

TURNING PROFIT INTO A WAR STRATEGY

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ABSTRACT

In an era of globalization, states employ private military and security companies (PMSCs) to carry out various military functions. This signals an international shift in military strategy away from traditional state actors and towards the use of nonstate actors motivated by profit. The result has been an unequal application of international humanitarian law (IHL) towards PMSC personnel in international armed conflict. This Comment offers three suggestions on how to standardize the treatment of PMSC personnel in international armed conflict and ensure accountability and compliance with IHLs: (1) treat PMSCs engaged in international armed conflict as personnel of the state employing them, (2) outlaw PMSCs operating in international armed conflict, or (3) require PMSCs to apply for international licenses. Each option is examined through the lens of Blackwater operations in Iraq and Wagner operations in Ukraine, two of the most notorious PMSCs widely criticized in the media for their blatant disregard for IHL. These suggestions aim to strike a balance between an evolving military landscape, the profit-driven motivations of nonstate actors, and IHL considerations. Ultimately, this will create a more equitable and legally sound framework for addressing the role of PMSCs in contemporary armed conflicts, ensuring that they are held accountable for their actions and that IHL is upheld.

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INTRODUCTION

Globalization has coincided with the rise of private military and security companies (PMSCs).¹ PMSCs are companies that employ contractors to work in the private military and security industry with responsibilities ranging from guarding and protecting persons, objects, and buildings to operating tanks, helicopters, drones, and other military-grade weaponry for governments, organizations, and individuals.² The use of PMSCs, specifically those operating in international armed conflicts, has generated significant debate and controversy, blurring the line between

¹ Huma T. Yasin, Comment, *Playing Catch-Up: Proposing the Creation of Status-Based Regulations to Bring Private Military Contractor Firms Within the Purview of International and Domestic Law*, 25 EMORY INT'L REV. 411, 432 (2011); *Globalization*, BLACK'S LAW DICTIONARY (11th ed. 2019) (globalization is the integration of economic, financial, trade, and communication worldwide).

² *International humanitarian law and private military/security companies – FAQ*, INT'L COMM. RED CROSS (Dec. 10, 2023), <https://www.icrc.org/en/document/ihl-and-private-military-security-companies-faq> [<https://perma.cc/SHQ3-QZLN>].

traditional military forces and private entities.³ In recent years, PMSCs have gained significant international attention for their ability to act as shadow armies for the states employing them, operating without transparency and free from legal accountability.⁴ This has become a tactical strategy that has allowed states to circumvent international humanitarian law (IHL).⁵ IHL, also referred to as the “law of conflicts,” is a set of rules and principles that governs the rights of independent nations during times of war and peace.⁶

The purpose behind IHL is to respect the inherent dignity of every human being even in the midst of international armed conflict.⁷ IHL violations include the torture of detainees, the shooting and killing of innocent civilians, looting, sexual harassment and assault, human and arms trafficking, and the participation in renditions.⁸ A concrete illustration is the detainment of former Australian citizen, Mamdouh Habib, who the US Central Intelligence Agency kidnapped and transferred to Poland for the sole purpose of torturing.⁹ Ultimately, the privatization of the military through PMSCs has deteriorated state credibility, turning war into a lucrative business.¹⁰ PMSCs operating in international armed conflicts continue to present a range of legal and ethical challenges to traditional IHL rules

³ Carlos Diaz, Ekaterina Zepnova, Felip Daza, Giulia Campisi & Nora Miralles, *Blurring the monopoly on violence: Private Military and Security Companies and coercive state power*, TNI LONGREADS (May 2021), <https://longreads.tni.org/stateofpower/blurring-the-monopoly-on-violence-private-military-and-security-companies-and-coercive-state-power> [<https://perma.cc/6W9A-CBKW>].

⁴ Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 516 (2005).

⁵ *Id.* at 516–517.

⁶ *Humanitarian Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁷ Hans-Peter Gasser, *International Humanitarian Law and the Protection of War Victims*, INT'L COMM. RED CROSS (Nov. 30, 1998), <https://www.icrc.org/en/doc/resources/documents/misc/57jm93.htm#:~:text=The%20objective%20of%20international%20humanitarian,of%20humanity%20on%20the%20other> [<https://perma.cc/D8GC-3RVH>].

⁸ Resolution on Human Rights Violations by Private Military and Security Companies, Particularly the Wagner Group, EUR. PARL. DOC. 2982(RSP) (2021); “*Rendition*” and *secret detention: A global system of human rights violations. Questions and Answers*, AMNESTY INT’L (Jan. 1, 2006), <https://www.amnesty.org/en/documents/pol30/003/2006/en/> [<https://perma.cc/6TXA-ZSZG>] (renditions are the transfer, apprehension, detention, or interrogation occurring before during and after the movement and exchange of extrajudicial prisoners).

⁹ *Torture of Detainees in US Counterterrorism Operations*, HUM. RTS. WATCH, <https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees> [<https://perma.cc/7CTQ-8KXL>] (last visited Nov. 12, 2023).

¹⁰ *Market for Force: The Emerging Role of Private Military and Security Companies in Contemporary Conflicts*, THE SECURITY DISTILLERY, (March 31, 2021) <https://thesecuritydistillery.org/all-articles/market-for-force-the-emerging-role-of-private-military-and-security-companies-in-contemporary-conflicts> [<https://perma.cc/N2Q4-5Y9A>].

governing international armed conflict. PMSCs must be held accountable for IHL violations and be subject to the same level of regulatory oversight as traditional military forces.¹¹

In this context, this Comment makes suggestions for closing the regulatory gap surrounding the use of PMSCs working in international armed conflicts. Part I analyzes the historical background of PMSCs with an explanation of their rise within the context of international armed conflict, an explanation of the current PMSC regulatory framework, and a brief introduction to two PMSC case studies: Blackwater and the Wagner. Part II analyzes three recommendations for regulating PMSCs engaged in armed conflict: (1) treat PMSCs as military personnel to disincentivize states from circumventing IHL, (2) outlaw PMSC engagement in an international armed conflict, but allow them to operate outside such conflict, or lastly, (3) impose an international licensing commission for uniform standards and practice. Each section examines the recommendations through the lenses of Blackwater operations in Iraq and the Wagner operations in Ukraine. This Comment examines the Blackwater and Wagner cases because they have received the most media attention and exhibit arguably the most egregious human rights violations. Lastly, Part III analyzes the future trajectory of PMSCs in international armed conflicts, arguing that, without international intervention, economic gains will give rise to a new wave of mercenaries and an increase in internationally armed conflicts.

I. BACKGROUND

Some of the earliest records of warfare mention the privatization of military forces, which has taken two main forms: mercenaries and PMSCs.¹² Part III of Additional Protocol I to the Geneva Conventions contains the modern definition of a mercenary:

Any person who: (1) is specially recruited locally or abroad in order to fight in an armed conflict; (2) does in fact take a direct part in the hostilities, (c) is motivated to take part in hostilities essentially 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

¹¹ *International humanitarian law and private military/security companies – FAQ*, *supra* note 2.

¹² Sean McFate, *Mercenaries and War: Understanding Private Armies Today*, NAT'L DEF. UNIV. PRESS (Dec. 2019), <https://ndupress.ndu.edu/Portals/68/Documents/strat-monograph/mercenaries-and-war.pdf> [<https://perma.cc/56YY-RYZ9>].

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.¹³

While, at first glance, the terms “PMSCs” and “mercenary” appear interchangeable, the difference between them is that PMSCs are organized companies providing professional services while mercenaries operate as individuals for hire.¹⁴ Similarly, PMSCs offer a wide range of services that extends beyond direct combat, such as personnel security for government officials and military training while mercenaries are typically confined to combat-related activities.¹⁵ Despite the overlap in services between PMSCs and mercenaries, mercenaries are classified as illegal while PMSCs are able to operate legally.¹⁶

This Comment offers recommendations for how to strengthen the regulatory framework to hold PMSC actors accountable for IHL violations; but first, it will explore three legal loopholes for PMSCs in armed conflicts: (1) the ambiguity of what can and should be considered an armed conflict, (2) the retreat of the state as a major player in international law, and, lastly, (3) the rise of nonstate actors and the general lack of enforceable laws against their conduct.

A. ARMED CONFLICTS

During armed conflicts, a unique set of laws, known as international humanitarian laws, implement international norms.¹⁷ While there is no internationally-agreed-upon definition of what constitutes an international armed conflict, the International Criminal Tribunal for the former Yugoslavia (ICTY) has proposed a widely accepted definition: “an armed conflict exists whenever there is a resort to armed force between States.”¹⁸ This definition has been adopted by international bodies and will be used to define international armed conflict in this Comment. Most international

¹³ Protocol Additional to the Geneva Conventions, June 8, 1977, 1125 U.N.T.S. 3.

¹⁴ Alican Tekingunduz, *Are Private Military Contractors any Different from Mercenaries?*, TRT WORLD, <https://www.trtworld.com/americas/are-private-military-contractors-any-different-from-mercenaries-20680> [<https://perma.cc/QV8D-G6AT>] (last visited Oct. 12, 2023).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Jann K. Kleffner, *The Legal Fog of an Illusion: Three Reflections on “Organization” and “Intensity” as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict*, 95 INT’L L. STUD. 161, 175 (2019).

¹⁸ Prosecutor v. Dyilo, ICC-01/04-01/06-2842, Judgment pursuant to Art. 74 of the Statute, ¶ 107 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> [<https://perma.cc/3GT4-6M4N>].

humanitarian laws can be found in the Geneva Conventions of 1949.¹⁹ The First Geneva Convention protects wounded and sick soldiers on land during war; the Second Geneva Convention protects wounded, sick, and shipwrecked military personnel at sea during war; the Third Geneva Convention applies to prisoners of war; and the Fourth Geneva Convention protects civilians, including those in occupied territory.²⁰

Under IHL, PMSCs are considered civilians, meaning they have no right to directly participate in hostilities.²¹ If captured, PMSCs are not prisoners of war.²² Nevertheless, they may receive other civilian protections.²³ The most important protection falls under the Fourth Geneva Convention which states that PMSCs cannot be legitimate targets for state actors to attack. There is an exception for when PMSCs have directly participated in hostilities.²⁴ Direct participation in hostilities is not commonly defined in IHL but has been understood by the International Committee of the Red Cross (ICRC) to mean the following:

(1) The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); (2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); (3) and the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).²⁵

¹⁹ *The Geneva Conventions of 1949 and Their Additional Protocols*, INT'L COMM. RED CROSS (Jan. 1, 2014), <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols> [<https://perma.cc/83SA-Y2W7>].

