

LAW, WAR AND THE PRINCIPLE OF DISCRIMINATION: A EUROPEAN EXAMPLE

INTRODUCTION

International norms are the building blocks of international law. A norm is a standard of behavior that is absolutely indispensable to human interaction. One such norm is the principle of discrimination, which dictates that civilians must never be the intended targets during hostilities and reciprocally must not participate in hostilities (Walzer 32)ⁱ. But what, exactly, does this mean to the parties who are engaged in international conflict? How does one define a civilian and what does it mean to participate in hostilities? This is where international law comes in. International law is supposed to give human beings a set of shared expectations about how to behave under certain conditions. It sets the parameters of a norm. Hence, international laws governing the principle of discrimination should provide parties engaged in hostilities a common way to determine who is a civilian, immune from attack and barred from participating in hostilities; and who is a combatant, subject to attack and permitted to engage in hostilities.

Presently, international law distinguishes between a combatant and a civilian based upon the group in which he or she is a part. It assumes that state-run militaries are the primary participants in hostilitiesⁱⁱ. So, a state's uniformed soldiers are endowed with the combatant privilege to engage in them. This is so because their group – a state-run military – enforces adherence to accepted standards of behavior. Civilians, on the other hand, do not belong to the armed forces of a party to a conflict, cannot be counted on to act in accordance with the laws of war, and do not engage in hostilitiesⁱⁱⁱ (Geneva Art III, Additional Protocol I Art 43 (1), Phillips 5).

This bright-line distinction between combatants and civilians has always been a little difficult to maintain because the parties to international conflict have always relied on some sort of civilian support. The Geneva Conventions provide a number of examples of such civilians, including supply contractors, members of labor units or of services responsible for the welfare of the armed forces and others, but this is far from an exhaustive list (Art IV). In order to deal with such individuals, the law specifies a sub-set of civilians known as civilians-accompanying-the-force. Such individuals may support a party to a conflict without sacrificing their protected status as civilians. But there are limits on the type of support they may legally provide to combatants. The law bars them from taking a direct part in hostilities. But this begs an important question. What counts direct participation in hostilities? The law is vague on this, and this lack of specificity is a growing problem.

Since the end of the Cold War, a \$100 billion yearly private military industry has emerged^{iv} (CanWest A2). This industry challenges the assumption of state primacy in the application of military force and has blurred long-standing legal distinctions between civilians and combatants. States generally employ the civilian members of this industry as civilians-accompanying-the-force, keeping them under the umbrella of protected civilians, even though their activities are becoming difficult to distinguish from those accomplished by the forces they support. This paper argues that international law is insufficiently equipped to deal with this industry since it does not provide an adequate set of shared expectations about the functions that civilians-accompanying-the-force may undertake during hostilities. Although the law is clear that civilians may not directly participate in hostilities^v, it fails to provide a common set of expectations about activities

encompassing direct participation. And without an accepted set of shared expectations about who is a protected civilian and who isn't, the international community puts the principle of discrimination at risk and increases the dangers posed to the civilian population (Heaton 51).

RECENT ACTIVITIES OF PRIVATE MILITARY FIRMS: THE LACK OF LEGAL GUIDANCE

To understand why current law is not equipped to deal with the private military industry, it is necessary to understand how these firms have behaved during recent international hostilities. In contrast to the traditional duties of civilians-accompanying-the-force, civilian members of the private military industry have begun to make significant contributions to the outcome of hostilities. Although this paper highlights these firms' activities in support of NATO and Europe, the use of civilians to accomplish military objectives is a global phenomenon.

In some cases, private firms engage in fighting in and around the battlefield. The most prevalent contemporary examples include military provider firms in Sierra Leone, Angola and Ethiopia that were hired expressly for combat (Krahmann 2). But their participation in hostilities isn't limited to the third world. States engaged in the war on terrorism often use civilians-accompanying-the-force in roles once reserved for government soldiers, even though the law recognizes the former as a civilian and the latter as a legal combatant. Civilians-accompanying-the-force in Iraq escort convoys and provide security^{vi}. In fact, the civilian footprint in Iraq has become so large that the private military industry has experienced more casualties than any other coalition contingent except the US (Schmitt *Humanitarian* 515).

