

Private Military and Security Companies, Responsibility of States and International Humanitarian Law: Toward an Interdisciplinary Definition****-*****

Empresas militares y de seguridad privadas, responsabilidad de los Estados y Derecho internacional humanitario: Hacia una definición interdisciplinaria

ABSTRACT

The aim of the article is two-fold. First, to identify the elements that distinguish private military and security companies (PMSCs) from other entities. Second, to propose a definition of PMSCs under international humanitarian law (IHL). The hypothesis of the study is that the type of military services

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provided by PMSCs, their direct participation in hostilities and the so-called ‘three externalities’ are the core elements of PMSCs and provide a solid basis for their definition in IHL.

The research methodology applied is based upon the interpretivist epistemological orientation, which is reflected through an open research question which seeks to examine a range of elements and observable processes which contribute to determining the result. To do this, the research question is formulated in such a way that the proposed analysis illustrates the way in which social and international agents represent “the world” and an object of study (PMSCs and their personnel) through their intersubjective interpretations. This is preferred by methodological pluralism and interdisciplinary focuses.

KEYWORDS

Private Military and Security Companies, military services, direct participation in hostilities, international humanitarian law, States’ international responsibility.

RESUMEN

El objetivo del artículo es doble. En primer lugar, identificar los elementos que distinguen a las Compañías militares y de seguridad privadas (CMSP) de otras entidades. En segundo lugar, proponer una definición de las CMSP en el derecho internacional humanitario (DIH). La hipótesis del estudio es que el tipo de servicios militares prestados por las CMSP, su participación directa en las hostilidades y las llamadas “tres externalidades” son los elementos centrales de las CMSP y brindan una base sólida para su definición en el DIH.

La metodología de investigación aplicada se basa en la orientación epistemológica interpretativista, la cual se refleja a través de una pregunta de investigación abierta que busca examinar una serie de elementos y procesos observables que contribuyen a determinar el resultado. Para ello, la pregunta

frentar en Colombia la corrupción asociada al crimen transnacional organizado, a la luz de una aproximación evolutiva a las dinámicas del narcotráfico marítimo por medio de simulación de sistemas sociales” (reference number: Minciencias 70593: 2020-2023), led by Prof. Héctor Olasolo (Faculty of Law of the Universidad del Rosario) as principal researcher. The Ibero-American Institute of The Hague for Peace, Human Rights and International Justice (The Netherlands) also supports financially the publication of the collective books of the Research Network on Responses to Corruption linked to Transnational Organized Crime, which was established in 2020 for the implementation of Research Program 70593.

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de investigación se formula de tal forma que el análisis propuesto ilustra la forma en que los agentes sociales e internacionales representan “el mundo” y un objeto de estudio (las CMSP y su personal) a través de sus interpretaciones intersubjetivas. Esta es la preferida por el pluralismo metodológico y los enfoques interdisciplinarios.

PALABRAS CLAVE

Compañías Militares y de Seguridad Privadas, servicios militares, participación directa en las hostilidades, derecho internacional humanitario, responsabilidad internacional de los Estados.

SUMMARY

Introduction. 1. Private Military and Security Companies and Military Services. 1.1. The Draft Articles on the Responsibility of States for Internationally Wrongful Acts. 1.2. The Montreux Document and the Code of Conduct. 1.3. Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies. 2. Direct Participation in Hostilities. 3. Contribution to the Definition of PMSCs by Other Disciplines. Conclusion. References.

INTRODUCTION

What are the elements that distinguish private military and security companies (PMSCs) from other entities so as to provide a solid basis for their definition in international humanitarian law (IHL)? This question arises from two international law debates, with contributions from other disciplines. The first debate is about the similarities between PMSCs and other pre-existing international legal conceptualizations. Legal scholars, political and military leaders and officials of international and non-governmental organisations have different views as to whether these companies are an updated form of mercenarism, a category of Private Security Company (PSCs) or something different.¹

The second debate concerns the scope of the existing regulatory framework under international law which regulates PMSCs. This discussion pits those who defend the relevance and effectiveness of self-regulation as a way of avoiding excesses and guaranteeing control within PMSCs' ranks against those who affirm the need for establishing binding rules.² Hence, the aim of the article

1 Urueña-Sánchez, M. I., “Las compañías militares de seguridad privada: ¿los nuevos mercenarios?”, In *Revista Criminalidad*, Vol. 61, No. 1, 2019, pp. 97-110, at p. 97.