²⁰ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 12, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 4–5, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)].

²¹ *International humanitarian law and private military/security companies – FAQ*, *supra* note 2.

²² Geneva Convention (IV), *supra* note 20, art. 84.

²³ Geneva Convention (IV), *supra* note 20, art. 4–5.

²⁴ NILS MELZER, INT'L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 41 (2009), <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf> [<https://perma.cc/KQ69-TYSN>]; José L. Gómez del Prado, *A United Nations Instrument to Regulate and Monitor Private Military and Security Contractors*, 1 NOTRE DAME J. INT'L & COMP. L. 1, 7 (2011).

²⁵ MELZER, *supra* note 24.

Based on the foregoing, it is extremely difficult to attribute PMSC conduct to state activities. As a result, PMSCs often raise the argument of self-defense.²⁶ This creates a legal loophole for states employing PMSCs to carry out IHL violations while maintaining plausible deniability for their actions.²⁷ Ultimately, PMSCs and states have created mutual dependency.²⁸ PMSCs have taken control of security service procurement while states have become dependent on access to PMSCs and their expertise.²⁹

PMSCs receive economic compensation and other benefits in return for military missions, trainings, and other services states use to advance national security goals.³⁰ The concern is that, unlike military actors, PMSCs operate outside the public realm, with governments entering into hidden contracts.³¹ In this legal “vacuum,” PMSCs are able to operate with little to no accountability.³² Accordingly, PMSCs have shown great success in military operations.³³ This likely stems from the fact that PMSCs do not follow the same protocols as traditional military soldiers, and eschew high levels of government screening and vetting.³⁴ Moreover, 2019 estimates suggest that states continue to support PMSCs, with fifteen thousand to twenty thousand supporters across states, but it is difficult to measure, given that some contracting companies are not incorporated.³⁵ This alone constitutes as much as 15 percent of the United States’ 130,000 international soldiers representing the United States and any corresponding national defense initiatives.³⁶

B. CURRENT PMSC REGULATORY REGIME

There have been several efforts to regulate PMSCs, but at its core, the industry relies on self-regulation.³⁷ One attempt to clarify legal

²⁶ *Id.* at 42.

²⁷ Stephanie Hurst, Comment, “*Trade in Force*”: *The Need for Effective Regulation of Private Military and Security Companies*, 84 S. CAL. L. REV. 447, 468 (2011).

²⁸ Andres Macias, *The Impact of PMSC on the Role of Today’s Military*, 12 OPERA 220, 229 (2012).

²⁹ *Id.*

³⁰ See Yasin, *supra* note 1, at 231.

³¹ See Hurst, *supra* note 27, at 468.

³² See Gómez del Prado, *supra* note 24, at 8.

³³ See de Groot, *infra* note 187, at 226.

³⁴ *Id.*

³⁵ *Mercenary/Private Military Companies (PMCs)*, GLOB. SEC., <https://www.globalsecurity.org/military/world/para/mercenary.htm> [<https://perma.cc/N2FA-XA33>] (last visited Oct. 13, 2023).

³⁶ *Id.*

³⁷ Daphne Richemond-Barak, *Can Self-Regulation Work? Lessons from the Private Security and Military Industry*, 35 MICH. J. INT’L L. 773, 776 (2014).

obligations for states deploying PMSCs into international armed conflicts is the Montreux document.³⁸ Ratified in 2008, the Montreux document is the result of an international process launched by Switzerland and the ICRC.³⁹ While it is not legally binding, states that sign on to the document agree to comply with certain practices and procedures when employing PMSCs.⁴⁰ Most of the document focuses on the need to respect IHL but falls short in articulating how PMSCs can respect IHL in practice and what types of ramifications there are for noncompliance.⁴¹ Moreover, the need for such a document in the first place illustrates the lack of regulation surrounding the PMSC industry operating in international armed conflicts.⁴²

The Montreux document has successfully set the floor for other regulatory regimes, such as the International Code of Conduct Association (ICoCa).⁴³ ICoCa is an international auditable management system formed in 2013,⁴⁴ and it serves as the governance and oversight mechanism for PMSCs operating in complex environments.⁴⁵ ICoCa has gone beyond the Montreux document by engaging with key players to foster legitimacy and demand compliance on a global scale.⁴⁶ Implementing this give-and-take method has achieved significant progress. States' willingness to enact domestic laws concerning the treatment of PMSCs creates international cooperation—but ICoCa still has a long way to go in achieving a legally enforceable outcome.⁴⁷

Lastly, and most recently, the Working Group on the use of mercenaries, an open-ended intergovernmental working group, drafted a proposal to attach state responsibility to PMSCs committing human rights violations.⁴⁸ The draft recommends implementing domestic judicial and nonjudicial mechanisms to ensure effective access to justice and adequate

³⁸ Letter dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General, U.N. Doc. A/63/467 (Oct. 6, 2008) (see the annexed Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict) [hereinafter Montreux Document].

³⁹ See Gómez del Prado, *supra* note 24, at 28.

⁴⁰ *Id.*

⁴¹ *Id.* at 30.

⁴² *Id.* at 32.

⁴³ INT'L CODE OF CONDUCT ASS'N, <https://icoca.ch/the-code/> [<https://perma.cc/4N6H-JQV8>] (last visited Sept. 20, 2022) [hereinafter ICoCa].

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See Richemond-Barak, *supra* note 37, at 778–9.

⁴⁷ *Id.* at 819.

⁴⁸ Rep. of the Hum. Rts. Council, at 36, U.N. Doc. A/74/53/Add.1 (2019).

remedies for victims of IHL violations committed by PMSCs.⁴⁹ The purpose of this document is to ensure accountability for perpetrators of human rights violations that take place within a state's jurisdiction and to address the shortcomings of ICoCa's enforcement mechanisms.⁵⁰ This proposal would still require substantial collaboration with states to create domestic laws and institutions that could carry out fair and reasonable procedures for PMSC violations, but it is nevertheless a step towards legally enforceable resolutions.⁵¹ As the lines between state and nonstate actions blur, questions arise as to who should be held accountable: PMSCs or the states employing them?⁵²

C. BLACKWATER AND WAGNER: HOW CIVILIANS ENTERED THE BATTLEFIELD

The rise of nonstate actors and the outsourcing of warfare has coincided with the retreat of the state.⁵³ PMSCs are exemplary of the state's retreat due to their cross-border operations for services that would otherwise be the responsibility of the state as the primary provider of security.⁵⁴ Two PMSCs in particular have received significant worldwide media coverage for their involvement in international armed conflicts: one is the US-incorporated PMSC known as "Blackwater," and the other is the Russian PMSC known as "Wagner."⁵⁵

⁴⁹ *Id.* at 37.

⁵⁰ Natasha Ampriester, *Combating Impunity: The Private Military Industry, Human Rights, and the "Legal Gap"*, 38 U. PA. J. INT'L L. 1189, 1190 (2017).

⁵¹ *See id.* at 1213.

⁵² *See generally* PMSCs: Risks and Misconduct, GLOB. POL'Y F., <https://archive.global-policy.org/pmscs/contractor-misconduct-and-abuse.html> [<https://perma.cc/6BA2-NWE7>] (last visited Oct. 22, 2022).

⁵³ Frédéric Mégret, *Are There "Inherently Sovereign Functions" In International Law?*, 115 AM. J. INT'L L. 452, 453 (2021).

⁵⁴ *See* Carsten Hoppe, Comment, *Passing the Buck: State Responsibility for Private Military Companies*, 19 EUR. J. INT'L L. 5, 989, 989–990 (2008).

⁵⁵ *See* James Dao, *The Struggle for Iraq: Security; Private Guards Take Big Risks, For Right Price*, N.Y. TIMES (Apr. 2, 2004), <https://www.nytimes.com/2004/04/02/us/the-struggle-for-iraq-security-private-guards-take-big-risks-for-right-price.html> [<https://perma.cc/3ZKN-TPEN>]; *see* Eric Schmitt, *More Russian Mercenaries Deploying to Ukraine to Take on Greater Role in War*, N.Y. TIMES (Mar. 25, 2022), <https://www.nytimes.com/2022/03/25/us/politics/russian-mercenaries-ukraine-wagner-group.html> [<https://perma.cc/RF45-EWGV>].

1. *Blackwater*

Blackwater was founded in 1997 by former Navy SEAL officers, Erik Prince and Al Clark.⁵⁶ The company began its endeavor by conducting private trainings for law enforcement, justice department officials, and military organizations.⁵⁷ This created a mutually beneficial relationship between the US government and the PMSC, with the government benefiting on the field from the deployment of highly trained contractors, and the PMSC receiving substantial profits.⁵⁸

However, the landscape of war and the utilization of PMSCs fundamentally changed on September 16, 2007.⁵⁹ On this day, five Blackwater PMSCs stationed in Baghdad, Iraq, entered the highly concentrated Nisour Square, where they shot and killed an unarmed civilian named Ahmed Haithem Ahmed.⁶⁰ The PMSCs opened fire into the crowd, killing sixteen other civilians, several of whom were young children.⁶¹ Blackwater claimed that its employees responded appropriately in defense to attackers who compromised their ambush, but the government expressed concern about this theory.⁶² Following the tragedy, the government revoked Blackwater's license to operate in Iraq, and the US military began an investigation, ultimately finding Blackwater responsible for the massacre.⁶³ A year later, the Blackwater contractors were indicted in a US domestic court, but the charges were dismissed for tainted evidence.⁶⁴ The contractors were later re-charged, receiving sentences as low as twelve years to as high as life in prison. Slatten, the first contractor to be fired,

⁵⁶ *Private Military Companies: Blackwater*, SILENT PRO., <https://silentprofessionals.org/blackwater/> [<https://perma.cc/23WL-DNTB>] (last visited Oct. 22, 2022) (Constellis is intentionally referred to by the company's previous name "Blackwater" because that was the company's name during the Nisour Square Massacre).