Somewhat more removed from the battlefield are activities like intelligence gathering and targeting^{vii}. In support of NATO forces between 1995 and 1997, civilians flew aboard the E-8 Joint Surveillance Target Attack Radar System. Similarly, civilians accompanying coalition forces flew on targeting and surveillance aircraft and operated unmanned reconnaissance aircraft in Afghanistan and Iraq^{viii} (Schmitt *Humanitarian* 517).

A more insidious impact these firms have had on modern hostilities comes from the consulting and support sectors. If we shift focus away from the physical proximity of an activity and instead look at how closely it is related to the infliction of violence, civilians accompanying the force often seem more like combatants than many military members. A prime example is found in one corporation's alleged activities in the Balkans, where consultants planned military operations and prepared Croatia's plans for a successful 1995 offensive against the Serbs (Singer *Corporate* 125)^{ix}. Even without firing a weapon, the activities of these individuals were strongly connected to the outcome of an engagement and could easily be construed as hostile.

The preceding examples are all actions in which combatants have participated throughout history. While international law does not effectively specify whether civilians-accompanying-the-force may legally participate in these long-established activities^x, recent changes in the nature of modern hostilities have multiplied the problem. Many modern military activities lack historical precedent and put even more pressure on international law for a set of shared expectations about whether they constitute direct participation^{xi}.

One defining feature of modern engagements is the proliferation of sophisticated weaponry and the support needed to maintain it. The growth of stealth aircraft and tactical missile systems, for example, has considerably increased the need for specialized expertise which often must be pulled from the private sector (Schmitt *Humanitarian* 512, Singer *Corporate* 61)^{xii}. A recent trend in British defense spending is a good example. The UK has established the broad-based "Future Contracting for Availability" concept, where it contracts with civilian companies to provide life-long maintenance for complicated systems like its AWACS aircraft, fighter jets and helicopters (GBP). NATO's commitment of forces to Bosnia during Operation Joint Endeavor is also telling of this trend, where the Electronic Sustainment Support Center employed 28 civilians-accompanying-the-force and supported 14 weapons systems (Schmitt *Direct* 515).

Additionally, a battlefield is no longer defined by geographic lines, but extends into cyber space. This has increased the potential for civilians-accompanying-the-force to change the course of an engagement (Pfaltzgraff 10, Heaton 63). A prime example concerns computer network attacks^{xiii}. Such attacks can be conducted from a distance without physical intrusion and without immediate physical damage, yet their consequences may be devastating if they cause certain system malfunctions^{xiv} (Durmann). Anyone with an internet connection can be an information warrior, but no law states whether or not those who conduct such attacks on behalf of a party to a conflict, if not formally incorporated into a state military, can maintain their protected status or if they are instead actively participating in hostilities (Durmann).

Psychological operations represent another military phenomenon in which civilians may easily become involved under current laws. During such operations, parties to a

conflict use persuasion to influence perceptions and encourage desired behavior (Civil). Such operations are nothing new^{xv}. But their importance has skyrocketed with the rise of satellite television and the internet^{xvi}. Like network attacks, they can be conducted far from the battlefield by an increasing number of individuals.

