47 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 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

38 Henckaerts and Doswald-Beck, 1 Customary International Humanitarian Law at 393 (cited in note 27).
39 See Ryan M. Scoville, Toward an Accountability-Based Definition of “Mercenary,” 37 Georgetown J Int’l L. 541, 557–58 (2006). Indeed, as Green notes, the mercenary intent motive is the only occasion in which “mental state and financial inducements, as distinct from function, have been used to determine status from the point of view of the law of armed conflict.” Green, Contemporary Law at 112 n 67 (cited in note 18).
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.40

It is easy to see how placing PMFs under this narrow definition would exempt whole categories of contractors from just prosecution. Indeed, it has often been noted that it is very hard to be convicted of mercenary acts.41 Most problematic with regards to application to PMFs is the requirement that mercenaries be neither a national of a Party to the conflict nor a resident of territory controlled by a Party. The official commentaries are cryptic on the matter: “Whether or not one is sympathetic to the cause that they are serving, nationals of a Party to the conflict who voluntarily engage in combat in the ranks of that Party, are not mercenaries.”42 Thus, it is unclear whether the drafters intended to exclude Party “guns for hire,” or whether the exception simply ignores the possibility that nationals of Parties to the conflict who engage in combat could be anything other than members of the armed forces. In actuality, there is a great deal of overlap between the nationalities of armed contractors and the nations that most employ them; the United States and United Kingdom, for example, are by far the greatest providers and consumers of private military services.43 Thus, the practical effect of a strict application of the mercenary classification would be the exemption of a large portion of armed contractors currently employed by major state powers.

An additional problem with Protocol I’s definition of mercenaries is the section 2(b) requirement that such individuals “take direct part in hostilities.” Exactly what direct participation entails is uncertain, as the term does not seem to make a distinction between defensive and offensive participation in combat. Additionally, in defining “direct participation in hostilities,” the International Committee of the Red Cross’s (“ICRC”) official commentaries on the Additional Protocols are unclear. On the one hand, direct participation in hostilities are “acts of war which are intended by their nature or their purpose to

40 Protocol I, art 47 at 649 (cited in note 8).
41 As a “learned friend” of Geoffrey Best famously quipped, “any mercenary who cannot exclude himself from this definition deserves to be shot—and his lawyer with him.” See Geoffrey Best, Humanity in Warfare 328 n 83 (Columbia 1980).
42 ICRC, Commentary at 580 (cited in note 20).
hit specifically the personnel and the *matériel* of the armed forces of the adverse Party." Setting aside the problem of application where action is taken against individuals that are not members of the armed forces of a party, such a definition would seem to suggest that “direct participation” only implies offensive action. The ICRC continues, however, to state more expansively that “[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.” Thus, it would appear that defensive action may also be considered “direct participation.” Such a reading of the term is both more plausible and problematic, since it is nonsensical to state that individuals commit the kind of atrocities that the Geneva Conventions are designed to prevent only when they are attacking, rather than being attacked. At the same time, however, this interpretation does not resolve the legal question of when an act of self-defense is elevated to active participation in combat.

Nonetheless, the more expansive reading of “direct participation in hostilities” would have the dual benefits of providing consistency in the law of armed conflict—since the primarily defensive actions of *levées en masse* could then also be considered participation in hostilities—and incorporating PMFs hired by parties for primarily defensive security operations. However, by requiring that mercenaries take direct part in hostilities “in fact,” section 2(b) suggests that it is insufficient that an accused mercenary has merely provided logistical or technical support to others engaged in combat. In order for prosecution for mercenarism to occur, the accused must have actually undertaken acts of violence. The official commentaries note that “foreign advisers and military technicians” are not mercenaries so long as they “do not take any direct part in the hostilities.” This creates a strict legal standard wherein a contractor may be armed legally, and yet, should she use her firearm in self-defense in a manner that would be permissible as a civilian under domestic law, she could nonetheless be prosecuted as a mercenary. As this hypothetical shows, the choice of whether the more expansive definition of “participation in hostilities” should be employed may ultimately depend on value judgments as to the inherent desirability of PMFs, since the adoption of the expansive definition would likely have a chilling effect on their use.

The International Convention against the Recruitment, Use, Financing and Training of Mercenaries (“Mercenary Convention”) may nonetheless undermine any deterrent effect that an expansive reading of section 2(b) might provide. The Mercenary Convention defines a mercenary as one who is “specially recruited

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45 Id.
46 Id at 579.
locally or abroad for the purpose of participating in a concerted act of violence aimed at: (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or (ii) Undermining the territorial integrity of a State . . . ."47 By specifying the objectives pursued necessary for an accused to be convicted of mercenarism, the Mercenary Convention likely exempts large numbers of PMFs. For example, it is unlikely that PMFs who use force in the course of providing logistical support to an Occupying Power could be classified as mercenaries under this definition.

Besides the impracticality of the mercenary classification for the reasons already set forth, it is important to note that the application of the definition would have extremely inequitable (although perhaps symmetrical) effects on armed contractors who are nationals of developing countries as opposed to those who are citizens of wealthy, developed countries. As already noted, section 2(d) of Article 47 would exempt American and British armed contractors operating in Iraq because they are nationals of Parties to the conflict, yet would leave third country nationals ("TCNs")48 vulnerable to classification as mercenaries. Conversely, section 2(c) might likewise exempt TCNs, since in many cases such contractors are paid the same as, or significantly less than, their western and military counterparts. In the Triple Canopy example above, three of the contractors involved were American, each making between $500 and $600 a day, whereas the fourth employee, a Fijian, made only $70 a day (approximately $2100 a month).49 In comparison, the salary of an American army sergeant serving in Iraq is approximately $2400 a month.50 This comparison highlights an additional inequality within 2(c); wealthy nations who can afford to pay their national militaries more than the international market price for TCN contractors would receive the additional benefit of exempting such TCNs from charges of mercenarism due to their relatively low pay, while TCN contractors would remain exposed to charges of mercenarism if they charge the international market price while serving countries that cannot pay their regular militaries at a comparable rate.