⁵⁷ *Id.*

⁵⁸ See Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV 549, 553 (2005); see also Anna Fifield, *Contractors Reap \$ 138B from Iraq War*, CNN (Mar. 19, 2013), <https://edition.cnn.com/2013/03/19/business/iraq-war-contractors/> [<https://perma.cc/WXB2-E554>].

⁵⁹ See Arnpriester, *supra* note 50, at 1192–1193.

⁶⁰ *Id.* at 1192.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See Mark Tran, *US Security Firm Blackwater Faces Expulsion from Iraq*, THE GUARDIAN (Jan. 29, 2009), <https://www.theguardian.com/world/2009/jan/29/iraq-licence-blackwater> [<https://perma.cc/UH3Z-HV8L>].

⁶⁴ See Arnpriester, *supra* note 50, at 1192.

received the harshest punishment.⁶⁵ Years later, it finally appeared that the US judicial system achieved justice for the families of the victims who were assassinated.⁶⁶ All of this progress was lost in 2020 when President Trump pardoned these men.⁶⁷ This not only undermined IHL, which obligates states to hold war criminals accountable for their actions, but also sent a broader message that current regulatory regimes allow PMSCs to operate with near impunity.⁶⁸

2. *Wagner*

Similar to Blackwater, Wagner came to dominate the media for its role in international armed conflicts.⁶⁹ Wagner has been a pivotal player in proxy wars in the Greater Middle East and has played a critical role in key hotspots around the world, including Syria and Libya.⁷⁰ Its involvement extends to a coup in Niger and the ongoing Russia-Ukraine war.⁷¹ Despite years of denial, in September of 2022, former ally turned enemy of President Putin, Yegveny Prigozhin officially admitted to owning and financing Wagner.⁷² For years Prigozhin was a member of President

⁶⁵ See Charlie Savage, *Three Ex-Blackwater Guards are Resentenced in Iraq War Massacre*, N.Y. TIMES (Jan. 29, 2009), <https://www.nytimes.com/2019/09/05/us/politics/blackwater-guards-sentencing-iraq.html> [<https://perma.cc/S5TN-ZYK7>].

⁶⁶ See generally Laurel Wamsley, *Shock and Dismay After Trump Pardons Blackwater Guards Who Killed 14 Iraqi Civilians*, NPR (Dec. 23, 2020), <https://www.npr.org/2020/12/23/949679837/shock-and-dismay-after-trump-pardons-blackwater-guards-who-killed-14-iraqi-civil> [<https://perma.cc/KJU6-VQQH>].

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See generally Schmitt, *supra* note 55, at 9.

⁷⁰ See generally Stavros Atlamazoglou, *Russia's Reliance on Wagner Group in Ukraine is Wearing Down Putin's Favorite Mercenary Group, the British Military Says*, BUS. INSIDER (Sep. 11, 2022), <https://www.businessinsider.com/wagner-group-role-in-ukraine-wearing-down-russian-mercenary-force-2022-9> [<https://perma.cc/2ZZ7-Z552>].

⁷¹ *Id.*

⁷² See generally The Editors of Encyclopedia, *Vladimir Putin*, BRITANNICA, (Aug. 27, 2023), <https://www.britannica.com/biography/Vladimir-Putin> [<https://perma.cc/UHW8-YX2M>] (Putin is the current President of the Russian Federation); see generally Joshua Keating, *The Wagner Group: Putin's 'Chef,' a Nazi-Obsessed Commando, and the Story of the Kremlin's Private Army*, GRID (Oct. 4, 2022), <https://www.grid.news/story/global/2022/10/04/the-wagner-group-putins-chef-a-nazi-obsessed-commando-and-the-story-of-the-kremlins-private-army/> [<https://perma.cc/8X3P-TS6B>]. See also Laurel Wamsley, *Shock and Dismay After Trump Pardons Blackwater Guards Who Killed 14 Iraqi Civilians*, NPR (Dec. 23, 2020), <https://www.npr.org/2020/12/23/949679837/shock-and-dismay-after-trump-pardons-blackwater-guards-who-killed-14-iraqi-civil> [<https://perma.cc/93W2-JX3R>]; see also *What is Russia's Wagner Group of Mercenaries in Ukraine?*, BBC (Oct. 3, 2022), <https://www.bbc.com/news/world-60947877> [<https://perma.cc/UFV2-9T4P>]; see also *Russia Says it Confirmed Wagner Leader*

Putin's inner circle extending Wagner's scope beyond beyond the realm of security services and, arguably, acting as an arm of the state rather than a PMSC.⁷³ This remains true in the wake of Prigozhin's short-lived armed rebellion against President Putin in June of 2023 and Prigozhin's unfortunate plane crash which resulted in his death only two months later.⁷⁴ With Prigozhin out of the picture, there was even more uncertainty as to whether Wagner would remain seen as a PMSC or begin operating as an official arm of the Russian state.⁷⁵ Ultimately, President Putin required Wagner members in Russia or Ukraine to swear allegiance to the state, however operations in other countries continue without a change in conditions.⁷⁶ Wagner continues to assist with the overthrow of African leaders in several countries, most notably Niger and has propped up other leaders such as President Faustin-Archange Touadéra in the Central African Republic and President Bashar al-Assad in Syria.⁷⁷ Thus, for purposes of this Comment, Wagner will be treated as a PMSC.

With the perceived deterioration of public international law, private companies have taken over the international arena.⁷⁸ Prigozhin's demonstration, one of the biggest challenges to Putin's power, is further evidence of this.⁷⁹ There is a notable disparity between accountability mechanisms for private actors compared to those for states within the framework of international law, as international law's entire purpose has traditionally been to regulate the conduct of states interacting with one

Prigozhin Died in a Plane Crash, AP NEWS (Aug. 27, 2023), <https://apnews.com/article/russia-prigozhin-wagner-2c77567908c73e538f91c76ae406f8f> [<https://perma.cc/SS4K-C2DA>].

⁷³ András Rácz, *Band of Brothers: The Wagner Group and the Russian State*, CTR. FOR STRATEGIC & INT'L STUDIES (Sept. 21, 2020), <https://www.csis.org/blogs/post-soviet-post/band-brothers-wagner-group-and-russian-state> [<https://perma.cc/YCB8-H2FN>].

⁷⁴ See *Decoding the Wagner Group: Analyzing the Role of Private Military Security Contractors*, NEW AM., <https://www.newamerica.org/international-security/reports/decoding-wagner-group-analyzing-role-private-military-security-contractors-russian-proxy-warfare/executive-summary-key-findings/> [<https://perma.cc/R24V-N4UT>].

⁷⁵ Sarah Baldwin, *What Happens to Wagner Group Now? What Prigozhin's Presumed Death Could Mean for the Mercenary Troops*, CBS (Aug. 25, 2023), <https://www.cbsnews.com/news/what-happens-to-wagner-group-now-yevgeny-prigozhin-death-plane-crash/> [<https://perma.cc/6P7M-87YA>]; Ece Goksedef, *Wagner Mercenaries Must Swear Allegiance to Russia – Putin*, BBC (Aug. 26, 2023), <https://bbc.com/news/world-europe-66627957> [<https://perma.cc/M65S-ZCR2>].

⁷⁶ *Id.*

⁷⁷ See Laura Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, 47 WM. & MARY L. REV 135, 138 (2005).

⁷⁸ *Id.*

⁷⁹ Dasha Litvinova, *Armed Rebellion by Wagner Chief Prigozhin Underscores Erosion of Russian Legal System*, AP NEWS (July 7, 2023), <https://apnews.com/article/russia-prigozhin-wagner-mutiny-ukraine-putin-898d750e843aeb105a3c220bb917f606> [<https://perma.cc/EF9N-A9C5>].

another.⁸⁰ This lack of accountability has resulted in rampant allegations of IHL violations.⁸¹ Specifically, on May 25, 2022, several Wagner Group fighters were charged with war crimes after allegedly torturing and murdering innocent civilians in Motyzhyn, Ukraine.⁸² Ukraine released the names and photographs of eight wanted men, five of whom are believed to be linked to Wagner.⁸³ At this moment, none of the accused are in custody, making it possible for them to flee or die in the ongoing war.⁸⁴ Nevertheless, Ukrainian forces continue to search for them.⁸⁵ The fact that these men continue to roam free despite allegedly committing heinous war crimes demonstrates how PMSCs circumvent accountability for IHL violations.⁸⁶ While it has not formally issued charges, the Economic Community of West African States has formally declared an interest in the Wagner's involvement in the Niger coup and a commitment to holding Russia accountable for human rights violations.⁸⁷

II. ANALYSIS

Not only has there been a rise in international armed conflict, but there has also been a steady increase in IHL violations, specifically those committed by PMSCs. This calls for a new regulatory framework.⁸⁸ Historically, international law has deferred to state sovereignty, including the

⁸⁰ See Anne van Aaken & Betül Simsek, *Rewarding in International Law*, 115 AM. J. INT'L. L. 195, 195 (2021).

⁸¹ *ICJ Calls for Accountability for Private Security Companies and Reparations for Victims at UN Negotiations on a Regulatory Framework*, INT'L COMM'N OF JURISTS (Apr. 20, 2023), <https://www.icj.org/icj-calls-for-accountability-for-private-security-companies-and-reparations-for-victims-at-un-negotiations-on-a-regulatory-framework/> [<https://perma.cc/B25Z-QBUH>].

⁸² Lorenzo Tondo et al., *Alleged Wagner Group Fighters Accused of Murdering Civilians in Ukraine*, THE GUARDIAN (May 25, 2022, 9:36 EDT), <https://www.theguardian.com/world/2022/may/25/wagner-group-fighters-accused-murdering-civilians-ukraine-war-crimes-belarus> [<https://perma.cc/T966-YXR4>].

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ INT'L COMM'N OF JURISTS, *supra* note 81.