It is difficult to determine how such operations fit in to current legal assessments of direct participation in hostilities. On one hand, they seem purely hostile. Hence, weeks before NATO forces launched a deadly 1999 attack against a Serbian television studio in Belgrade a NATO spokesman described the station as "an instrument of propaganda and repression, [and] therefore a legitimate target" (Simon). This assessment certainly bolsters the idea that psychological operations constitute direct participation. So, some legal scholars quickly label these operations as such and cordon off civilians-accompanying-the-force from participation in them^{xvii}. But state practice does not bear this interpretation out. The same NATO that targeted the Serbian station has its own psychological operations units, and much of their work depends on civilians-accompanying-the-force. In fact, the former Deputy Commander of NATO's Information Campaign in Bosnia argues that psychological operations could never be conducted without such support, since civilians "must work with their military colleagues to help the military understand how civilians work and think^{xviii}" (Naef). Are the civilians who help state-controlled forces decide when and how to target an enemy during psychological operations engaging in hostilities? Currently "there is precious little international treaty law or customary law restricting [or defining] the uses of such operations," and the Geneva Conventions do not explicitly regulate them (Smyczek 16)^{xix}.

All of these examples – fighting, high-tech maintenance, intelligence gathering, targeting, network attack and psychological operations – undermine the usefulness of international law’s current means of discriminating between combatant and civilian. International law simply prohibits civilians-accompanying-the-force from direct participation in hostilities and leaves it up to the parties involved in a conflict to determine which activities they are willing to contract out to a third party and to decide whether civilians-accompanying-the-force who engage in such activities are legitimate, hostile targets. Clearly, the dearth of international law regulating civilian participation in such activities is harmful to the principle of discrimination.

PROPOSED SOLUTIONS: STATUS QUO OR TRANSFORMATION?

Thanks to increased interest in this area of international law, it is more and more difficult to find arguments that direct participation in hostilities can only be interpreted to mean acts “such as firing at enemy soldiers, throwing a Molotov-cocktail at an enemy tank, blowing up a bridge carrying enemy war materiel and so on” (Kalshoven 99). Admittedly, it is a well-settled fact that general support of the military, even in a theater of operations, is not a hostile act in and of itself^{xx}. But there is a vast space between the two poles of firing a weapon at an enemy and supporting the war effort by cooking for a combatant, and the debate about how to define direct participation amounts to more than what some fallaciously describe as “modest, if persistent, definitional squabbles^{xxi}” (Jinks 2656). It is rather a matter of grave concern. Since scholarly debate over this topic has flourished, so too has the number of proposed solutions.

This section is devoted the two basic solutions one may offer to alleviate the problems the private military industry has wrought for international definitions of a legal

combatant: status quo solutions and transformative solutions. Status quo solutions center on how individual states^{xxii} may adjust their behavior in the absence of clear international legal guidance. Transformative solutions center on how international law must adapt and improve. Using Europe as a guiding example, it is clear that status quo solutions do little to solve the problem.

Status quo scholars offer state-level fixes and thus accept or ignore indefinitely the dangerous implications of international confusion. Instead of seeking to amend or specify the laws of war, they suggest that states simply turn questionable civilians into combatants – even though they don't agree on who is a questionable civilian and how a state should integrate him or her^{xxiii}. As one expert describes it, this “alchemy” is possible because international law allows any state to decide upon the composition of its own armed forces and to include civilians-accompanying-the-force among its list of lawful combatants^{xxiv} (Guillory 20). But such a solution falls short of suggesting much multilateral cooperation and continues to undermine the principle of discrimination.

One status quo solution has surfaced in the UK with the 1996 Reserve Forces Act. This municipal law introduced a new category of serviceman called a sponsored reservist. Members of this civilian category carry out functions that may be construed as hostile, so they become subject to military call up during times of war (British). These occasional combatants, when serving the armed forces, are subject to the Service Discipline Acts and thus would meet the Geneva criteria for membership in a group that enforces the laws of armed conflict (Krahmann 8).

But this is dangerous alchemy^{xxv}. In disregarding international confusion over the definition of direct participation, the UK glosses over the problem even as it tries to

provide legitimate combatant status for a number of questionable civilians. The implementation of the sponsored reservist scheme evidences this. The functions in which such reservists currently participate are wide-ranging; from meteorological support to heavy equipment transportation to logistical assistance (Blizzard 16). But these are only a few examples of the numerous activities that an adversary may consider to be direct participation. Since the UK remains free to interpret direct participation however it wants, it is completely up to the British government to select which activities to include in the sponsored reservist scheme.