49 See id. However, in that scenario, the Fijian national would also likely be exempt under Article 2(d), since Fiji has sent troops to Iraq.
50 Defense Finance and Accounting Service, United States Department of Defense, 2007 Pay Table, available online at <http://www.dfas.mil/militarypay/militarypaytables/2007MilitaryPayChartst-1.doc> (visited Apr 5, 2008). This assumes an E5 with four years of experience and the inclusion of Imminent Danger/Hostile Fire Pay, but excludes allowances for housing, clothing, education benefits, and health care services. Thus, the difference in salary may be even greater.
C. PERSONS ACCOMPANYING THE ARMED FORCES

Thus, although recognizing that classification of PMFs in the employ of Parties to a conflict as either civilians or mercenaries under international law is problematic, it remains to be seen whether employing a classification that explicitly recognizes the agency relationship to a state would be more appropriate. The first possibility is that spelled out under Article 4A(4) of the Third Geneva Convention: “Persons who accompany the armed forces without being members thereof,” including “civilian members of military aircraft crews, war correspondents, supply contractors,” and “members of labour units or of services responsible for the welfare of the armed forces.” Furthermore, the Convention states that such individuals will retain their right to prisoner-of-war status “provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card.”

Like the civilian and mercenary classifications that have preceded it, this category seems intuitively to apply to PMFs. Indeed, contractors like those that Singer classifies as “military support firms” would fit perfectly into this definition. Thus, this classification may help to provide legal traction to the factual question of whether an act is conducted in self-defense or as a part of hostilities. The ease of application is reduced, however, when one moves away from the unarmed civilian cook to the automatic rifle-wielding contractor whose primary purpose is to defend individuals or objects with the use of force if required. To understand why, one must look at the evolution of the concept of non-combatants in armed conflict. Drafted at the beginning of the twentieth century, the Hague Regulations provide prisoner-of-war status to those who “follow an army,” providing a list of such individuals that was incorporated almost verbatim into the Third Geneva Convention. More importantly, the Regulations recognize a distinction between “combatants” and “non-combatants” in the armed forces. According to the renowned German jurist L.F.L. Oppenheim, the individuals the Regulations included within the “non-combatant” category of the armed forces were such individuals as “couriers, doctors, farriers, veterinary surgeons, chaplains, nurses, official and voluntary ambulance men, contractors, canteen-caterers, newspaper correspondents, civil

51 Third Geneva Convention, art 4A(4) at 431 (cited in note 21).
52 Id.
53 Id.
54 Singer, Corporate Warriors at 97 (cited in note 12).
55 Hague Convention, ch 2, art 13 at 79 (cited in note 21).
56 Id, art 3 at 76.
servants, diplomatists, and foreign military attachés.”

Furthermore, such individuals retained their rights not to be directly attacked by the enemy only “in so far as these non-combatant members of armed forces do not take part in the fighting.”

Forty years and two world wars passed before the Third Geneva Convention adopted the Hague Regulations’ grant of prisoner-of-war status to those accompanying the armed forces. The Hague Regulations distinguish between combatants and non-combatants within the armed forces, though this is not mentioned in the Third Geneva Convention—perhaps due to its focus on prisoner-of-war issues rather than on regulating actual combat. During the intervening period, however, innovations—such as armored tanks, aerial warfare, and new guerilla tactics developed during wars of national liberation—had blurred the distinction between the front and rear of military operations. Indeed, thirty years later, Protocol I, which was negotiated in response to the wars of decolonization and makes no mention of contractors, eliminated the distinction between “combatant” and “non-combatant” of the armed forces. The ICRC official commentaries note:

In fact, in any army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons. These include auxiliary services, administrative services, the military legal service and others. Whether they actually engage in firing weapons is not important. They are entitled to do so, which does not apply to either medical or religious personnel, despite their status as members of the armed forces, or to civilians, as they are not members of the armed forces.

Thus Protocol I maintained the non-combatant role for medical and religious personnel, but eliminated it for all others. It continues, “[t]his should therefore dispense with the concept of ‘quasi-combatants’. . .[s]imilarly, any concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day, also disappears.” Considering the lack of mention in Protocol I of accompanying forces, this elaboration by the ICRC raises the question of which, if any, of the personnel listed in Article 4A(4) of the Third Geneva Convention remain independent of the armed forces.

Prudence suggests that the distinction set forth by Oppenheim—whether such individuals engage in hostilities—remains. Certainly individuals, such as war correspondents, should be immune from attack, so that all parties may enjoy the

57 Oppenheim, 2 International Law at 255 (cited in note 34).
58 Id at 345.
59 Third Geneva Convention, art 4A(4) at 431 (cited in note 21).
60 ICRC, Commentary at 515 (cited in note 20).
61 Id.
benefits of a free and unbiased press. Nonetheless, war correspondents’ frequent proximity to combatant forces means that they may at times legitimately come under fire. Similarly, while civilians providing pure logistical or supply services to the armed forces are vulnerable to attack during the period of service, we would not wish for them to be attacked when they return to their homes.62 In both cases, permitting the individuals in question to engage in hostilities would undermine the incentives for their opponents to respect their general immunity from harm. Thus, in light of Protocol I, the only viable interpretation of Article 4A(4) is that the individuals listed therein are non-combatants who may be attacked only under certain circumstances, and as a result merit prisoner-of-war status if captured. However, once such individuals have taken up arms beyond self-defense, any claims they may have to non-combatant status is revoked, and they must instead be considered subject to some other classification under the Geneva Convention.

On a more practical level, classifying armed contractors under Article 4A(4) is inconsistent with other provisions of the Geneva Conventions. Article 4A(2) requires that members of militias wear a fixed emblem recognizable at a distance and carry their arms openly.63 Howard Leive speculates that the rationale behind the distinctive emblem requirement was probably twofold: (1) to protect the members of the armed forces of the Occupying Power from treacherous attacks by apparently harmless individuals; and (2) to protect innocent, truly noncombatant civilians from suffering because the actual perpetrators of a belligerent act seek to escape identification and capture by immediately merging into the general population.64 To these rationales might be added the desire to allow civilian non-combatants to identify combatants and thus prevent becoming an inadvertent casualty by avoiding potential crossfire or mistaken identity situations. Article 4A(4), by merely requiring armed contractors to possess an identification card, will not provide the kind of distinction of combatants that Article 4A(2) requires.

D. COMBATANT UNDER AUTHORITY OF A PARTY TO THE CONFLICT

The final category under international law into which members of PMFs could be placed is that of being a combatant under the authority of a Party to

62 See Green, Contemporary Law at 105 (cited in note 18).
63 Third Geneva Convention, art 4A(2)(b),(c) at 430–31 (cited in note 21).
64 Howard S. Leive, 59 International Law Studies: Prisoners of War in International Armed Conflict 46–47 (Naval War College 1977).
the conflict. Here, the Geneva Conventions and Protocol I provide several subcategories: combatants may be a part of a Party’s armed forces proper, members of militias or other volunteer corps, or paramilitary or law enforcement agencies incorporated into the armed forces of the party. Each of these terms in turn requires definition.