2 Urueña-Sánchez, M. *Mercenarios y compañías militares y de seguridad privadas estructuración de sus redes normativas*, Valencia, Tirant lo Blanch, 2020.

is two-fold. First, to identify the elements that distinguish private military and security companies (PMSCs) from other entities. Second, to propose a definition of PMSCs under international humanitarian law (IHL).

The hypothesis of the study is that the type of military services provided by PMSCs, their direct participation in hostilities and the so-called ‘three externalities’ are the core elements of PMSCs and provide a solid basis for their definition in IHL. The first two elements appear repeatedly in the definitions of PMSCs under international conventional law. The third element comes from academic literature and the contribution of the authors of this study.

The research methodology applied is based upon the interpretivist epistemological orientation, which is reflected through an open research question which seeks to examine a range of elements and observable processes, which contribute to determining the result. To do this, the research question is formulated in such a way that the proposed analysis illustrates the way in which social and international agents represent “the world” and an object of study (PMSCs and their personnel) through their intersubjective interpretations. This is preferred by methodological pluralism and interdisciplinary focuses.³

The investigative technique used in this study is an analysis of documentary sources that includes international conventional law and academic literature from various social sciences, thereby favouring an interdisciplinary approach to address the phenomenon of PMSCs.

The article is divided into four sections. The first section analyses the initiatives under international law to provide a definition of PMSCs based on the type of military services that they provide. In the second section, said normative initiatives are analysed in light of IHL provisions on direct participation in hostilities and the limits they impose on PMSCs. In the third section, academic literature on PMSCs from non-legal disciplines is studied to search for other possible elements of the definition of PMSCs. In the final section, a proposal is advanced about the core elements of PMSCs that should be included in their definition under IHL.

1. PRIVATE MILITARY AND SECURITY COMPANIES AND MILITARY SERVICES

1.1. The Draft Articles on the Responsibility of States for Internationally Wrongful Acts

When addressing the issue of PMSCs in international law, one of the challenges faced by scholars is to characterise a private actor that operates mainly in the public sphere. This is shown by the relevance of the tasks of PMSCs’ person-

³ Mcleod, A. and O’Meara, D., *Theories des relations internationales, contestations et résistances*, Athena, Outremont, 2010.

nel for international human rights law (IHRL), IHL and international criminal law (ICL).

The power of PMSCs to use lethal weapons in contexts often marked by institutional fragility may be seen as threatening the Westphalian model upon which modern international law has been built. It thereby poses a threat to the ability of states to control the use of massive means of physical coercion to safeguard the integrity of their territory and population. This control leads to the assumption of international responsibility by states for internationally wrongful acts conducted in their name by those representing them.

The second chapter of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) specifies which conduct is attributable to states. Moreover, Article 5 deals with the behaviour of persons or entities exercising elements of governmental authority. According to this provision:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.⁴

Although the Draft Articles do not explicitly refer to PMSCs, they lay the foundation upon which states' international responsibility for wrongful acts committed by PMSCs' personnel can be asserted. Nevertheless, these acts can only be attributable to states if committed by PMSCs' personnel empowered by the law of the relevant state to exercise elements of governmental authority. Thus, states' international liability only exists in cases where PMSCs act with the states' acquiescence, which is not always the case.