In fact, it is certainly not clear the British government has an integrated plan to ensure that all activities that may be considered direct participation are only performed by sponsored reservists rather than by members of any other private military firm. It has admitted quite the opposite. In 2002 the House of Commons confessed general confusion about which activities constitute direct participation. The government's conclusion that a distinction should be drawn "between combat and non-combat activities" is continually hampered by its opinion that "defining the point at which a company becomes directly involved in combat is difficult" (Private). Despite the intriguing legal implications of the sponsored reservist scheme, the problem of defining direct participation continues unmitigated.

Again, the lack of international guidelines concerning direct participation is detrimental to the principle of discrimination. The absence of international laws regulating the actions that civilian members of the private military industry may undertake during hostilities effectively defers regulation to the state level. Yet incongruent state regulation hinders any real progress. Europe is a microcosm of this

global dilemma. Since European states do not have matching or even similar forms of regulation, confusion abounds and the principle of discrimination suffers immensely^{xxvi}.

Three brief examples make this evident. As described above, the UK embraces the private military industry. While it initially confined private firms to providing clearly non-combatant support, it has begun to outsource more combat-like functions such as logistics and training (Caprini 111). Germany is somewhat different. Privatization of the Bundeswehr has been slower than military privatization in the UK, and “the German government has tried to maintain direct control over military services through government ownership” (Krahmann 10). While Germany does not forswear the use of civilians-accompanying-the-force in all potentially hostile activities, it has been far less eager than the UK to outsource combat related functions to private corporations.

France’s relationship with the private military industry is more complicated^{xxvii}. On one hand, France represents the opposite extreme of the UK. In 2003 the French passed legislation effectively banning civilians from participating in hostilities (Whitaker 116). Yet the French government has not renounced the possibility that the private military industry could take a stronger role in some highly restricted military activities. For instance, in 2004 the foreign ministry suggested the French firm Secopex offer armed protection services around refugee camps in Darfur (Indian). So, although the French clearly want to strictly regulate the activities of private military firms, they are willing to accept that such firms may be more politically and economically expedient during some hostilities than national militaries.

Obviously, status quo solutions are doomed because the status quo is unacceptable. Wars are, by definition, fought by more than one party. Without a set of shared

expectations about the functions that civilians may undertake during hostilities between parties, one party will always be able to take advantage of the legal loophole and put innocent civilians at risk. Only transformative solutions can truly bolster adherence to the principle of discrimination because they seek to close the loophole.

It is beyond the purview of this paper to describe all of the numerous transformative solutions in detail. Like the international community, transformative scholars seem unable to agree on what activities constitute direct participation^{xxviii}. However, three common bonds among their proposed solutions require illumination. First, an acceptable definition must focus on military objectives rather than just violence and physical destruction^{xxix}. We must question whether operating a weapons system is the only useful litmus test for whether an action constitutes direct participation or if we should instead focus on the value added to the war effort of the opposing party to a conflict (ICRC)^{xxx}.

Second, any workable definition must account for continual advances in warfare. This paper has given examples like network attack and psychological operations, but there are numerous other activities that come close to direct participation^{xxxi}. What is the status of an activity like terminal attack control, where an individual designates a target for attack with a laser (Phillips 6)? What about a network attack aimed at a critical economic infrastructure? What about a civilian security guard at a Darfur refugee camp faced with an armed attack? Clearly, any definition of direct participation must at least provide a framework for answering these questions.

Last, a commonly accepted definition must be accompanied by an attendant regime to amend and update the law as needed. Put another way, a good definition must not be a legal straight jacket. It must be written in ink, not stone^{xxxii}. It is vital that the rules of

direct participation be able to keep pace with continued technological and tactical advances in warfare, so some international group of experts and policy-makers must be charged with identifying when new tactics or techniques have begun to undermine the spirit of the law. The body or bodies responsible for providing such guidance is not clear. But without an attendant legal regime to monitor compliance and reduce the transaction costs of further changes to the law, any new definition would be a toothless animal^{xxxiii}.