While the Third Geneva Convention does not explicitly define what is meant by “armed forces,” Protocol I requires that

[the armed forces of a Party to a conflict consist of organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.]

It may be no mistake that the drafters of Protocol I made the definition of armed forces very broad, since the definition of a state’s armed forces—and thus by extension the right to control such forces—is arguably a fundamental aspect of sovereignty. Thus, as Oppenheim has noted, the composition of the armed forces is inherently a question of domestic law. Only those requirements most essential for the operation of international law—command authority and general compliance—are imposed by international convention.

With regards to groups and units not explicitly part of a Party’s armed forces, the drafters of the Geneva Conventions and Protocol I appear more willing to set defining requirements. The Third Geneva Convention requires that militias and other volunteer corps fulfill the following conditions: “(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.” Thus, there exists a difference between Protocol I’s requirements for armed forces and the Geneva Convention’s requirements for militias: the former makes the requirements of distinctive emblems and openly bearing arms requisite for inclusion within the category, while Protocol I makes

65 See Third Geneva Convention, art 4A(1) at 430 (cited in note 21); Protocol I, art 43, § 1 at 647 (cited in note 8).
66 See Third Geneva Convention, art 4A(1), (2) at 430–31 (cited in note 21).
67 See Protocol I, art 43, § 3 at 647 (cited in note 8).
68 Id, art 43, § 1 at 647.
69 Oppenheim, 2 International Law at 255 (cited in note 34).
70 Third Geneva Convention, art 4A(2) at 430–31 (cited in note 21).
71 It should be noted, however, that Article 44, § 3 of Protocol I requires that combatants distinguish themselves (cited in note 8).
a distinction from the civilian population a responsibility of the armed forces. Considering that failure of members of the armed forces to distinguish themselves results in a loss of prisoner-of-war status under Article 44, section 4, it is curious that Protocol I did not simply make the rule a requisite under Article 43. Again, the rationale for this difference between the two instruments may be born out of respect for the sovereign right of states to define their armed forces, or perhaps may simply be imprecise drafting.

The final subcategories of Party combatants are those mentioned in Article 43, section 3 of Protocol I, which requires Parties to notify other Parties to a conflict when they have incorporated a "paramilitary or armed law enforcement agency into its armed forces." Incorporation of such groups into the combatant forces of a Party is problematic in itself, since the goals of maintaining public order and achieving military objectives may be incompatible. Such may explain why notification is required: it signals to opposing parties that law enforcement agencies have ceased their policing duties in order to participate in hostilities directly and are therefore legitimate combatants who may employ the use of force and be the subject of attack. If explicit incorporation has not taken place, then police forces should be permitted to continue their civil defense work as outlined in Chapter VI of Protocol I and their public order duties under Article 54 of the Fourth Geneva Convention.

Considering each of these subcategories, one common feature may be noticed: in each classification, the individuals are subordinate to superiors who are responsible for adherence to the laws of war. In the case of militias and the armed forces proper, this requirement is explicit; in the case of armed law enforcement agencies, it may be derived from their incorporation into the forces of a Party to the conflict, who in turn is responsible for obeying and enforcing international law. If subordination to a responsible Party is the common requirement for classification as a Party combatant, it follows that members of PMFs who are in the employ of Parties may, when legally liable to the Party for their actions, be classified in such a manner.

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73 Id at 647. It should be noted that "paramilitary" in this context is likely more analogous to police forces than the militias mentioned in the Geneva Convention. See ICRC, Commentary at 517 (cited in note 20).
74 See ICRC, Commentary at 517 (cited in note 20).
76 Fourth Geneva Convention, art 54 at 518 (cited in note 36).
77 Protocol I, art 87 § 1 at 672 (cited in note 8).
A review of recent legislation suggests that the United States may have created sufficient legal responsibility over PMFs working on behalf of the Department of Defense to justify classification of those contractors as Party combatants. With the creation of the UCMJ in 1950, the United States military’s traditional ability to prosecute those accompanying the armed forces was re-established in modern law. A series of judicial opinions soon followed, however, which constrained the military’s use of this authority with respect to the civilian dependents of service members and to contractors working for the military at times when war had not been officially declared. Partially in response to these cases, various legislative proposals for the extension of military jurisdiction over civilians and ex-service members have arisen over the past forty years. These efforts resulted first in the Military Extraterritorial Jurisdiction Act of 2000 (“MEJA”), which gave military commanders the power to arrest civilians accompanying the armed forces for violations of US civilian law. This act was supplemented by the USA PATRIOT Act, which extended the criminal jurisdiction of the United States to

(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and (B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

It should be noted, however, that while the MEJA and the USA PATRIOT Act had the effect of extending the territorial jurisdiction of the United States, it did not make such jurisdiction global. Thus, were crimes to be committed outside the premises listed in the Act, the United States would not have territorial jurisdiction to prosecute them. Furthermore, MEJA and the USA PATRIOT Act did not impose any new substantive legal liabilities on armed

81 Gibson, 148 Mil L Rev at 136 (cited in note 78).
83 18 USC § 7(9)(A), (B). The USA PATRIOT Act revised section 7 of Title 18 of the US Code, adding paragraph (9). It should be noted that it was this provision of the USA PATRIOT Act that enabled the prosecution of David Passaro, a civilian contractor working on behalf of the Central Intelligence Agency operating in Afghanistan. See United States v Passaro, Indictment, 5:04-CR-211-1 (EDNC June 17, 2004), available online at <http://www.cdi.org/news/law/cia-contractor-indictment-passaro.pdf> (visited Apr 5, 2008).
contractors. To remedy this, Congress in 2006 amended Article 2 of the UCMJ—\textit{which grants jurisdiction over individuals accompanying the armed forces in the field, regardless of whether the acts occurred on American-controlled territory—to apply in “both time of declared war or a contingency operation.”}\(^\text{84}\) Thus, with one small adjustment to the US Code, Congress potentially made all contractors accompanying the armed forces in Iraq and Afghanistan subject to military law.