⁸⁷ Oluwatobi Aworinde, *Niger Coup: ECOWAS Vows To Hold Russia Responsible If Wagner Violates Human Rights*, CHANNELS (Aug. 11, 2023), <https://www.channelstv.com/2023/08/11/niger-coup-ecowas-vows-to-hold-russia-responsible-if-wagner-violates-human-rights/> [<https://perma.cc/MRU5-JLDF>].

⁸⁸ Ian Davis & Claudia Pfeifer Cruz, *Global Developments in Armed Conflicts, Peace Processes, and Peace Operations*, STOCKHOLM INT'L PEACE RSCH. INST., <https://www.sipri.org/yearbook/2022/02> [<https://perma.cc/6RCR-9QBG>] (last visited Nov. 20, 2022); Mégret, *supra* note 53, at 452; see also Yasin, *supra* note 1, at 413–414, 440.

discretion to outsource.⁸⁹ On the one hand, this gives states the power to privatize warfare; but on the other hand, the very act of privatization has divested states of their own sovereign power.⁹⁰ To be recognized as sovereign, a state must meet the four requirements of statehood set forth in the 1933 Montevideo Convention on the Rights and Duties of States. It must have: (1) a permanent population, (2) a defined territory, (3) a government, and (4) the capacity to enter into relations with other states.⁹¹ These requirements have created both theoretical and practical controversies concerning states' right to self-determination.⁹²

This Comment offers three suggestions for how to regulate PMSCs working in international armed conflicts and disincentivize states from using PMSCs to circumvent human rights violations and suppress the right to self-determination: (1) treat PMSCs as military personnel to disincentivize states from circumventing IHL, (2) outlaw PMSC engagement in armed conflict but allow other PMSC operations, or (3) impose an international licensing commission for uniformity in standards and practice. This Comment will apply these recommendations to Blackwater operations in Iraq and Wagner's operations in Ukraine.

A. TREAT PMSCS ENGAGED IN ARMED CONFLICT ON BEHALF OF A STATE AS MILITARY PERSONNEL OF THAT STATE

One way to regulate PMSCs is to treat them as active combatants of the state employing them.⁹³ As parties to international treaties, states are bound to follow certain international laws.⁹⁴ This creates a positive obligation for states to refrain from violating IHL and take reasonable measures to prevent others from doing so as well.⁹⁵ Despite the proliferation of legal initiatives and literature addressing corporate responsibility for human rights violations, there has been minimal attention towards

⁸⁹ Yasin, *supra* note 1, at 424.

⁹⁰ See generally Mégret, *supra* note 53, at 452–54.

⁹¹ Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 U.N.T.S. 21.

⁹² See generally Rosalyn Cohen, *The Concept of Statehood in United Nations Practice*, 109 U. PA. L. REV. 1127, 1127 (1961).

⁹³ See generally Vanessa Ballesteros Moya, *The Privatization of the Use of Force Meets the Law of State Responsibility*, 30 AM. U. INT'L L. REV. 795, 825 (2015).

⁹⁴ *How International Law Works*, AN ROINN GNÓTHAÍ EACHTRADA DEP'T. OF FOREIGN AFFAIRS, <https://www.dfa.ie/our-role-policies/international-priorities/international-law/how-international-law-works/> [<https://perma.cc/LNN4-PR94>] (last visited Nov. 20, 2022).

⁹⁵ Moya, *supra* note 93, at 811.

PMSCs operating within conflict zones.⁹⁶ Moreover, holding states accountable for all activity, instead of just the activity that constitutes direct participation in international armed conflict, creates a state-based regulatory scheme instead of industry-wide self-enforcement.⁹⁷

Arguably, attributing PMSC conduct to the state employing the PMSC is the easiest recommendation to integrate. Because PMSC conduct is indistinguishable from state conduct, states will have an incentive to undergo due diligence for PMSC contracts involving international armed conflict. In return, PMSCs have a heightened standard to respect IHL to be re-contracted by states.⁹⁸ In order to implement this circular logic, states must enforce legally binding instruments and, secondly, assume responsibility for all PMSC behavior through a legally binding instrument.⁹⁹ This would treat PMSC activity akin to that of a state soldier.¹⁰⁰

Despite enhancing accountability and oversight, PMSCs have the potential to introduce domestic constitutional and democratic harms.¹⁰¹ PMSCs in international armed conflicts have nearly analogous responsibilities to state military personnel, wearing uniforms that are often indistinguishable from the state military and operating the same or nearly identical weapons and machinery.¹⁰² While it would be easy to tie PMSC behavior to the states that have contracted them since they appear indistinguishable, states prefer not to take on responsibility for PMSC activity.¹⁰³ In fact, states already breach binding obligations (they are actually the primary violators of IHL), and thus have no desire to take on accountability for PMSC violations of IHL.¹⁰⁴ States are accustomed to receiving substantial benefits from outsourcing warfare, including a domestic stronghold

⁹⁶ Mégret, *supra* note 53, at 453.

⁹⁷ Hurst, *supra* note 27, at 453.

⁹⁸ Berenike Prem, *The Regulation of Private Military and Security Companies: Analyzing Power in Multi-Stakeholder Initiatives*, 42 CONTEMP. SEC. POL'Y 345, 347–48 (2021).

⁹⁹ Lindsey Cameron & Vincent Chetail, *The International Responsibility of States and its Relevance for PMSCs*, in PRIVATIZING WAR 134, 134 (Cambridge Univ. Press 2013).

¹⁰⁰ *Id.*

¹⁰¹ John D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L. Q. 1001, 1008 (2004).

¹⁰² See Matthew Sutherland, *Market Force: The Emerging Role of Private Military and Security Companies*, SEC. DISTILLERY (Mar. 17, 2021), <https://thesecuritydistillery.org/all-articles/market-force-the-emerging-role-of-private-military-and-security> [<https://perma.cc/HQ34-NEBY>].

¹⁰³ See NIHAL EL MQUIRMI, POL'Y CTR. FOR THE NEW S., POL'Y BRIEF NO. 27/22, NAVIGATING IN A GREY ZONE: REGULATING PMSCS 2 (2022).

¹⁰⁴ U.N. Office of the High Commissioner of Human Rights, *Guiding Principles on Business and Human Rights*, at 3, HR/PUB/11/04 (2011).

with the public and even the ability to circumvent liability for IHL atrocities.¹⁰⁵

Enforcing the proposed legally binding document treating PMSCs as active combatants of the state employing would inadvertently cause political consequences.¹⁰⁶ The international tribunal process for PMSCs that violate IHL presents unique challenges to those in the Global North as opposed to those in the Global South, and even more so for states who find themselves in transition.¹⁰⁷ States in the Global North have power to influence enforcement mechanisms.¹⁰⁸ Meanwhile, those in the Global South could be implicitly coerced into enforcing or not enforcing certain legal instruments.¹⁰⁹ Proposals for stronger enforcement involving prosecutorial discretion are at risk of appearing facially neutral but being discriminatory in practice.¹¹⁰ This idea is similar to the creation of the International Criminal Court (ICC), which in theory has discretion to investigate claims arising from all over the world but has been biased in its investigations against nationals from developing countries, particularly African nations.¹¹¹ For developing states, there are heightened concerns for coercion, duress, and manipulation.¹¹² An international armed conflict is not confined to combat; it also extends a dark shadow over global trade and commercial activities, public health, and safety, as well as environmental and natural resource concerns.¹¹³ Treating PMSCs engaged in international armed conflict as state military personnel incentivizes IHL compliance. Reaching this solution will require international compromise and is expected to take place

¹⁰⁵ *International humanitarian law and private military/security companies – FAQ*, *supra* note 2.

¹⁰⁶ See generally U.N. Office of the High Commissioner of Human Rights, Guiding Principles on Business and Human Rights, at 5, HR/PUB/11/04 (2011) (highlighting different responsibilities for state and nonstate actors under international law).

¹⁰⁷ See Matilda Shepard, “Privatized Military Industry,” *Global South Studies: A Collective Publication with The Global South* (Aug. 17, 2017), [https://globalsouthstudies.as.virginia.edu/articles/pdf/221\[https://perma.cc/2B34-8G7Q\]](https://globalsouthstudies.as.virginia.edu/articles/pdf/221[https://perma.cc/2B34-8G7Q]).

¹⁰⁸ Emily Meierding & Rachel Sigman, *Understanding the Mechanisms of International Influence in an Era of Great Power Competition*, 6(4) J. GLOB. SEC. STUD. 1, 1 (2021).

¹⁰⁹ See *id.*

¹¹⁰ Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 521 (2003).

¹¹¹ Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT’L L. 265, 271 (2012).

¹¹² See Tami Davis Biddle, *Coercion Theory: A Basic Introduction for Practitioners*, 3 TEX. NAT’L SEC. REV. 94, 95 (2020) (explaining coercion theory in military contexts).

¹¹³ *International humanitarian law and the challenges of contemporary armed conflicts: Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions*, 101 INT’L REV. RED CROSS 869, 880, 937 (Apr. 2020).

through a political proposal United Nations members states can vote on and adopt.

1. *Blackwater*

If PMSCs were treated the same as US military personnel, Blackwater would have been held to a higher standard for the tragic 2007 Nisour Square Massacre. The United States is a military powerhouse, recognized for having one of the highest military spending budgets, the latest weaponry systems, and the largest military presence in the world with over seven hundred foreign military bases spread across eighty nations (three times as many bases as all other countries combined).¹¹⁴ Despite an abundance of military resources, the US government has continued to outsource warfare.¹¹⁵ Notably, the United States has employed PMSCs while waging war in the Middle East, in contexts that also implicate intrastate/civil war conflict.¹¹⁶ This is exactly what took place in 2003, when President Bush launched a military attack against Iraq.¹¹⁷ The United States believed that Iraq's leader at the time, Saddam Hussein, had created a weapons-of-mass-destruction (WMD) program.¹¹⁸ While the United States fought an interstate war against Iraq, there was also an intrastate war within Iraq against terrorist organizations like Al-Qaeda.¹¹⁹

The US government has entered into several contracts with PMSCs, and has used PMSCs for several reasons, such as for flexibility of deployment, specialized expertise, and the ability to operate in areas where

¹¹⁴ Everett Bledsoe & Brain Bartell, *How Many US Military Bases Are There in the World*, THE SOLDIERS PROJECT (Jan. 2, 2023), <https://www.thesoldiersproject.org/how-many-us-military-bases-are-there-in-the-world/#:~:text=the%20United%20States%3F,United%20States%20Military%20Bases%20Worldwide,as%20all%20other%20countries%20combined> [<https://perma.cc/99UC-XX3U>]; *U.S. Defense Spending Compared to Other Countries*, PETER G. PETERSON FOUND. (Apr. 24, 2023), https://www.pgpf.org/chart-archive/0053_defense-comparison [<https://perma.cc/7395-8N4Z>]; see Astri Edvardsen, *USA Demonstrated New Weapons System – Wanted to Deter Russia Without Escalating*, HIGH N. NEWS (Nov. 11, 2022, 4:29 PM), <https://www.highnorthnews.com/en/usa-demonstrated-new-weapons-system-wanted-deter-russia-without-escalating> [<https://perma.cc/553V-2UHD>].