Unfortunately, all transformative solutions suffer from the same major impediment: a lack of political will^{xxxiv}. Many states have not reached agreement about the activities that encompass direct participation in hostilities because it is not in their interest to do so. Even though it is not entirely clear that states reap all the benefits ascribed to the hiring of privatized military firms – cost savings, immediate access to high-tech expertise, reduced political costs and so on – they obviously gain some advantage (Avant 1). Otherwise, they would not demand their services. It presently seems that the dictates of these forces outweigh the dictates of the principle of discrimination. Practically speaking, until an egregious desecration of the rules of war related to private military firms occurs, “the likelihood of any international body being willing to take on [a] complex regulatory function is extremely limited” (Singer *War* 547). As unfortunate as it sounds, we must wait for the situation to get worse before it gets better.

CONCLUSION

In a discussion of Geoffrey Best’s *War and Law Since 1945*, Charles Dunlap provides a useful insight about current international law. He writes, “where once the law sought to protect ‘a person who formed no part of an enemy country’s armed strength and made no contribution to it,’ it now extends coverage to all those not formally part of a military

organization” (10). In other words, existent international law assumes that armed conflict occurs primarily between state-controlled militaries. The new private military industry challenges the usefulness of this assumption. Civilians-accompanying-the-force are making more direct contributions to one party’s success during hostilities, and doing so while retaining their rights as civilians. The traditional method of discriminating between civilian and combatant is becoming obsolete. The parties who engage in war in the modern era must find some way to agree upon what types of behavior that constitutes direct participation in hostilities rather than simply extending combatant status only to those individuals who are formally part of a military organization. The principle of discrimination demands it.

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ⁱ This norm is well-established both in customary law and positive law (see Geneva Art III; *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, 1996 ICJ 257: 78, 83; *Corfu Channel Merits Judgment* 1949 ICJ 22: 215; *Military and Paramilitary Activities in and Against Nicaragua Judgment* 1986 ICJ 113: 218; *North Sea Continental Shelf Case Judgment* 1967 ICJ: 36). However, the international community has failed to adopt attendant rules governing how the parties to a conflict can determine whether an individual outside of a state-run military is taking a direct part in hostilities.

ⁱⁱ There are important exceptions to this, and international law has to some degree begun to recognize that some non-state actors like revolutionary movements are also participants in hostilities.

ⁱⁱⁱ This paper recognizes, but does not explore, the multitude of norms and rules that make up the law of armed conflict. It acknowledges that certain rules may be a part of customary law and hence do not require state ratification of a treaty to be binding on the parties to a conflict. However, it also assumes that state practice determines the substance of customary law. Since a multitude of states have not expressly agreed to control their use of civilians-accompanying-the-force for activities described in this paper, but have instead commonly enabled civilians to engage in them, one must assume that they are not prohibited under customary law (Zarate).

^{iv} Private military companies differ from mercenaries or militias based on their organizational structure. Mercenaries like the White Legion of the 1997 Zairian conflict or the dispossessed combatants from the Former Soviet Union who inundated the Balkans are private military actors who thrive in areas of weak governance. Militias and private armies, on the other hand, are more organized groups like transnational terrorists who “are supported by whatever country can obtain funds and hardware... [and who] fight for control of a given region, resource” or political cause (O’Brien 62). Private military firms are different. They are organized along corporate lines, they include boards of directors, share-holdings and corporate structures, and by and large provide services to legitimate states (O’Brien 62, Wither 107).

^v The Geneva Conventions use the term “direct” participation, while the 1977 Protocol I uses the term “active” participation in hostilities. Neither term is adequately defined. They are generally used interchangeably (Comm 155). Very recently, the International Criminal Tribunal for Rwanda opined that the terms are so similar they should be treated synonymously (Schmitt *Direct* 507).