The extension of the UCMJ to individuals accompanying the armed forces during contingency operations came as a surprise to many.\(^\text{85}\) In the months that followed, some confusion existed as to how the new law would be interpreted, not least because the larger question of whether the State Department or Department of Defense possessed ultimate responsibility for PMFs working in Iraq had yet to be resolved.\(^\text{86}\) In December of 2007, the State Department and Department of Defense released a Memorandum of Agreement, which outlined a system of shared responsibility for contractors in Iraq, but did not address whether the UCMJ would be applied to PMF personnel.\(^\text{87}\) Finally, in March of 2008, the Secretary of Defense Robert Gates released a memorandum stating the Department of Defense policy with regards to prosecution of civilians accompanying or in the employment of the Armed Forces.\(^\text{88}\)

The Gates Memorandum outlined a system of prosecutorial deference; military commanders are required to refer criminal infractions by civilian employees of the Department of Defense and civilians accompanying the armed forces to the Department of Justice. It is important to note, however, that deference does not equal an abdication of authority. The memorandum requires military commanders to continue to “address” crimes while the Department of Justice undertakes its investigation and prosecution of crimes committed by individuals subject to Article 2(a)(10). Should the Department of Justice prove unwilling or unable to prosecute a violation of US criminal law, military commanders with general court-martial convening authority retain the


\(^{87}\) The Memorandum of Agreement is available online at \(<\text{http://www.nimj.org/documents/DoS-DoD%20Agreement%20on%20PSCs.pdf}>\) (visited Apr 5, 2008).

\(^{88}\) Secretary of Defense Robert Gates, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretaries of Defense, Commanders of the Combatants Command, UCMJ Jurisdiction over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (Mar 10, 2008), available online at \(<\text{http://www.nimj.org/documents/2a10.pdf}>\) (visited Apr 5, 2008).
authority—with certain exceptions—to refer charges to a court-martial.\textsuperscript{89} Such a system of deference is not entirely different from that currently governing the prosecution of service members who commit major crimes in violation of both the UCMJ and federal civilian law,\textsuperscript{90} since in both systems certain crimes are referred to civilian authorities for prosecution, yet the military does not relinquish jurisdiction.

Thus, the change to Article 2 of the UCMJ, as interpreted by the Gates Memorandum, has the potential to greatly expand the authority of American military commanders with general court-martial convening authority over PMFs working on behalf of the Department of Defense.\textsuperscript{91} Prior to the 2006 amendment, military commanders who wished to discipline contractors for failure to obey an order would have to work through the government’s contracting officer—the only government official able to proscribe contractor conduct.\textsuperscript{92} Subsequent to the change in the UCMJ, should a contractor disobey the orders of military officials, they could face prosecution in military courts.\textsuperscript{93}

In reviewing the various international legal requirements for classification as a Party combatant, the extension of UCMJ jurisdiction potentially fulfills Protocol I’s requirements that armed forces be “subject to an internal disciplinary system.”\textsuperscript{94} Additionally, since American military officers are responsible for the actions of those over whom they have legal authority,\textsuperscript{95} the amended Article 2 of the UCMJ arguably fulfills the Third Geneva Convention’s requirement that militias and volunteer corps be “commanded by a person responsible for his subordinates.” Finally, since military officers likewise have a duty to ensure that their subordinates comply with the international law of armed conflict,\textsuperscript{96} the UCMJ grant of authority ensures that PMFs are required to

\textsuperscript{89} Id.


\textsuperscript{91} It remains unclear whether Article 2(a)(10) applies to PMFs working on behalf of other government agencies, such as the Department of State.


\textsuperscript{93} See 10 USC § 890(2). In theory, a contractor could also be punished for disrespecting an officer, 10 USC § 889, and attacking an officer, 10 USC § 890(1).

\textsuperscript{94} Protocol I, art 43, § 1 at 647 (cited in note 8).

\textsuperscript{95} Protocol I, art 43, § 1 at 647 (cited in note 8).

\textsuperscript{96} Protocol I, art 87 at 672–73 (cited in note 8).
conduct “their operations in accordance with the laws and customs of war.” Therefore, by extending the UCMJ to cover armed contractors in contingency operations, the United States has arguably created a nexus of responsibility over the PMFs in its employ sufficient to justify classification of such contractors as either members of the armed forces or members of a militia under its control.

While extension of military authority is insufficient to determine the subcategory of Party combatants into which members of PMFs fall, classification generally as a legitimate combatant bestows many benefits on armed contractors, including the right to prisoner-of-war status. At the same time, however, classification of PMFs as Party combatants creates many responsibilities not only for the armed contractor, but also for the Party that has legal authority over him. To understand why, one must turn to the international law of state responsibility.

IV. INTERNATIONAL LAW OF STATE RESPONSIBILITY

It could be argued that the classification of PMFs as members of the armed forces will bring a degree of responsibility for the actions of PMFs that states do not desire. A review of current international law, however, suggests that—at least in the case of the United States—the state may already be responsible for the actions of some of these groups. Under Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, “[t]he conduct of a person or group shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

The degree of control that is required for states to be held liable has been debated in various international tribunals. For example, the degree of control may need to be very high. In Nicaragua v United States, the International Court of Justice (“ICJ”) set forth an agency test for state responsibility, holding that while

97 Third Geneva Convention, art 4A(2) at 430–31 (cited in note 21).
98 Id, art 4A(1),(2); Protocol I, art 44 at 647–48 (cited in note 8).
99 See James Crawford, The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries 110 (Cambridge 2002). Although the Draft Articles were never formally adopted, they were endorsed by the UN General Assembly. See id at 60. See also the International Law Commission, available online at <http://untreaty.un.org/ilc/summaries/9_6.htm> (visited Apr 5, 2008). Additionally, the articles have been referenced by numerous international tribunals. See, for example, Advisory Opinion, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 ICJ Reports 62, 87 at ¶ 62 (Apr 29, 1999) (“According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility.”); see also Saad Gul, The Secretary Will Deny All Knowledge of Your Actions: The Use of Private Military Contractors and the Implications for State and Political Accountability, 10 Lewis & Clark L Rev 287, 308 (2006).
the United States was responsible for its own support for the *contras*, it was only responsible for individual acts conducted by the *contras* in specific instances. Generally, in order for the United States to be responsible for the acts of the *contras*, "it would in principle have to be proved that [the United States] had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."