¹¹⁵ Ellie Stanton & Josh Frank, *Can't Do With, Can't Do Without: The Use of Private Military Contractors in U.S. War Efforts*, UNIV. OF COLO. BOULDER COLL. OF ARTS & SCIS.: POL. SCI. (Mar. 2, 2020), <https://www.colorado.edu/polisci/2020/03/02/cant-do-cant-do-without-use-private-military-contractors-us-war-efforts> [<https://perma.cc/Q6T5-AVPP>].

¹¹⁶ *Id.*

¹¹⁷ *Timeline: The Iraq War*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/timeline/iraq-war> [<https://perma.cc/RE6L-9QV9>] (last visited Oct. 15, 2023).

¹¹⁸ *Id.*

¹¹⁹ Stanton & Frank, *supra* note 115.

traditional military personnel is not permitted.¹²⁰ With time, the government continued to renew contracts with existing PMSCs and sign new ones, including a contract with security firm Blackwater.¹²¹ Blackwater was responsible for guarding diplomats and loading bombs onto predator drones, and, at one point, it was even hired by the US government to covertly track and kill Al-Qaeda operatives worldwide.¹²² Blackwater's activities in Iraq have become a symbol for outsourcing wartime responsibilities and a deterioration in traditional civil-military relations.¹²³ While there had been several infractions with Blackwater personnel, including allegations about an off-duty intoxicated Blackwater guard shooting an Iraqi vice presidential bodyguard, none generated the same outrage and media attention as did the Nisour Square Massacre.¹²⁴

The Nisour Square Massacre was a watershed moment demonstrating the need for increased oversight and accountability of PMSCs operating in a global context.¹²⁵ In reality, the killing of innocent, unarmed civilians only cemented the belief that PMSCs can operate with near impunity.¹²⁶ In the immediate aftermath, the US House of Representatives passed a bill known as the Military Extraterritorial Jurisdiction Act stipulating that all PMSCs fell within US jurisdiction.¹²⁷ Thus, in 2008, the US Department of Justice charged five of the Blackwater employees on fourteen counts of manslaughter, twenty counts of attempted manslaughter, and a weapons violation.¹²⁸ Justice moved slowly, straining US-Iraqi relations. In 2013, prosecutors dropped the charges against one of the PMSCs

¹²⁰ See generally *PMSCs: Risks and Misconduct*, GLOB. POL'Y F., <https://archive.global-policy.org/pmcs/contractor-misconduct-and-abuse.html> [<https://perma.cc/6BA2-NWE7>] (last visited Oct. 22, 2022).

¹²¹ Marc Fisher et al., *Behind Erik Prince's China Venture*, WASH. POST (May 4, 2018), <https://www.washingtonpost.com/news/world/wp/2018/05/04/feature/a-warrior-goes-to-china-did-erik-prince-cross-a-line> [<https://perma.cc/BED3-3AV8>].

¹²² Matt Apuzzo, *Blackwater Guards Found Guilty in 2007 Iraq Killings*, N.Y. TIMES (Oct. 22, 2014), <https://www.nytimes.com/2014/10/23/us/blackwater-verdict.html> [<https://perma.cc/478X-DKT9>].

¹²³ *Id.*

¹²⁴ See Sydney Henderson, *The Nisour Square Massacre*, TIDINGS MEDIA (June 12, 2021), <https://tidingsmedia.org/blog/nisour-square-massacre> [<https://perma.cc/Y5QB-S39F>].

¹²⁵ Justin H. Whitten, *They're Getting Away with Murder: How the International Criminal Court Can Prosecute U.S. Private Security Contractors for the Nisour Square Tragedy and Why It Should*, 11 WASH. U. GLOBAL STUD. L. REV. 503, 504–505 (2012).

¹²⁶ Michaels, *supra* note 101, at 1011.

¹²⁷ Whitten, *supra* note 125, at 522.

¹²⁸ *Five Blackwater Employees Indicted on Manslaughter and Weapons Charges for Fatal Nisour Square Shooting in Iraq*, DEP'T. OF JUSTICE (Dec. 8, 2008), <https://www.justice.gov/archive/opa/pr/2008/December/08-nsd-1068.html> [<https://perma.cc/9HPM-RAZ7>].

for lack of evidence, and not until seven years after the incident (2014) did the four remaining PMSCs stand trial.¹²⁹ On trial, PMSC Nicholas Slatten received the harshest sentence—life in prison for first-degree murder. Meanwhile, fellow PMSCs Slough, Liberty, and Heard were found guilty of voluntary and attempted manslaughter and using a machine gun to commit a violent crime, and they were sentenced to a statutory minimum of thirty years in prison.¹³⁰ In 2017, Slatten was retried, and in 2019, Slough, Liberty, and Heard had their sentences reduced.¹³¹

Everything changed in 2022 when President Trump pardoned all four of the Blackwater PMSCs.¹³² UN experts, including Jelena Aparac, former chair of the UN Working Group on the Use of Mercenaries, argued that this was a violation of IHL and most definitely violated broader US obligations under international law.¹³³ The Geneva Conventions require war criminals be held accountable for their crimes, and thus, the PMSCs involved in the Nisour Square Massacre should be treated as war criminals.¹³⁴ Nevertheless, the foregoing demonstrates that not only can the companies employing PMSCs evade the law, but so can the individual perpetrators.¹³⁵ Treating PMSCs as members of the military would involve the state, casting a wider reach of accountability.¹³⁶

It is imperative to refrain from categorizing PMSCs as civilians, they should be acknowledged as operating under the command and

¹²⁹ David Ingram, *Blackwater Guards Face New U.S. Charges for Iraq Shooting Deaths*, REUTERS (Oct. 17, 2013), <https://www.reuters.com/article/us-usa-crime-blackwater-idUSBRE99G1A320131017> [https://perma.cc/S8KG-DNVX]; Matt Apuzzo, *Jurors' Note Hints at Conviction in Blackwater Case*, N.Y. TIMES (Oct. 1, 2014), <https://www.ny-times.com/2014/10/02/us/blackwater-iraq-shooting-trial-manslaughter.html> [https://perma.cc/WG9A-LNRG].

¹³⁰ *Former Blackwater Employee Sentenced to Life Imprisonment for Murder in 2007 Shooting at Nisour Square in Iraq*, DEP'T. OF JUSTICE (Aug. 14, 2019), <https://www.justice.gov/usao-dc/pr/former-blackwater-employee-sentenced-life-imprisonment-murder-2007-shooting-nisour-square> [https://perma.cc/FYS9-CNS7].

¹³¹ *United States v. Slatten*, 395 F. Supp. 3d 45, 45 (D.D.C. 2019); Ashraf Khalil, *Sentences Reduced for 3 Blackwater Guards from 2007 Iraq Massacre*, MIL. TIMES (Sept. 8, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/09/08/sentences-reduced-for-3-blackwater-guards-from-2007-iraq-massacre> [https://perma.cc/5QXW-JW74].

¹³² *Trump Pardon of Blackwater Iraq Contractors Violates International Law*, REUTERS (Dec. 30, 2020, 4:55 AM), <https://www.reuters.com/article/us-iraq-blackwater-un/trump-pardon-of-blackwater-iraq-contractors-violates-international-law-un-idUSKBN294108> [https://perma.cc/KN2V-GCV3].

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Robert Bejesky, *The Economics of the Will to Fight: Public Choice in the Use of Private Contractors in Iraq*, 45 CUMB. L. REV. 1, 17 (2014/2015).

¹³⁶ *Id.* at 13.

jurisdiction of the state employing them. Instead of casting PMSC violations of IHL like the Nisour Square massacre as tragic accidents, this would be a direct violation of Article 8(2)(b)(i) of the Geneva Convention, which states that “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities is outlawed.”¹³⁷ Overall, this sort of classification would have had direct implications for the United States.¹³⁸ The Nisour Square Massacre drew widespread media attention and arguably would have instigated a United Nations investigation if the perpetrators had been considered US military personnel.¹³⁹ Moreover, treating PMSCs as members of the military of the state employing them dissuades states from using PMSCs to violate IHL and discourages PMSCs from engaging in said violations.¹⁴⁰

2. *Wagner*

Similarly, alleged IHL violations committed by Wagner demonstrate the need for PMSCs engaged in international armed conflict to be treated as members of the military employing them. With an international system of anarchy, it is no surprise that states hire PMSCs, and Russia has followed suit.¹⁴¹ While some consider Wagner to be under the control of the Russian State, others consider Wagner to be a rogue paramilitary organization, as it conducts activities from reconnaissance to committing human rights abuses and war crimes, such as the killing of civilians and prisoners of war.¹⁴² Thus, Wagner finds itself straddling the distinction between mercenary and PMSC.¹⁴³

Russia’s use of PMSCs is not a new phenomenon, but rather dates back to the Soviet era, which used insurgent paramilitary activities for state-sponsored military missions.¹⁴⁴ Tapping into the past has allowed

¹³⁷ Whitten, *supra* note 125, at 509.

¹³⁸ See U.N. Hum. Rts. Off. of the High Comm’r, *supra* note 104, at 3.