^{vi} In Mosul for instance, civilians protect an entire half of the perimeter of a military base where they share fire support and heavy weapons with US forces (Singer *Transcript* 83). A major controversy concerning the legal precedent for the use of civilians in such potentially hostile roles is now raging in the US. The Federal Acquisition Regulation and a Department of Defense Supplement govern contracts that outsource US military functions (Avant 2). The Department of Defense has issued an interim rule that is now operative within these regulations. It includes a new category of civilian called a “security contractor”, who is “authorized to use deadly force when necessary to execute [his or her] security mission to protect assets and persons, consistent with the mission statement contained in their contract”. Herbert Fenster, a legal expert and specialist in Government Contract Law, has provided an accurate comment on the implications of this new rule. He says, “it is well beyond question that combat activities are intended... there is [no] realistic limitation in the interim rule concerning what a combat commander may insert in a ‘mission statement’ that would expand combat activities or redefine them in the field” (7).

^{vii} The most infamous case from recent history is the Abu Ghraib abuse scandal in Iraq, where contractors and civilian employees conducted prisoner of war interrogations in order to obtain battlefield intelligence (Caparini 10). Two companies are being investigated for their role in torture allegations: CACI, from Virginia, who supplied at least one interrogator and Titan of California, who supplied at least two translators named in a classified internal Army report.

^{viii} The US military has since assumed operational control of all these assets.

⁹ Additionally, civilians accompanying coalition forces during the first Gulf War who were teaching the Saudi National Guard how to use heavy weapons systems accompanied the Guard into battle against Iraqis in Khafji (Heaton 19).

¹⁰ There is still a great deal of uncertainty about whether many traditional wartime activities constitute direct participation. For instance, at a recent meeting of legal experts there was serious debate over whether “an individual driving an ammunition truck to the front could be directly targeted because he or she was directly participating or whether the driver was only exposed to proportional incidental injury (or death) during an attack on the truck” (Schmitt *Direct* 507).

^{xi} Admittedly, international law is capable of dealing with issues lacking historical precedent. The Martens Clause, a well-accepted principle of humanitarian law, provides that whenever a situation is not covered by an international agreement civilians and combatants shall be subject to principles derived from established custom, humanity, and the dictates of public conscience (Schmitt *Wired* 369). Yet current practice indicates that civilian participation in the methods of warfare described here violates neither established custom nor the dictates of humanity or public conscience.

^{xii} Ironically, many states justify advanced weaponry because it can lead to greater discrimination in battle. NATO member states, for instance, have increased their use of precision munitions because of their “capacity to carry out surgical strikes” and reduce collateral damage (Smith 362). Yet these weapons come with a reciprocal cost to the principle of discrimination. In most cases, the center of technological acceleration in such weaponry lies in the commercial, non-defense sectors (Schmitt *Bellum* 1069). Hence battlefield maintenance for such weapons increasingly comes from civilians-accompanying-the-force.

^{xiii} This is a somewhat generic form of attack which includes hacker activities and the application of viruses and worms.

^{xiv} Due to the secrecy which states attach to their network attack capabilities, it is difficult to collect reliable data on the subject. Policy experts estimate that up to 100 states are developing their network attack capabilities (Matthews). The amount of civilian involvement in this sector of the military industry is unknown. But here it is only essential to draw attention to the potential for civilian involvement in these operations, and the possibility for civilian involvement is tremendous.

^{xv} Operations Tokyo Rose and Axis Sally during World War II were both psychological operations, as was the dropping of leaflets urging soldiers to surrender during the first Gulf War (Church).

^{xvi} The means of conducting psychological operations is also problematic for international laws governing discrimination. The International Telecommunications Satellite Organization Agreement of 1973, for example, seeks to ensure that satellites are used only for peaceful purposes. Although the agreement exempts some satellites with strictly military purposes from its jurisdiction, many militaries make extensive use of civilian systems. Whether psychological operations conducted with such systems, including portions of the internet, are inherently hostile, “is a fundamental issue that has not yet been settled” (Barnett).