Finding the ICJ's opinion in *Nicaragua* to be confusing, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), in its decision in *Prosecutor v Tadic*, interpreted it as setting forth a two-step test to determine a state's liability for the actions of individuals: "(i) responsibility arising out of unlawful acts of State officials; and (ii) responsibility generated by acts performed by private individuals acting as de facto State organs." In order for States to be held responsible under (ii), "the Court required that private individuals not only be paid or financed by a State, and their action be coordinated or supervised by this State, but also that the State should issue specific instructions concerning the commission of the unlawful acts in question."

After setting forth its reading of the *Nicaragua* opinion, the ICTY continued to state that it found the ICJ's reasoning inconsistent with the logic of the law of state responsibility. Quoting Article 8 of the Draft Articles, the ICTY stated,

> if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility.

The ICTY continued, "[t]he requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case." The Appeals Court then outlined several examples of where the actions of an individual could be attributed to a State. In one example, the Appeals Court considered the case of a
State entrusting a private individual with the performance of a legal task, and in the course of performance, the individual “breach[es] an international obligation of the State.” In such a case, “by analogy with the rules concerning State responsibility for acts of State officials acting ultra vires, it can be held that the State incurs responsibility on account of its specific request to the private individual or individuals to discharge a task on its behalf.”

Furthermore, the ICTY compared the case of a private individual acting on behalf of a State with that of “individuals making up an organized and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels.” Here, the Appeals Court found that it was “sufficient to require that the group as a whole be under the overall control of the State.”

Perhaps in response to the critique by the ICTY, the ICJ reiterated the agency test that it set forward in the Nicaragua case in February 2007. The Court stated that “to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court’s judgment quoted above expressly described as ‘complete dependence.’” What must be noted here is that the Court did not reject the notion that agency may exist where state responsibility is conferred by internal law, yet the degree of dependence is less than complete.

If this proposition is correct, it may be argued that regardless of whether one adopts the strict agency test of state responsibility articulated in Nicaragua, or the more permissive interpretation advanced in Tadic, the United States, by placing PMFs under the UCMJ, may have made those firms organs of the state. Since the definition of what comprises the armed forces of a state is arguably a matter of domestic law, it seems that there is little more than the extension of UCMJ jurisdiction that a state could do under domestic law to...
bring PMFs into their armed forces. On a practical level, it stretches credulity to state that an individual who may face prison for disrespecting or disobeying the orders of a US Army officer is not an agent of the United States government.

Thus, if the United States is already responsible for the actions of PMFs under its employ, the US government should clarify the rights and responsibilities of armed contractors under the international law of armed conflict in order to protect individual commanders and civilian leaders from being held criminally liable for the actions of such forces. As the United States Army Field Manual notes,

[In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control... The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.]

This prophylactic need to clarify the role of PMFs is all the more pressing once one considers, as James Crawford has noted, that an important distinction exists between the purposes of the ICJ and the ICTY. The Nicaragua case dealt with State responsibility, whereas Tadic dealt with resolving the standard for individual criminal responsibility. Thus, the standard of vicarious responsibility may be more permissive in finding responsibility with respect to individual criminal culpability (in international criminal courts) than with respect to the attribution of responsibility to sovereign states (in the ICJ).

The question of individual responsibility for subordinate acts became crucially important when the Rome Statute establishing the International

\[114\] The Department of Defense has also recognized that contractors are a part of the Department's "Total Force." See Department Of Defense, Quadrennial Defense Review Report 75 (Feb 6, 2006), available online at <http://www.defenselink.mil/qdr/> (visited Apr 5, 2008).

\[115\] See 10 USC §§ 889–90 (cited in note 93).

\[116\] US Department of the Army, Field Manual at § 501 (cited in note 95) (emphasis added). Additionally, failure to stop or to prosecute war crimes conducted by subordinates could leave American military commanders vulnerable to international prosecution under Article 87 of Protocol I. See Department of the Army, Law of War Documentary Supplement at 387 (cited in note 8) (the United States will take "reasonable measures" to comply with Article 87). Military commanders may also be subject to domestic prosecution under 10 USC § 892 (Failure to Obey Order or Regulation).

\[117\] Crawford, International Law Commission at 112 (cited in note 99); see also Tadic, Case No IT-94-1, ¶ 101 (cited in note 102).
Criminal Court ("ICC") entered into force on July 1, 2002. In response to the possibility of American military personnel being brought to trial at the ICC, the United States has entered into bilateral "Article 98 Agreements" with over ninety countries, wherein the two parties agree not to surrender the "nationals" or "military personnel" of the other party to ICC jurisdiction without that party's permission. These agreements might be said to cover contractors in the employ of the United States if, as discussed previously, they are considered members of armed forces. Thus the immediate risk of foreign prosecution may be greatly diminished.

These agreements, however, are only a limited solution to a more complex problem. First, although such agreements practically limit the likelihood of American contractors appearing before international tribunals, they do nothing to resolve substantive issues of legal culpability. Second, although refusal by foreign governments to enter into Article 98 Agreements could result in the loss of American military assistance under section 2007(a) of the American Service-Members Protection Act, there are no guarantees that those nations that have entered into such agreements will continue to honor them should a calculation of national interest dictate otherwise. Third, many important allies of the United States, including Mexico, have refused to sign Article 98 Agreements, meaning that indicted American personnel located in those countries could be subject to extradition to the Hague. Finally, while these bilateral agreements protect American nationals from international prosecution, they are generally not applicable when PMFs are employed by nations other than the United States. As discussed below, in many international conflicts—most notably in Afghanistan and the Sudan—the US government may wish to attribute the actions of substate actors to their sponsoring governments; failing to advocate a norm of incorporation could undermine US foreign policy goals in such situations. Dependence on bilateral arrangements is therefore an insufficient response to the growth of the PMF industry. Alternatively, establishing an international norm of incorporation both resolves substantive questions of legal responsibility and establishes a framework within which the United States may pursue its foreign policy objectives in a world increasingly characterized by substate actor violence.