¹³⁹ See *Crimes Against Humanity*, U.N. OFF. ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml> [<https://perma.cc/HCL8-F9EY>] (last visited Jan. 14, 2023) (investigating preemptory norms that states violate).

¹⁴⁰ See Gómez Del Prado, *supra* note 24, at 3.

¹⁴¹ See EDWARD L. MIENIE, *INTERNATIONAL SECURITY AND FOREIGN POLICY* 103 (2019).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Decoding the Wagner Group: Analyzing the Role of Private Military Security Contractors*, NEW AM., <https://www.newamerica.org/international-security/reports/decoding-wagner-group-analyzing-role-private-military-security-contractors-russian-proxy-warfare/executive-summary-key-findings/> [<https://perma.cc/7ALW-23UD>] (last visited Jan. 14, 2023).

Wagner “ghost warriors” to reconsolidate state security and re-shape Russian civil-military relations.¹⁴⁵ While Wagner is not the only PMSC operating jointly with Russian military forces, it has become the most infamous.¹⁴⁶ One reason for the group’s media spotlight comes from alleged IHL violations committed by Wagner members, such as rape, murder, and torture.¹⁴⁷ After all, Prigozhin himself had spent nearly a decade behind bars and actively recruited prisoners to join Wagner in exchange for their release.¹⁴⁸

Despite the allegations circulating Wagner’s infamy, it is unclear what, if any, IHL violations Wagner has actually committed.¹⁴⁹ Most of this uncertainty rests on the lack of a central authority for reporting and investigating alleged human rights violations. Current international law mechanisms for PMSCs can be found within the Montreux document (which states can ratify), domestic law (which, as seen in the case of Blackwater, is second to the state’s unwillingness or inability to prosecute alleged violators), and the ICC (which has limited ability to exercise jurisdiction).¹⁵⁰ Neither Ukraine nor Russia is a party to the Montreux Document or the Rome Statute, and with an ongoing war, they do not find themselves in a position to prosecute perpetrators.¹⁵¹ There are also practical considerations when investigating Wagner. Typically, PMSCs are nearly indistinguishable from the military employing them—they operate military equipment (such as cars, helicopters, and planes), wear uniforms like those of the military, and have military training, making identification on the battlefield extremely difficult, if not outright impossible.¹⁵²

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ ‘Army of Looters’: Russia’s Pillaging of Ukraine is the Latest in History of Criminality, AL-MASHAREQ (May 4, 2022), https://al-mashareq.com/en_GB/articles/cnmi_am/features/2022/05/04/feature-01 [https://perma.cc/N28C-KWB4].

¹⁴⁸ Olha Chepil & AFP, *Wagner’s Expanding Activities, Recruitment Point to Prigozhin’s Ambitions*, CARAVANSERAI (Nov. 21, 2022), https://central.asia-news.com/en_GB/articles/cnmi_ca/features/2022/11/21/feature-01 [https://perma.cc/RQP5-D3EP].

¹⁴⁹ *What is Russia’s Wagner Group of Mercenaries in Ukraine?*, BBC (Sept. 6, 2023), <https://www.bbc.com/news/world-60947877> [https://perma.cc/HKV5-V5NC].

¹⁵⁰ Montreux Document, *supra* note 38; Whitten, *supra* note 125, at 522.

¹⁵¹ Montreux Document, *supra* note 38; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90; *Participating States of the Montreux Document*, FDFA, <https://www.eda.admin.ch/eda/en/dfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html> [https://perma.cc/E7PA-GF6V] (last visited Nov. 12, 2023).

¹⁵² El Mquiri, *supra* note 103, at 2.

If PMSCs were treated as military personnel of the state employing them, these concerns would shift from the individual to the state.¹⁵³ In the context of the Russia-Ukraine war, there would have to be proof that Russia had been employing Wagner; only with sufficient evidence would state liability attach.¹⁵⁴ The United Nations could step in to enforce IHL—for example, the security council could compel Russia to comply with international law obligations or establish a tribunal to investigate.¹⁵⁵ Unfortunately, Russia has already violated several IHLs by invading Ukraine, therefore, attaching liability for Wagner’s behavior is not likely to have the same deterrent effect on Russia as treating PMSCs as state personnel would on the United States.¹⁵⁶ Nevertheless, PMSCs engaged in international armed conflict should be treated as military personnel of the state that is employing them. This ensures international accountability and upholds the rule of law.¹⁵⁷

B. OUTLAW PMSCS OPERATING IN INTERNATIONAL ARMED CONFLICTS BUT ALLOW PMSCS TO OPERATE IN OTHER CONTEXTS

Another way to regulate PMSCs is by preventing them from operating in international armed conflicts but allowing states to employ them in other contexts. Delegating highly sensitive responsibilities to contracted individuals can create a conflict of interest with the state’s duty to protect human rights and their contractual interests.¹⁵⁸ States cannot contract out a duty they are obligated to carry out.¹⁵⁹ While it would be improper to generalize that all PMSCs engaged in international armed conflict violate

¹⁵³ See *UN Finds Russia Responsible for ‘Vast Majority’ of Potential War Crimes in Ukraine*, REUTERS (Oct. 18, 2022), <https://www.reuters.com/world/un-finds-russia-responsible-vast-majority-potential-war-crimes-ukraine-2022-10-18> [<https://perma.cc/NY69-LX9B>].

¹⁵⁴ *Id.*

¹⁵⁵ Press Release, Security Council, Security Council Must Strengthen, Uphold Responsibility to Ensure Accountability When International Law is Violated, Speakers Stress in All-Day Debate, U.N. Press Release SC/14919 (June 2, 2022).

¹⁵⁶ AL-MASHAREQ, *supra* note 147.

¹⁵⁷ Berenike Prem, *The Regulation of Private Military and Security Companies: Analyzing Power in Multi-Stakeholder Initiatives*, 42 CONTEMP. SEC. POL’Y 345, 347–48 (2021).

¹⁵⁸ U.N. Hum. Rts. Off. of the High Comm’r, *supra* note 104, at 8.

¹⁵⁹ See Lauren Groth, *Transforming Accountability: A Proposal for Reconsidering How Human Rights Obligations are Applied to Private Military Security Firms*, 35 HASTINGS INT’L & COMP. L. REV. 29, 52 (2012); see generally *Uphold International Law*, UNITED NATIONS, <https://www.un.org/en/our-work/uphold-international-law> [<https://perma.cc/4YJA-Y8GN>] (last visited Nov. 20, 2022) (discussing state duties as a consequence of state sovereignty).

IHL, there are several allegations and reports indicating that PMSCs have violated and, in some cases, continue to violate IHL.¹⁶⁰ Accordingly, states must take adequate measures to ensure that the PMSCs they outsource comply with international laws and do not compromise their duties as sovereigns including, in this context, the duty to protect against human rights violations.¹⁶¹ Businesses, on the other hand, have some responsibility to protect against human rights violations but few binding requirements with which to comply and even fewer instances of enforcement.¹⁶²

Eliminating PMSCs in their entirety removes several benefits they offer, such as conducting military training programs, acting as security personnel for high level government officials, protecting domestic monuments or government buildings, and more.¹⁶³ PMSCs are active in the humanitarian sector—for example, they help carry out United Nations peacekeeping missions and Red Cross humanitarian aid programs.¹⁶⁴ Instead of removing all the benefits PMSCs offer, this Comment’s proposed solution intends to eliminate the space in which PMSCs have allegedly abused their authority by committing IHL violations.¹⁶⁵ Porous domestic legal boundaries and incongruent international regulatory policies create significant obstacles for accountability during international armed conflict.¹⁶⁶ Removing PMSCs from international armed conflicts reduces their potential to commit IHL violations (though they could still commit other kinds of atrocities).¹⁶⁷ Literature presumes that PMSCs will continue to operate in international armed conflicts and advocates for regulation instead of elimination. However, international norm internalization could and should alter this discourse.¹⁶⁸ Because of the foregoing benefits, there is little to no incentive for states to sign away PMSCs operating in international armed

¹⁶⁰ See U.N. Hum. Rts. Off. of the High Comm’r, *supra* note 104, at 8–9.

¹⁶¹ See *id.* at 8–12.

¹⁶² See *id.* at 13.

¹⁶³ See Nickolas Bruetsch, *Market for Force: The Emerging Role of Private Military and Security Companies in Non-Traditional Fields*, THE SEC. DISTILLERY (Apr. 10, 2021), <https://thesecuritydistillery.org/all-articles/market-for-force-the-emerging-role-of-private-military-and-security-companies-in-non-traditional-fields> [<https://perma.cc/2J9R-36A5>].

¹⁶⁴ See *PMSCs & the UN*, GLOBAL POL’Y F., <https://archive.globalpolicy.org/pmscs/50225-pmscs-at-the-un.html> [<https://perma.cc/PCN9-B5U5>] (last visited Nov. 20, 2022); see also *International humanitarian law and private military/security companies – FAQ*, *supra* note 2.

¹⁶⁵ See Arnpriester, *supra* note 50, at 1192–93.

¹⁶⁶ See Hurst, *supra* note 27, at 467.

¹⁶⁷ See Arnpriester, *supra* note 50, at 1194.

¹⁶⁸ See Zoe Salman, *Private Military Contractors and the Taint of a Mercenary Reputation*, 40 N.Y.U. J. INT’L L. & POL. 853, 878 (2008) (explaining that the law seeks to prevent not only the use of mercenaries, but also the use of PMSCs by states).

conflict. Despite IHL regulating the conduct of PMSCs or other corporate entities that are sufficiently linked to international armed conflict, inadequate implementation has created legal loopholes.¹⁶⁹ PMSCs are highly specialized, so they incentivize states to continue contracting their services, especially since PMSC violations are rarely sanctioned.¹⁷⁰

Eliminating the use of PMSCs in international armed conflict poses unique challenges to states in the Global North as opposed to those in the Global South.¹⁷¹ Accountability mechanisms are largely dependent upon the state; a state who has employed PMSCs now operating alongside military personnel from a third-party country is rarely in a position to monitor IHL activity.¹⁷² With this approach, there are questions about who could investigate this type of activity, who could call into question whether or not this type of activity is taking place, and how the international community could enforce sanctions against states that continue to outsource warfare.¹⁷³ Technically, outsourcing warfare is not illegal, since states have the power to privatize.¹⁷⁴ Thus, striking a balance between upholding state sovereignty to protect national security interests while supporting broader international principals looks different for each state.¹⁷⁵ Outlawing PMSCs operating within international armed conflicts but allowing their operation elsewhere would require significant international agreement, but similar to the previous proposal should take place through a political proposal United Nations members states can vote on and adopt.