^{xvii} According to Peter Smyczek, a psychological operation can “easily be viewed as a combatant act, [and] it should only be performed by uniformed personnel. Any nation using non-uniformed personnel to conduct [a psychological operation] could be violating the principle of [discrimination]” (21).

^{xviii} He does, however, argue that the principle of discrimination is still a vital matter. “My personal feeling is when the target is military; then the military is the right vehicle. If the target is the civilian population, there needs to be a different way to do it: in the US case that would be through the State Department as it has the mission of public information” (Naef).

^{xix} Since a psychological operation often serves as a nonviolent means of achieving a military objective, it sometimes seems like an activity in which civilians-accompanying-the-force should be allowed to

participate. Unfortunately, international law offers little help in determining whether this is the case.

^{xx} It would be an unfortunate regression to return to Allied standards of the Second World War, where “the thesis was repeatedly heard that the mere fact of making a contribution to the war effort was sufficient ground for a civilian to lose his right to protection against the effects of military operations” (Kalshoven 100).

^{xxi} Goodman and Jinks argue that the definition of direct participation is “precise” because the Commentaries to the 1977 Geneva Conventions Protocols define it as “a direct causal relationship between the activity engaged in and the harm done to the enemy,” and entails “a sufficient causal relationship between the act of participation and its immediate consequences” (2655). This definition would be extremely useful if it were truly a part of international law, and scholars commonly suggest it as a means of clarifying the law’s present ambiguity on the subject of direct participation (Schmitt). However, the assumption that this is a commonly accepted definition is false. This definition is found in the expert commentary on the Protocols, rather than in the Protocols themselves. While the International Court of Justice Art 38 does legitimately establish the work of publicists as “a subsidiary means for the determination of rules of law,” it is difficult to imagine that the commentaries of six individuals could establish laws that are binding on all parties to a conflict. Even if their source was the Protocols, the Protocols are not a part of customary law in their entirety. The US has not ratified them and the UK issued strong reservations to Art 44, which governs the status of combatants.

^{xxii} States are not the only global actors to employ private military firms. However, this paper focuses on states for the simple fact that they are the international entities most likely to wage war. Hence, states have the greatest interest in fleshing out the definition of direct participation in hostilities. Yet one must admit that other international actors are concerned with the issue and may become more so in the future.

^{xxiii} Status quo solutions are popular in the US, where one can easily find arguments that American civilians can be legally transformed into combatants because new municipal laws ensure that they will obey the laws of war. Specifically, the War Crimes Act of 1996 made certain crimes committed by any US national a federal offense and the Military Extraterritorial Jurisdiction Act of 2000 extended federal jurisdiction to felonies committed outside the US by civilians accompanying the force (Guillory 21). These laws, the status quo camp argues, would satisfy the criteria that civilians accompanying the force can be counted on to comply with the laws of war. With this complicated task accomplished, the other Geneva criteria are easy to meet (See end-note xxiv). Thus armed with combatant status, these civilians would no longer pose a challenge to the principle of discrimination.

^{xxiv} Civilians-accompanying-the-force may become legal combatants as long as they meet the criteria of the Geneva Conventions – being commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war (Geneva Art III). Such status would give them the combatant privilege to use force against an enemy and would give the enemy the right to target them in accordance with the laws of war.

^{xxv} Even status quo scholars often admit that the criteria set up in the Geneva Conventions seriously restricts the feasibility of such a state-level solution. This is particularly true in the US. As previously mentioned, state-run militaries are naturally able to fulfill Geneva’s Article III requirement that combatants be commanded by a person responsible for subordinates as well as the Additional Protocol I requirement that combatants be subject to an internal discipline code. The legal short-hand for this type of command in the US is the Uniform Code of Military Justice, which can only apply to civilians accompanying the force during Congressionally-declared war. “Given the fact that the US has only declared war five times, the last such declaration taking place during the Second World War... declared wars are now the exception” (Guillory 24). In the meantime, the US is still mired in international conflict and continues to use civilian members of the private military industry to achieve potentially hostile objectives without bringing them under the control of the Uniform Code of Military Justice.