118 For a list of countries that have signed Article 98 Agreements, see Georgetown University Law Library, International Criminal Court—Article 98 Agreements ¶ 1 (May 2007), available online at <http://www.ll.georgetown.edu/intl/guides/article_98.cfm> (visited Apr 5, 2008).
119 See, for example, id at ¶ 100 (Agreement Regarding the Surrender of Persons to the International Criminal Court, signed Feb 15, 2004, between US and United Arab Emirates).
120 22 USC § 7426(a).
121 US and Mexico at Odds over Tribunal, Seattle Times A13 (Oct 29, 2005).
A few examples illustrate how explicit adoption of PMFs may shield the United States government and its representatives from criminal or civil liability and further American military objectives. Under Article 43(3) of Protocol I, States are required to inform other parties which paramilitary and law enforcement agencies they have incorporated into their armed forces.\textsuperscript{122} In a chaotic theater of operations such as Iraq in 2008, countless PMFs may be operating on behalf of a variety of clients.\textsuperscript{123} If the United States announces which PMFs they have analogously incorporated into their armed forces, they create a public legal distinction that may shield them from responsibility for actions taken by PMFs operating within a combat theater, yet not under the direct control of the United States. To take the Triple Canopy example listed above, had the United States government formally announced that Triple Canopy was not incorporated into their armed forces, the nexus of American legal liability for the intentional targeting of civilians would be removed by two degrees—statement of nonincorporation and not being subject to the UCMJ.

Incorporation into the armed forces would impose certain additional responsibilities onto PMFs, such as requiring them to adhere to the Geneva Convention's requirement of displaying a distinctive emblem recognizable at a distance.\textsuperscript{124} Failure to distinguish themselves as party combatants would result in a loss of the right to prisoner-of-war status under Article 44, section 4 of Protocol I. While the distinctive emblem requirement has been relaxed due to the experiences of the resistance movements of the Second World War,\textsuperscript{125} the situations which would necessitate the relaxation of the requirement must be "exceptional and . . . only arise in respect of resistance movements in occupied territory or a liberation movement engaged in hostilities against a colonial power."\textsuperscript{126} PMFs therefore have a responsibility as party combatants to distinguish themselves from the civilian population. The benefits to the United States government of adhering to this rule are clear; by visibly demarcating in some way which PMFs are under its control, the US military would avoid accusations of legal responsibility for the actions of privately employed contractors and would hopefully avoid retaliatory strikes for the same.

\textsuperscript{122} As the official commentaries note, official notification of incorporation of law enforcement agencies may be made through the Swiss Federation Council, the depository of the Conventions. See ICRC, Commentary at 517 (cited in note 20); Protocol I, art 93 (cited in note 8).

\textsuperscript{123} Robert Pelton quotes one source as saying that at one point in 2005, anywhere between twenty-five and one hundred PMFs were operating in Iraq. See Robert Y. Pelton, Licensed To Kill: Hired Guns in the War on Terror 212 (Crown 2006).

\textsuperscript{124} Third Geneva Convention, art 4 at 430–31 (cited in note 21).

\textsuperscript{125} Green, Contemporary Law at 108 (cited in note 18).

\textsuperscript{126} Id at 109 n 45.
For PMFs, adherence to the distinctive emblem rule would have mixed effects, but on balance, the benefits may be said to outweigh the costs. As already mentioned, distinguishing themselves from the civilian population allows PMFs to retain prisoner-of-war status. In an era of unconventional warfare where videos of decapitated prisoners litter the internet, the protections of the Geneva Conventions may be small comfort. This assumes, however, that PMFs are never again going to be used in forms of traditional warfare, a proposition the record does not support. Armed contractors have been employed by the United States during both the First Gulf War and the initial invasion of Afghanistan in 2001. Thus, while the Geneva Conventions may not be commonly invoked in current conflicts, there is no reason to assume that PMFs will not desire to appeal to them in the future.

In addition, it is precisely the ability of PMFs to blend in with the civilian population that provides them with their greatest protection, and thus the adoption of a distinctive emblem might make them more of a target. In an age of increasing covert operations by government intelligence agencies, however, the opposite may be true, as recent events in Iraq demonstrate. On March 30, 2004, four employees of Blackwater were killed in the city of Fallujah, their bodies dragged through the streets in full view of the world’s television audience. As Robert Young Pelton notes, before the attack,

Fallujans had noticed that in addition to the military presence, groups of military looking Westerners dressed as civilians were shuttling around the region in support of the U.S. occupation. They could be easily identified by their sunglasses, short hair, safari-style clothing and, of course, their weapons . . . . The word on the street was that these were CIA and their mercenaries.

While it is unclear whether the members of the Fallujan mob would have been less likely to attack the Blackwater personnel had they been wearing emblems identifying them as contractors working for the government, this incident does disprove the opposite: that dressing in a nondescript, yet heavily armed manner keeps contractors safe through anonymity.

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127 See Singer, Corporate Warriors at 97 (cited in note 12) (contractors accompanied Saudi National Guard forces into combat during the first Gulf War); Pelton, Licensed to Kill at 102 (cited in note 123) (by the time of the Second Gulf War, the ratio of contractors to soldiers had increased from one for every fifty to one for every ten). Furthermore, Military Professional Resources Incorporated (“MPRI”) was employed by the United States during the Bosnian War. See Stanger and Williams, 2 Yale J Intl Aff at 8 (cited in note 43).

128 Pelton, Licensed to Kill at 291 (cited in note 123) (“[T]he traditional British style . . . [tries] harder to blend in and be discreet, hoping to pass unnoticed below the radar screen of those who might want to attack them.”).

129 Id at 129–30.
Finally, the display of a distinctive emblem requirement raises the larger question of whether PMFs that have been legally incorporated into the armed forces classification should be legitimate targets for the use of force under the law of armed conflict. The short answer is that they are, but such is not dependent on their being incorporated by the armed forces of a Party to the conflict. Even if PMFs were considered civilians for Geneva Convention purposes, the mere fact that they bear arms would make them at least subject to prosecution under civilian law and potentially a legitimate target for opponents. On a practical level, however, the legitimacy of PMFs as targets is dependent on the manner in which they are employed. If they are guarding civilians, “dangerous forces” (that is, potentially hazardous man-made structures such as dams or dykes), or cultural properties, then any attack against them would be illegitimate.

V. THE NEED FOR AN INTERNATIONAL AGREEMENT

The foregoing analysis has focused on the use of the Hague and Geneva Conventions to define the legal identity of PMFs. Of course, there is nothing inevitable about reliance on traditional international treaty law in confronting the dilemma posed by the use of security contractors in armed conflict. As a matter of policy, states might choose—either implicitly or explicitly—two other courses of action. As will be shown, neither is viable in the long term from a legal policy perspective, and thus some recourse to international law is ultimately preferable.