1. *Blackwater*

Eliminating PMSCs operating in international armed conflicts is necessary to prevent future IHL violations.¹⁷⁶ Each year, the United States sees an uptick in the outsourcing of national security interests, which

¹⁶⁹ *Privatizing War: The Impact of Private Military Companies on the Protection of Civilians*, CTR. FOR CIVILIANS IN CONFLICT, https://civiliansinconflict.org/wp-content/uploads/2022/12/CIVIC_PMC.pdf [<https://perma.cc/EC9B-WRJR>] (last visited Nov. 12, 2023).

¹⁷⁰ GLOBAL POL'Y F., *supra* note 57.

¹⁷¹ See Tom de Groot & Salvador Santino F. Regilme Jr., *Private Military and Security Companies and the Militarization of Humanitarianism*, 38 J. DEVELOPING SOC'YS. 50, 66 (2022).

¹⁷² See Bejesky, *supra* note 135, at 10.

¹⁷³ See *International humanitarian law and private military/security companies – FAQ*, *supra* note 2.

¹⁷⁴ See Bejesky, *supra* note 135, at 13.

¹⁷⁵ See Roman Kwiecien, *Does the State Still Matter? Sovereignty, Legitimacy, and International Law*, 32 POLISH Y.B. INT'L L. 45, 58 (2012).

¹⁷⁶ See generally Stanton & Frank, *supra* note 115.

incentivizes war for lucrative personal gain.¹⁷⁷ One argument is that PMSCs are essentially mercenaries.¹⁷⁸ While PMSCs are different from mercenaries in that they are recruited into an organization instead of hired by whomever pays, the activities they are hired to carry out definitionally overlap when operating within an international armed conflict.¹⁷⁹ While PMSCs offer significant advantages outside of armed conflicts, such as increased security, advanced military training, and corporate intelligence, among others, PMSCs engaged in international armed conflict have repeatedly violated IHL and thus deserve to be outlawed.¹⁸⁰

Blackwater is just one example of why PMSCs should be outlawed in international armed conflict. The lack of oversight and centralized command of authority can create chaos, leaving innocent civilians dead.¹⁸¹ Events like the Nisour Square Massacre strained relations between the U.S. and Iraq and arguably contributed to the prolongation of the Iraq war.¹⁸² Additionally, PMSCs' status in international law offers states plausible deniability.¹⁸³ Plausible deniability allows a person, organization, or, in this case, a state to deny knowledge of or responsibility for particular actions or events, even with the presence of actual direct involvement (direct involvement is used in the context of clandestine or covert operations).¹⁸⁴

The United States has trained several special operations forces and could easily deploy a team of military personnel instead of spending money on PMSCs.¹⁸⁵ Thus, there is at least some state calculation that favors the use of PMSCs over a state's own highly trained military personnel

¹⁷⁷ See Peter W. Singer, *Outsourcing War*, BROOKINGS (Mar. 1, 2005), <https://www.brookings.edu/articles/outsourcing-war/> [<https://perma.cc/U5R2-U4Y3>].

¹⁷⁸ See Alican Tekingunduz, *Are Private Military Contractors Any Different from Mercenaries?*, TRT WORLD (Oct. 16, 2018), [https://www.trtworld.com/americas/are-private-military-contractors-any-different-from-mercenaries-20680#:~:text=Both%20private%20military%20contractors%20\(PMC,they%20only%20fight%20for%20money](https://www.trtworld.com/americas/are-private-military-contractors-any-different-from-mercenaries-20680#:~:text=Both%20private%20military%20contractors%20(PMC,they%20only%20fight%20for%20money) [<https://perma.cc/GY8E-VYRS>].

¹⁷⁹ *International humanitarian law and private military/security companies – FAQ*, *supra* note 2.

¹⁸⁰ See Matthew Sutherland, *Market for Force: The Emerging Role of Private Military and Security Companies in Contemporary Conflicts*, THE SEC. DISTILLERY (Mar. 31, 2021), <https://thesecuritydistillery.org/all-articles/market-for-force-the-emerging-role-of-private-military-and-security-companies-in-contemporary-conflicts> [<https://perma.cc/D2FH-DC5P>].

¹⁸¹ See Yasin, *supra* note 1, at 414.

¹⁸² See Oliver R. Jones, *Implausible Deniability: State Responsibility for the Actions of Private Military Firms*, 24 CONN. J. INT'L L. 239, 240–43 (2009).

¹⁸³ *Id.* at 256.

¹⁸⁴ *Plausible Deniability Definition, Examples & Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹⁸⁵ See generally Eric Sof, *From Ordinary Mercenaries to the Private Military Contractors*, SPEC OPS MAG. (Jan. 12, 2021), <https://special-ops.org/from-ordinary-mercenaries-to-the-private-military-contractors/> [<https://perma.cc/5NQA-8FGD>].

because the former provides the opportunity to enter into contracts that border the gray zone of illegality.¹⁸⁶ Because of these significant battlefield advantages, it seems unlikely that world leaders would outlaw the use of PMSCs in international armed conflict, and it seems counteractive to United States national security interests.¹⁸⁷

2. *Wagner*

Similarly, without Wagner, Russia would be in a very different situation with its neighbor, Ukraine.¹⁸⁸ Russian aggression towards Ukraine has steadily increased into a war.¹⁸⁹ A former Wagner commander who was at one point in charge of ninety-five mercenaries in Syria told sources that he was convinced that if it weren't for the outsourcing of warfare, "there would be no question of success that the Russian army has achieved so far."¹⁹⁰ Ukraine Defense Minister Oleksiy Reznikov corroborated this information, stating that Wagner troops had been deployed into Ukraine for Russia's "most difficult and important missions."¹⁹¹ The troops have allegedly played a key role in Russian victories in both Mariupol and Kherson.¹⁹² Thus, it is arguable that the rise of PMSCs has given states the power to engage in territorial expansion.¹⁹³

Russia has not only been employing PMSCs, but has them strategically positioned on the frontlines.¹⁹⁴ This is arguably the same as, if not worse than, employing mercenaries, since PMSCs provide the state with a legal loophole of plausible deniability that mercenaries cannot offer.¹⁹⁵ Under Russian laws, mercenaries are illegal, and, arguably, Wagner's activities are mercenary in nature.¹⁹⁶ Nevertheless, PMSCs remain a central

¹⁸⁶ *Id.*

¹⁸⁷ See de Groot, *supra* note 171, at 66.

¹⁸⁸ Saskya Vandoorne et al., *Morale is Plummeting in Putin's Army as Russia's War in Ukraine Falter*, CNN (Oct. 7, 2022), <https://www.cnn.com/2022/10/06/europe/wagner-ukraine-struggles-marat-gabidullin-cmd-intl/index.html> [<https://perma.cc/JKB6-XDTH>].

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Nicholas Lees & Ulrich Petersohn, *To Escalate, or Not to Escalate? Private Military and Security Companies and Conflict Severity*, 41 *STUD. CONFLICT & TERRORISM* 1, 2 (2018).

¹⁹⁴ Vandoorne, *supra* note 188.

¹⁹⁵ Jones, *supra* note 182, at 243–45.

¹⁹⁶ Catrina Doxsee, *Putin's Proxies: Examining Russia's Use of Private Military Companies*, *CTR. FOR STRATEGIC & INT'L STUD.* (Sept. 15, 2022), <https://www.csis.org/analysis/putins-proxies-examining-russias-use-private-military-companies> [<https://perma.cc/X2KD-CE7D>].

component of Russian military strategy.¹⁹⁷ Aside from the war in Ukraine, Wagner has been extraordinarily successful in securing state control over lucrative resources abroad. Thus, it is highly unlikely that Russia would ever agree to outlaw the use of PMSCs; even if it did, Wagner's teetering position between mercenary and PMSC could allow Russia to sever ties rather easily.¹⁹⁸

C. ALLOW PMSCS TO OPERATE IN ARMED CONFLICTS BUT SET UP
AN INTERNATIONAL LICENSING COMMISSION FOR UNIFORMITY IN
CONDUCT

Lastly, arguably the most reasonable solution for regulating PMSC conduct is to set up an international licensing commission for uniformity in industry standards.¹⁹⁹ The United Nations working group on the use of mercenaries has already recommended an international convention on regulating the private military industry.²⁰⁰ The result of this convention was the Montreux Document.²⁰¹ While this document went beyond the Geneva Conventions by requiring PMSCs to comply with IHL, clarifying the legality of existing practices, it has fallen short of being able to enforce its principles.²⁰² Accordingly, an updated document with definitions, standards, and licensing requirements would create enforceability and compliance.²⁰³ Given the regulation of new industries, such as artificial intelligence, advanced computing technologies, and drones, it seems reasonable to regulate PMSCs, especially when considering the public backlash the industry has received in recent years for alleged IHL violations.²⁰⁴

While there is certainly a need for a new licensing commission, there are some concerns about how to create the commission, including

¹⁹⁷ *Id.*

¹⁹⁸ See Vandoorne, *supra* note 188.

¹⁹⁹ See *International humanitarian law and private military/security companies – FAQ*, *supra* note 2.

²⁰⁰ Rep. of the Hum. Rts. Council, at 5, U.N. Doc. A/HRC/51/25 (2022).

²⁰¹ *Id.*

²⁰² See Montreux Document, *supra* note 38; *Participating States of the Montreux Document*, FDFA, <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html> [<https://perma.cc/VA55-TBQZ>] (last visited Nov. 12, 2023).

²⁰³ See Rep. of the Hum. Rts. Council, ¶ 28, U.N. Doc. A/HRC/48/65 (2021) (discussing authorization mechanisms such as a licensing commission).