The assemblage of international and domestic private actors that have contracted the services of PMSCs is varied both in purpose and in nature. Legally constituted actors, such as transnational companies, especially from the mining-energy sectors, or NGOs promoting human or environmental rights, operate in conflict zones which requires protection for their personnel or certain territories. However, these same security services have also been engaged by organized criminal networks such as Latin American drug cartels or warlords in Africa or Asia.⁵ Under these, and many other, circumstances it is difficult to invoke state responsibility. This is due to how imprecise the establishment of attribution to State bodies is, since these companies are not even "de facto" state appendages as the competent authorities have not had delegated to them the mandate to administer the violence.⁶

4 United Nations, "Responsibility of States for Internationally Wrongful Acts, 2001", 2005.

5 Avant, D. "Private Security" in Williams, P.D. *Security Studies*, Routledge, London and New York, 2013, pp. 425-440, at p. 432.

6 United Nations, above note 4.

Neither do the structural problems of the scheme, by which international law imposes international responsibility on the State, disappear when there is a clear contractual link between the State and the PMSCs that commit excesses that violate human rights and IHL. In regional and national jurisprudence in the Americas there are two examples that illustrate the fact that while state responsibility cannot always be invoked *a priori*, it can be done effectively.

In 2013, the Inter-American Court of Human Rights sanctioned the Colombian State for a bombing in which its air force killed 18 civilians, believing they were guerrilla members. Despite the sanction being against the State, the Colombian Government was not willing to take action against the American company *Airscan*, owner of the spy plane that gave the coordinates of the target. That same year, the US Federal Court of the District of Columbia ruled in favor of PMSC *Dyncorp* for lack of evidence. It rejected the thesis of joint responsibility between the company and the Colombian government arising from the environmental and health effects on Ecuadorian peasants living in the border area between the two countries, caused by spraying with glyphosate.⁷

These cases make it necessary to explore other international standards that can help to explain the complexity of PMSCs and provide more specific elements for their definition.

1.2. *The Montreux Document and the Code of Conduct*

The so-called *Swiss Initiative* is a joint effort between the International Committee of the Red Cross (ICRC) and the Swiss government to provide regulatory guidelines on PMSCs for states and companies. In relation to states, the *Swiss Initiative* succeeded in bringing forward the 2008 *Montreux Document*⁸ with the participation of 17 states and the assistance of representatives of non-governmental organisations (NGOs), PMSCs and academic experts.⁹ The *Montreux Document* is a non-binding intergovernmental agreement that reminds states of good practices in the procurement of PMSCs in armed conflicts. It advises states to not hire PMSCs to carry out activities reserved by IHL to state agents. It also stresses the need both to ensure compliance with IHL and to not collaborate in its breach.

Furthermore, the *Montreux Document* provides PMSCs with guidance on good practices concerning: (i) the services they may or may not provide in a given territory; and (ii) the need to be governed by a competent central author-

7 Urueña-Sánchez, M, above note 2.

8 Jerbi, S. *The international code of conduct for private security service providers*, In *Academy Briefing* No. 4, Geneva Academy, Geneva, 2013.

9 Hurst, S. M. “‘Trade in Force’: the need for effective regulation of private military and security companies”, In *California Law Review*, Vol. 84, No. 2, 2011, pp. 448–490, at p. 460.

ity, to act in full compliance with applicable national law, IHL and IHRL, and to establish clear rules on the use of armed force and the handling of weapons.¹⁰

Unlike the Draft Articles, the *Montreux Document* provides the following definition of PMSCs:

[...] private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.¹¹

The *Montreux Document* also defines PMSCs' personnel as 'persons employed by, through direct hire or under a contract with, a PMSC, including its employees and managers.'¹² Both PMSCs and their personnel are thus defined by the *Montreux Document* in terms of the duties they perform and their nature.