First, states employing or hosting PMFs may choose to ignore the problem and adopt an ad hoc position of seeking to reap the benefits of the use and association with such firms when advantageous to state interests, while maintaining plausible deniability when it is not. The problem with such an argument is that—assuming arguendo that legal state responsibility cannot be found—a state cannot sever its political liability for PMFs in its employ or comprised of state nationals in the court of public perception. When American national security contractors commit unpopular acts of violence in foreign lands, a disclaimer of legal responsibility by the United States government may be politically ineffectual at best and harmful to international perception of the United States (and American interests by extension) at worst.

Furthermore, by refusing to take affirmative responsibility, the United States runs the risk that other states will move to fill the jurisdictional void.

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130 See Fourth Geneva Convention, art 64 at 520 (cited in note 36).
131 Civilians participating in levées en masse are considered to be combatants. See Green, Contemporary Law at 106 (cited in note 18).
example, in the wake of the shootings by the PMF firm Blackwater USA on September 16, 2007, the Iraqi Parliament began to take steps to overturn Order 17, the Provisional Coalition rule that exempted military contractors from criminal liability under Iraqi law. While making PMFs operating in Iraq subject to a foreign jurisdiction is arguably better than leaving them in large part unaccountable to any legal body, such a system is likely to create diplomatic tensions between the American and Iraqi governments should Iraqi prosecutions proceed. Additionally, it could make the costs of using PMFs far greater in the future, as the financial risk of potential foreign legal liability is incorporated into contracts.

Second, states may claim that legal questions governing the use of and responsibility for PMFs are fundamentally matters of domestic law. Certainly, most of the effective methods of holding PMFs accountable for their actions will be dependent on the use of domestic legal tools—for example, criminal courts and civil liability statutes. However, relying solely on domestic law likewise provides few ways (other than ad hoc diplomacy and judicial comity) of resolving competing national claims of jurisdiction over PMFs.

Thus, while the previous section showed that the use of existing treaty law to define the legal identity of PMFs resembles fitting square pegs into round holes, the alternatives of doing nothing or relying solely on domestic law are even less appealing from a legal policy perspective. Some sort of international agreement on the use of and state responsibility for PMFs is therefore needed. The exact definition of what comprises the armed forces of a state is unquestionably a matter of domestic law so that it is possible that the US could unilaterally extend the armed forces classification to PMFs. But there are several reasons why it may be prudent for the US to seek a more comprehensive international agreement on standards for the use of PMFs by state actors—through existing international law, a new treaty regime, or advocacy of a new norm of customary international law.

First, while it is unnecessary for reciprocity to exist between belligerents before one or both is bound to abide by the Geneva Conventions, the United

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133 Alissa J. Rubin, *Iraqi Cabinet Votes to End Security Firms’ Immunity*, NY Times A10 (Oct 31, 2007). Of course, it is unclear at the moment whether lifting Order 17 immunity would allow Iraq, consistent with international law on the nonretroactivity of criminal law, to prosecute contractors who committed crimes while Order 17 was still in effect.

134 Use of bilateral Status of Forces Agreements (“SOFAs”) and Article 98 agreements may offer a solution to the jurisdictional issue that splits the difference between a purely domestic jurisdiction and reference to international law. The use of such instruments is nonetheless problematic for the reasons discussed in the previous section.

135 Oppenheim, 2 *International Law* at 255 (cited in note 34).

States cannot expect adverse parties to accept that PMFs may properly claim prisoner-of-war status or be immune from prosecution by foreign tribunals, if no international norm exists to support those positions. If the United States anticipates employing PMFs in future conflicts, then it is advantageous to seek international support for a conception of the rights and duties of such contractors before the fog of future wars sets in.

Second, the United States and the United Kingdom may have incentives to create an international standard while they maintain a relative monopoly on PMF services. As Allison Stanger and Mark Eric Williams note, the United States is currently “not only the world’s largest provider of private military services, but also its largest consumer.”137 Stanger and Williams suggest a three-pronged “firewall” currently maintains the United States’ virtual monopoly: “a smaller demand for [PMF] services by non-U.S. clients; a smaller supply of military services by non-U.S. and non-UK [PMFs]; and other countries’ unwillingness to confront the United States.”138 None of these factors, however, can be considered permanent.139 Indeed, several factors argue against the United States maintaining its monopoly of consumption of PMF services. If the United States’ dominant position in international affairs is challenged by emerging powers such as China, Russia, or the EU, states currently unwilling to draw the ire of the American superpower may become more willing to pursue courses of action at odds with the desires of Washington. Free to deflect the disapproval of the US by allying with another global power, the relative ease of outsourcing military work to highly-trained PMFs may prove irresistible to states unable to overcome the significant financial barriers to the domestic production of twenty-first century military forces. In such an environment, any benefits that the United States may gain through the use of PMFs—such as economic efficiency, reduced attributable casualties, and greater military agility140—may be diminished as other states employ PMFs in opposition to the United States.

Emerging simultaneously with growing challenges to American interests from other nation-states is the potential decline of the state’s monopoly on violence.141 While declining costs of weapon systems, transportation, and

137 Stanger and Williams, 2 Yale J Intl Aff at 14 (cited in note 43).
138 Id.
139 Id at 15.
140 Id at 8.
141 An interesting historical example of how continuing monopolization of violence by the state led to greater legal control of private armed forces may be found in the gradual incorporation of naval privateers into the armed forces. From the fifteenth to the eighteenth century, belligerents would grant letters of marque to private vessels to conduct hostilities at sea. As nation-states became increasingly capable of financing professional navies, the practice declined and was abolished by the Declaration of Paris of 1856. The use of private vessels in naval service
communications have empowered substate actors willing to use force to achieve their goals, the traditional system of national sovereignty has provided such actors a haven from the reach of the criminal justice system of opponent foreign states. The norm of incorporation helps to side step this problem, by attributing the acts of a substate transgressor to its sponsor state. Without the norm of incorporation, however, the ability of the United States to use international tribunals to achieve its foreign policy goals is greatly decreased. For example, the United States abstained in the vote of Security Council Resolution 1593 (thus helping to assure its passage) to refer the Darfur situation to the ICC, despite objections to the judicial forum.\textsuperscript{142} If, arguendo, the Sudanese employed PMFs in addition to the Janjaweed, the lack of a norm of incorporation would necessitate the more problematic finding of implied, rather than explicit, culpability under the \textit{Tadić} standard in order to hold Sudanese government officials accountable.