²⁰⁴ *Blueprint for an AI Bill of Rights*, OSTP, <https://www.whitehouse.gov/ostp/ai-bill-of-rights/> [<https://perma.cc/5T7A-LQAZ>] (last visited Nov. 12, 2023).

questions of leadership, enforcement, and noncompliance.²⁰⁵ Under the current PMSC regulatory system, there is no synthesis between internationalized standards and national systems of licensing and regulation.²⁰⁶ The entire industry is predicated on self-regulation, but lucrative gains associated with privatization and outsourcing have blurred the boundary between mercenarism and PMSCs.²⁰⁷ A more robust licensing system would inevitably guarantee that states fulfill their due diligence obligations to ensure private actors contracted on their behalf are not committing human rights violations.²⁰⁸ There are apprehensions regarding governance of the licensing commission: Who would be in charge? How would leadership be decided? And how would it be enforced?²⁰⁹ Despite these concerns, an international licensing commission would create uniform standards, allowing for stronger accountability and a wider scope of oversight.²¹⁰ In fact, Germany has already undergone its own state-based licensing commission for a very niche practice of PMSCs—private maritime security companies.²¹¹ The licensing authority is run by the German Federal Trade and Export Control Agency and is a two-fold process encompassing a business license and a firearms license.²¹² Certification of this nature requires proof of liability insurance, evidence of contracts of employment, and annual training.²¹³ This could be a useful model to scale for international PMSC regulation.

1. *Blackwater*

Imposing an international commission for industry-wide standards would hold Blackwater accountable for the atrocious human rights and IHL violations committed in Iraq.²¹⁴ The idea of holding individual

²⁰⁵ See U.N. Hum. Rts. Council, *ICJ Submission to the Second Session of the IGWG on PMSCs*, at 7 (Aug. 13–17, 2012).

²⁰⁶ *Russian Federation: Regulating Private Military and Security Companies*, INT'L COMM. RED CROSS (June 2, 2016), <https://www.icrc.org/en/document/russian-federation-regulating-private-military-security-companies> [https://perma.cc/ESF4-YCT7].

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See generally Gómez Del Prado, *supra* note 24.

²¹⁰ *Id.* at 3.

²¹¹ Dr. Maximilian Guth et al., *PMSC Licensing Up and Running in Germany*, OCEANUS LIVE (July 30, 2013), <https://www.oceanuslive.org/main/viewnews.aspx?uid=00000765> [https://perma.cc/3Q9H-Q6KA].

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See Whitten, *supra* note 125.

PMSC actors accountable through international judicial proceedings is highly theoretical, considering it is difficult to trace the violation back to a specific actor.²¹⁵ Thus, a licensing commission offers the ability to monitor PMSC operations to ensure global compliance with international law and create a means for implementing employment procedures.²¹⁶

Standardized licensing procedures would legitimize the PMSC industry—which is believed to be operating in the dark shadows of the global economy—and minimize operational challenges PMSCs currently face.²¹⁷ Under a licensing commission, PMSCs would have to be properly screened and trained before earning a license.²¹⁸ This type of vetting procedure could ensure, depending on the efficiency of the procedure, that only the most qualified and competent contractors work in the industry.²¹⁹ Moreover, just as felons are punished for unlawful activity with harsher sentences, PMSCs would be similarly punished for repeated violations of international law, allowing for organizational viability.²²⁰ Under this type of procedure, private military and security companies, such as Blackwater, would have to report every allegation of misconduct to the licensing commission.²²¹

A licensing commission could temporarily suspend or even revoke PMSCs' contracts.²²² Since there were several allegations of misconduct prior to the Nisour Square massacre, it is possible that the massacre could have been avoided altogether through appropriate employment procedures. The main concern with a commission is the interference with an individual's liberty to contract.²²³ While this is not equally important for all states, certain states, particularly democratic states may raise concerns about third-party interference in top-secret national defense contracts. When a commission starts revoking licenses involving top-performing contracts, such conditions create concerns for a security vacuum that could be filled with mercenaries.²²⁴ There is also the possibility of competitors

²¹⁵ DAMIAN LILLY, INTERNATIONAL ALERT, REGULATING PRIVATE MILITARY COMPANIES: THE NEED FOR A MULTI-DIMENSIONAL APPROACH 4 (2002).

²¹⁶ *Id.* at 8.

²¹⁷ Mark W. Bina, *Private Military Contractor Liability and Accountability After Abu Ghraib*, 38 J. MARSHALL L. REV. 1237, 1258 (2005).

²¹⁸ See Lilly, *supra* note 215, at 7.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 8.

²²² *Id.* at 7.

²²³ Christopher Kinsey, *Regulation and Control of Private Military Companies: The Legislative Dimension*, 26 CONTEMP. SEC. POL'Y 84, 89–90 (2005).

²²⁴ *Id.* at 84.

and adversaries misinforming the commission in hopes of purposefully removing certain PMSCs as a broader geopolitical tactic.

2. Wagner

Similarly, standardized industry rules based on an international licensing commission would reduce many of the IHL violations Wagner has allegedly carried out in Russia's war with Ukraine. The prevailing criticism of PMSCs is that they lack both accountability and a checks-and-balances system over their conduct. An international licensing commission could rectify both of those omissions.²²⁵ The commission would be responsible for addressing judicial and nonjudicial grievance mechanisms regarding IHL violations.²²⁶ Accordingly, the commission should set up its own tribunal to try PMSC perpetrators free from state interference. While the ICC could be an option, historical evidence demonstrates that the court has carefully selected cases to adjudicate, and even those cases rarely result in conviction.²²⁷ Therefore, a faster, victim-centered grievance mechanism would hold PMSC actors accountable.²²⁸

In the context of Wagner, the ongoing Russia-Ukraine war has prevented state prosecutors from having the time and resources required to investigate individual and business involvement in human rights– and humanitarian law– related crimes.²²⁹ These gaps in the provision of remedies for PMSC-related human rights abuses should be filled with an international tribunal established through an internationally binding licensing commission.²³⁰ There are multiple reports of Wagner violating IHL, yet few opportunities to formally investigate and prosecute these allegations exist.²³¹ An international PMSC licensing commission would create a grievance mechanism, triggering an investigation, and if necessary a judicial proceeding.²³² At the very least, the ongoing allegations of Wagner in

²²⁵ Bina, *supra* note 217, at 1258–59.

²²⁶ U.N. Hum. Rts. Off. of the High Comm'r, *supra* note 104, at 8.

²²⁷ Geoff Dancy & Glorencia Montal, *From Law Versus Politics to Law in Politics: A Pragmatist Assessment of the ICC's Impact*, 32 AM. U. INT'L REV. 645, 671 (2017).

²²⁸ U.N. Hum. Rts. Off. of the High Comm'r, *supra* note 104, at 8.

²²⁹ *See id.*

²³⁰ *See id.*

²³¹ *Treasury Sanctions Russian Proxy Wagner Group as a Transnational Criminal Organization*, U.S. DEP'T OF TREASURY (Jan. 26, 2023), <https://home.treasury.gov/news/press-releases/jy1220#:~:text=Wagner%20Group%20personnel%20have%20perpetrated,torture%2C%20and%20displacement%20of%20civilians> [https://perma.cc/Q45A-E59X].

²³² *See Lilly, supra* note 215, at 2.

Ukraine would have been reported, commencing an investigation and potentially altering Russian power on the battlefield.²³³

Thus, there is a growing need for an international commission setting uniform standards for PMSC conduct. Uniformity and enforcement have become extremely important in the context of Wagner—which continues to fight in the highly publicized Russia-Ukraine war, even with the fall of its leader, Yevgeny Prigozhin.²³⁴

III. CONCLUSION

International efforts to regulate PMSCs have proven ineffective. Despite the opportunity to use PMSCs to achieve legitimate goals, the industry has taken advantage of ambiguous regulations. In times of war, states have turned to PMSCs to carry out human rights abuses. Paradoxically, doing so has delegitimized state militaries and state authority. These lucrative gains are likely to prove disastrous in an anarchic international system that rests on states self-regulating. Are mercenaries to become the future of war? States are not the only parties contracting PMSCs—multinational corporations, nongovernmental organizations, and international organizations have become a significant customer base for PMSCs. Given the twenty-first century rise of the PMSC industry, what changes will the industry undergo in the near future? Will PMSCs continue operating with near impunity?

Ultimately, the future of PMSCs will depend on industry compliance with shared standards, norms, and international expectations. This Comment offered three recommendations on how to legitimize PMSCs operating in international armed conflicts: (1) treat PMSCs as military personnel to disincentivize states from circumventing IHL, (2) outlaw PMSC engagement in international armed conflict while allowing PMSC operations outside of such conflicts, or, lastly, (3) impose an international

²³³ See *Human rights breaches by Russian paramilitary groups, in Somalia and in Cameroon*, EUR. PARL. (Nov. 25, 2011), <https://www.europarl.europa.eu/news/en/press-room/20211118IPR17630/human-rights-breaches-by-russian-paramilitary-groups-in-somalia-and-in-cameroon> [https://perma.cc/8Q6T-SYYT].

²³⁴ See, e.g., Carole Landry, *Has the Russian Offensive Begun?*, N.Y. TIMES (Feb. 1, 2023), <https://www.nytimes.com/2023/02/01/briefing/russia-ukraine-war-trade.html> [https://perma.cc/7MAH-SDKL]; Ben Hubbard, *U.S. Presses Partners to Weed Out Illicit Trade with Russia*, N.Y. TIMES (Feb. 4, 2023), <https://www.nytimes.com/2023/02/04/world/middleeast/us-turkey-uae-russia-sanctions.html> [https://perma.cc/CD6M-JFRF]; Steven Erlanger, *When it Comes to Building its Own Defense, Europe has Blinked*, N.Y. TIMES (Feb. 4, 2023), <https://www.nytimes.com/2023/02/04/world/europe/europe-defense-ukraine-war.html> [https://perma.cc/39VN-MKZH].

licensing commission for uniformity in standards and practice. By implementing these suggestions, the international community can further strengthen accountability over PMSCs and work to prevent further international human rights abuses.