^{xxvi} Some countries like Denmark, Finland, France, Portugal and Spain, have strict and comprehensive controls of private military services. Others, such as Germany, Austria and Italy, have only narrowly defined regulations. Some countries have had laws controlling private security services since the early 1980s while others have for a long time favored self-regulation of the sector and only introduced national legislation only in recent years (Caprini 113).

^{xxvii} As recently as June 2006 a French court sentenced civilian Bob Denard to a five year suspended sentence for taking part in an unsuccessful putsch in the Comoros in 1995 (Agence). But this example proves that France has mixed feelings about the use of civilians in hostilities. In the ruling, the Paris Criminal Tribunal also said the French authorities had given at least tacit approval to the coup, and that "it is clear that the French secret services knew of the plan for a coup d'etat conceived by Robert Denard, both its preparation and execution" (Sage 36).

^{xxviii} They also cannot agree on the larger issue of how the international community should regulate the private military industry. Suggestions include creating a new international monitoring body, expanding the scope of the 1989 UN Convention Against the Recruitment, Use, Financing and Training of Mercenaries, and establishing new international licensing procedures for private military firms.

^{xxix} Acts of violence and physical destruction are obviously blanketed under direct participation. Such actions are included under the accepted definition of *attack*, which is "an act of violence against the adversary, whether in offense or defense" (Additional Protocol I Art 49 (1)).

^{xxx} This is why Heaton includes activities like "gathering intelligence for the immediate purpose of selecting targets for attack, assisting in the planning of imminent or ongoing military combat operations and directing or advising on the conduct of imminent or ongoing combat operations" in his list of activities that are inherently hostile (34). A less specific definition was adopted by a working group of US military lawyers at a recent conference. They defined direct participation as "any act or integral part of an act that may result in actual harm to the personnel and equipment of the enemy," and offered a thumbnail sketch of impermissible activities that included loading weapons, providing lookout in forward areas and strategic or tactical intelligence gathering, surveillance and reconnaissance (Phillips 6). Each of these definitions has theoretical merit, but it is unfortunate that legal experts must continually re-invent this wheel every time they wish to address the issue of private military firms and the legal status of their employees.

^{xxxi} The literature is replete with confusion about where to put a number of activities that are new to the modern battlefield. As Caparini and Schreier note, "it is intriguing that Singer lists firms that engage in information warfare, psychological warfare and provide intelligence capabilities under *military support firms* rather than *military provider firms*... even if he labels these potentials as 'non-lethal' and 'assistance' it does not solve the problem since such things like the provision of offensive information warfare operations in particular could cause much more harm than mercenaries can in conventional combat operations" (50).

^{xxxii} At the International Committee of the Red Cross' last expert meeting on the subject of direct participation, there was general agreement that it was not feasible to come up with an abstract definition that would cover all conceivable instances of direct participation, whether or not it was accompanied by a non-exhaustive list of examples (ICRC).

^{xxxiii} Although a formally ratified multilateral treaty would certainly help, a more modest proposal may have a better chance of success. For instance, major military states could at least issue a statement of principles wherein they declare which activities constitute direct participation in hostilities (Heaton 30).

^{xxxiv} Pessimism about the political likelihood of any transformative solution is one of the driving forces behind status quo arguments. According to Caparini and Schreier, "Short of convening a new Geneva Convention to rewrite the laws of war, there is no way to fix the ambiguous status of these hired guns

[private military firms]. And even if one could, it is doubtful that the international legal community would support legal protection for armed contractors conducting military operations. That is why, in the meantime, governments must do what they can to oversee the actions of these contractors and ensure they comport with national policies and objectives (60).