The *Swiss Initiative* had the support of 58 PMSCs to issue the *International Code of Conduct for Private Security Service Providers* in 2010.¹³ This instrument is based on the *Montreux Document* regarding the need to regulate two main aspects of PMSCs' corporate governance practices. On the one hand, the *Code of Conduct* makes clear that PMSCs should be subject to IHL and IHRL regarding *inter alia* the use of force, the detention and apprehension of persons and the prohibition of torture or other cruel or inhuman treatment, sexual exploitation, gender-based violence, human trafficking, slavery and child labour. On the other hand, the *Code of Conduct* establishes principles on PMSCs' good administration and governance, in particular in relation to the selection and rejection of their personnel, their training techniques and the handling and use of weapons.¹⁴

Like the *Montreux Document*, the *Code of Conduct* also provides a definition of PMSCs and their personnel. Nevertheless, the *Code of Conduct* refers to PMSCs as private security companies (PSCs) and defines them as any company whose business activities include the provision of security services (including escorting and protecting persons and objects, such as convoys, facilities, designated sites, property or other places, and any other activity for which the personnel of such companies are required to use weapons in the

10 International Committee of the Red Cross and Federal Department of Foreign Affairs, "The Montreux Document On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict", 2009.

11 Ibid.

12 Ibid.

13 Jerbi, S. above note 9.

14 Ibid.

performance of their duties) either on its own behalf or on behalf of another, irrespective of how such company describes itself.¹⁵

Moreover, according to the *Code of Conduct*, PSCs' personnel include all:

[...] persons working for a PSC, whether as employees or under a contract, including its staff, managers and directors. For the avoidance of doubt, persons are considered to be personnel if they are connected to a PSC through an employment contract (fixed term, permanent or open-ended) or a contract of assignment (whether renewable or not), or if they are independent contractors, or temporary workers and/or interns (whether paid or unpaid), regardless of the specific designation used by the Company concerned.¹⁶

When comparing the definitions of the *Montreux Document* and the *Code of Conduct*, it is striking that both texts define: (i) PMSCs and PSCs on the basis of the type of services they provide; and (ii) their personnel by the type of contractual relationship they have with the companies.

Following the adoption of the *Code of Conduct*, the *Conference of Montreux +5*, in which 49 states and three international organisations took part, was held in 2013. Its main purposes were to help clarify the obligations imposed by international law on PMSCs and to promote their implementation by states at the national level.¹⁷

1.3. Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies

Resolution 2005/2 of the then UN Commission on Human Rights ended the mandate of the Special Rapporteur on the use of mercenaries and created a Working Group of five international experts from different regions of the world for an initial period of three years. The Working Group was tasked *inter alia* with (i) monitoring and studying 'the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights, particularly the right of peoples to self-determination'; and (ii) preparing 'draft international basic principles that encourage respect for human rights on the part of those companies in their activities'.¹⁸ In 2008, the term of the Working Group was

15 Ibid.

16 Ibid.

17 DeWinter-Schmitt, R. "Montreux Five Years On: An analysis of State efforts to implement Montreux Document legal obligations and good practice", 2013.

18 Rother, D. L. and Ross, J.I. "Private Military Contractors, Crime, and the Terrain of Unaccountability", In *Justice Quarterly*, Vol. 27, No. 4, 2010; General Assembly United Nations and Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination : addendum*, Report, A/HRC/7/7/Add.3, UN, 2008.

extended. Moreover, the Working Group was given the power to investigate the impact of PMSCs' activities.

In 2008, the Working Group presented an extensive list of potential legal standards for PMSCs, including registration, licensing, accountability mechanisms, vetoing, human rights training and surveillance.¹⁹ Furthermore, the Working Group proposed that national legislation on PMSCs should include the types of activities preventing PMSCs from national registration.

The efforts of the Working Group to promote mechanisms for the effective regulation of PMSCs led to the drafting, in 2009, of the *Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies*.²⁰ Although its entry into force is far from being imminent due to the limited support from states,²¹ the Draft Convention can be considered as a statement of principles, which seeks to:

[...] reaffirm and strengthen the principle of State responsibility for the use of force and to identify those functions which are, under international law, inherently governmental and cannot be outsourced as well as to promote cooperation between States regarding licensing and regulation of the activities of private military and security companies in order to more effectively address any challenges to the full implementation of Human Rights obligations including the right to self-determination, to ensure monitoring of the activities of private military and security companies and devise mechanisms to monitor abuses and violations of international humanitarian and human rights law.²²