If both the dominant market role of the United States and the state monopoly on violence are on the wane, then the window in which the US can use its position to establish international norms with regards to the use of PMFs may be short. If direct application of the existing law of armed conflict treaty regime is determined to be either legally or politically unworkable, the United States could use its influence to advocate a new international agreement on the use of PMFs that would incorporate three points from existing treaties.

First, the agreement would have to state that countries shall incorporate all armed PMFs under their employment into their armed forces for purposes of the Geneva Conventions. Furthermore, states would have to agree to enforce PMF compliance with the laws of war, according to their responsibilities under Articles 80 and 87 of Protocol I. States also have to guarantee prisoner-of-war status to PMFs incorporated into the armed forces of opposing Parties.

Second, for the purposes of ensuring distinction between PMFs and civilians, as well as establishing clear lines of legal responsibility, parties shall inform opposing Parties and the Swiss Federation Council (the depository) of the PMFs that they have so incorporated.

Third, states shall, in accordance with their responsibilities as Occupying Powers under Articles 64–67 of the Fourth Geneva Convention, ensure that


\hspace{1cm} continued through the Second World War, however, with the conversion of merchant vessels into combatants. The issue was dealt with in Convention VII (not signed by the United States), which required, among other things, that such vessels bear marks distinguishing nationality, be commanded by a commissioned officer of the state and crewed by seamen subject to military discipline, and obey the laws of war. See Oppenheim, \textit{International Law} at 261–64 (cited in note 34).
Professional Military Firms under International Law

PMFs not incorporated into the armed forces of a Party to the conflict are subject to civilian criminal law. This requirement is essential if any system of distinction of party combatant and civilian PMFs is to be made. A legal framework that would impose substantial responsibilities for PMFs incorporated into the armed forces, yet leave contractors in the private sector largely immune from prosecution, would create incentives for states to avoid liability for the actions of PMFs by claiming that such are actually employed by private parties. Instead, by exposing PMFs not responsible to state parties to what may be a relatively more punitive civilian legal regime, this new international norm would have dual positive effects: state-employed PMFs would seek to affirm their relationships to Parties, and PMFs not incorporated into a Party’s armed forces—being clearly subject to a specific domestic regime—would be incentivized to adhere to domestic and international law.

Codifying the norm of state responsibility in a treaty regime has several inherent benefits. First, treaties can precisely define the duties and expectations of state parties, allowing for a common point of legal reference when conflicts arise. Second, a written treaty regime would give clear guidelines to PMFs in the performance of their duties, which in turn provide the simultaneous benefits of encouraging appropriate risk-taking and establishing what contractors may not do. There are, however, several drawbacks to this approach. Diplomacy and negotiation are essential to the creation of an international agreement; such processes take time, meaning that treaties negotiated under certain historic circumstances may be inflexible and incapable of adaptation when factual circumstances change. Moreover, where a state possesses a disproportionate interest in the subject matter of an international agreement, that state may be unwilling to make the concessions necessary for international consensus. Thus, the United States government may be reluctant to agree to foreign proposals for constraints on the use of PMFs because of the United States’ relative monopoly on their employment.

Nonetheless, even if a written treaty regime (based on existing treaties or otherwise) is determined to be politically infeasible, the prudence of developing some form of international law governing PMFs remains. To this end, the United States could use its dominant market position to establish norms for the

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143 Fourth Geneva Convention, art 64–67 at 520–21 (cited in note 36).
144 Here, a hypothetical example may be helpful. Imagine a scenario where PMFs assisting in the provision of humanitarian relief during a civil war encounter individuals committing genocide, such as the massacre of Bosniaks at Srebrenica in 1995. In the absence of clear, black letter international law that states that PMFs have a duty to use force to prevent the commission of war crimes, it is questionable whether the contractors in question would engage in the defense of the genocide victims, for fear that by doing so they would expose themselves to not only physical danger, but civil and criminal liability as well.

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use of PMFs as a part of customary international law. Substantively, the customary law would incorporate the essential components of the norm of state responsibility, including commitment to prosecution or extradition, establishing and enforcing appropriate rules of engagement, clear identification of PMFs employed by the state, and guarantees of humanitarian treatment following capture.

Procedurally, a set of international norms could be established through bilateral and multilateral agreements between states providing and consuming PMF services. Analogy can be made to the Proliferation Security Initiative, a legally nonbinding set of agreements wherein participating states establish procedures for cooperation and coordination in the interdiction of proliferated weapons of mass destruction. The Australia Group, an international forum for the harmonization of domestic law governing the export of dual-use components that could be used in the production of chemical or biological weapons, is another helpful analogue.

Within the context of PMFs, the United States could enter into bilateral agreements with the other market-dominant states (such as the United Kingdom, Australia, and South Africa) to coordinate domestic policies governing PMFs’ use and to share information regarding firms and personnel (including, for example, tax information and criminal records). While such a voluntary coalition would not have the same legal effect as a formal treaty, it nonetheless could encourage a high degree of policy coherence between nation-states regarding PMFs, which in turn could give credence to claims that norms effectuated by those shared policies have achieved the status of customary international law.

VI. CONCLUSION

Although the extension of the UCMJ to armed contractors is a welcome assertion of national responsibility for the actions of PMFs, domestic regulation alone is an insufficient response to the growth of the privatized security industry; professional military firms almost by definition are likely to be employed across


146 See The Australia Group (2007), available online at <http://www.australiagroup.net/en/index.html> (visited Apr 5, 2008). The regulation of “dual use” items suggests an interesting domestic law method of PMF regulation. The Arms Export Control Act (AECA) forbids the sale or lease of a “defense article or defense service” unless the President makes specific findings regarding the method and terms under which the exported goods will be transferred and used. 22 USC § 2753(a) (2006) (emphasis added). Thus, it is possible that the US could prevent the provision of PMF services by an American-based corporation or individual should the President find that the proposed transaction violates a provision of the Act.
lines of national jurisdiction. Furthermore, a global framework that relies on national regulation may lead to a race to the bottom, where PMFs seek incorporation in the most permissive legal regime.\textsuperscript{147} Thus, a comprehensive approach to the use of privatized military services requires the utilization of both national and international instruments. To this end, adoption of a norm of incorporation—either through reference to existing international law, a new treaty regime, or evolving customary international law—draws on the strengths of both systems: international legal and diplomatic consensus centered on a shared norm of state responsibility dovetailed with the functional capabilities of domestic legal regimes.