Although inspired by some elements of the *Montreux Document*, the *Draft Convention* acknowledges the insufficiency of the *Montreux Document* to ensure compliance by PMSCs with IHRL and IHL. Consequently, while the *Montreux Document* is a non-binding instrument that does not establish new legal obligations, the *Draft Convention* seeks to establish an innovative international legal framework over the duties of PMSCs and their personnel.²³

With a wider range of addressees, such as states, international organisations and non-state actors (including PMSCs and their personnel), the *Draft Convention* starts by defining private military and/or security companies as corporate entities which provide 'on a compensatory basis military and/or

19 General Assembly United Nations and Human Rights Council, above note 18.

20 General Assembly United Nations and Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Right of Peoples to Self-Determination*, Report, A/HRC/15/25, UN, 2009.

21 Huskey, K. A. "Accountability for Private Military and Security Contractors in the International Legal Regime", In *Criminal Justice Ethics*, Vol. 31, No. 3, 2012.

22 United Nations, Office of The United Nations, and High Commissioner for Human Rights, "Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies", UN, 13 July 2009.

23 Huskey, K. A. Above note 22.

security services, including investigation services, by physical persons and/or legal entities'.²⁴

For the *Draft Convention*, military services:

[...] refer to specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, military training and logistics, and material and technical support to armed forces, and other related activities.²⁵

Regarding Security Services, for the *Draft Convention* they:

[...] refer to armed guarding or protection of buildings, installations, property and people, police training, material and technical support to police forces, elaboration and implementation of informational security measures and other related activities.²⁶

The definition of PMSCs adopted by the *Draft Convention* is in principle rather similar to the definition of PMSCs in the *Montreux Document*. Nevertheless, since the drafters of the *Draft Convention* chose to separately define military and security services, there seems to have been a significant expansion in the scope of activities to which the *Draft Convention* applies. While the references in the *Draft Convention* to security services, armed guarding and protection of personnel and infrastructure are consistent with the *Montreux Document*, there are significant differences in the definition of military services because the *Draft Convention* includes among them certain types of services that may be used in offensive operations, such as strategic planning, intelligence and air operations, among others.

As a consequence, while the *Montreux Document* restricts the definition of PMSCs to companies which only carry out defensive operations, and thus distinguishes more clearly the functions of PMSCs from the functions that are inherently governmental and cannot be outsourced by states, the *Draft Convention*, by expanding the functions of PMSCs to offensive operations, generates an overlap between the functions of states and the functions of PMSCs.²⁷

According to the *Draft Convention*, states have the duty to take such measures as are necessary to investigate, prosecute and punish violations of the *Draft Convention* by PMSCs within or outside their territory, and to ensure effective remedies to victims. As a result, the drafters justify the extension of the scope of application of the *Draft Convention* because of the need to

24 General Assembly United Nations and Human Rights Council, above note 21.

25 Ibid.

26 Ibid.

27 Ibid.

create obligations for states that subcontract said types of military services from PMSCS.²⁸

This means that states are required to enforce IHRL and IHL and prohibit: (i) PMSCS' direct participation in armed conflicts, military actions or terrorist acts; and (ii) the handling and trafficking of certain types of weapons by PMSCS.²⁹

Regarding the other addressees, the *Draft Convention* imposes on international organizations the obligation to monitor the Convention once it enters into force. Moreover, the *Draft Convention* imposes on non-state actors the obligation to comply with IHRL, IHL, corporate responsibility guidelines provided for by international law and the national laws of the host state.³⁰

Another innovative element of the *Draft Convention* is the creation of a *Committee on the Regulation, Oversight and Monitoring of Private Military and Security Companies*. The Committee would be made up of 14 experts appointed by the member states to: (i) provide guidance on the interpretation of international law that is applicable to the provision of PMSCS' services; and (ii) conduct confidential investigations into incidents, if authorised. The Committee would also appoint *ad hoc* conciliation commissions to find amicable solutions in cases of disputes arising between member states.³¹

Finally, regarding the extent to which the definitions of PMSCS and military services in the *Montreux Document* and in the *Draft Convention* could be considered international customary law, it should be noted that the initiatives of the Swiss government and the ICRC, and of the UN Working Group, have been supported by different actors in the international society. Thus, while the US, the UK and other European states where PMSCS' headquarters are located, have signed the *Montreux Document* and support the *Code of Conduct*, Russia, China and the G77 have supported the *Draft Convention*.

Nevertheless, the support given to both proposals appears to amount to little more than a mere formality, with no actual intention that any of these documents, and the definitions contained therein, become binding through their incorporation into international customary law.³²

2. DIRECT PARTICIPATION IN HOSTILITIES

Because PMSCS and their personnel operate in armed conflicts, a question arises as to their status under IHL, particularly because, as mentioned in the previous section, the high likelihood of the use of lethal weapons by PMSCS

28 Ibid.

29 Ibid.

30 Ibid.

31 Elsea, J. K. "Private Security Contractors in Iraq and Afghanistan: Legal Issues. Russia, China and Eurasia-Social", In *Historical*, 2011, pp. 45–93, at p. 54.

32 Matteo, D. "The use of private military and security companies in international society: contestation and legitimization of state practice", Doctoral thesis, University of Westminster, 2015.

blur the existing distinction between: (i) the notion of protected persons, which includes civilians, medical, health and religious personnel, and those who are *hors de combat* because they are shipwrecked, wounded and unable to defend themselves, have surrendered and given up their weapons or have fallen into enemy's hands; and (ii) the notions of combatants (applicable in international armed conflicts) and members of the parties to the conflict (applicable in non-international armed conflicts).

For the ICRC, the notion of *direct participation in hostilities* plays a central role in answering the question as to the status under IHL of PMSCs and their personnel. Accordingly, during the first decade of the 21st century, the ICRC promoted a series of international meetings, with the participation of delegates from many governments and NGOs, with the aim of defining the notion of *direct participation in hostilities*. As a result, the ICRC published in 2009 the *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Interpretative Guide)*.

According to the *Interpretative Guide*, the notion of direct participation in hostilities covers all acts which meet the following criteria and are committed by persons who may, in principle, have protected status:

1. Threshold of harm: '[...] 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'.
2. Direct causation: '[...] 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'.
3. Belligerent nexus: '[...] 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'.³³

By proposing a direct causal link between the hostile activity and the threshold of harm, the *Interpretation Guide* establishes a more appropriate way of analyzing the actions of PMSCs and their personnel. According to the Guide, PMSCs' personnel are initially granted the status of protected persons. Nevertheless, they lose it when they directly participate in hostilities and for the duration of such participation.³⁴

33 Melzer, N. "*Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*", In International Committee of the Red Cross, 2009.

34 Kálmán, János. "*Mercenaries reloaded? Applicability of the Notion of 'Mercenaries' in Relation to Private Military Companies and their Employees*", In *Acta Juridica Hungarica*, Vol. 54, No. 4, 2013; Schmitt, M. N. "*Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*", In *Chicago Journal of International Law*, Vol. 5, No. 2, 2005.

The notion of *direct participation in hostilities* makes it possible to place PMSCs' personnel beyond the protected persons/combatants (or members of the parties to the conflict) dichotomy. Moreover, this notion is linked to other approaches that seek to overcome such dichotomy when it comes to the legal qualification of PMSCs.³⁵

On the one hand, the *Martens Clause* of the Second Hague Convention of 1899 places protected persons and combatants on an equal footing in situations of the absence of conventional regulation, guaranteeing their protection and subjecting their activities to the principles of the law of nations emerging from established customs.³⁶

On the other hand, academic literature has developed the following three intermediate notions between protected persons and combatants, which should be analysed regarding their possible application to PMSCs operating in international armed conflicts: (i) *civilians accompanying the armed forces*, (ii) *special non-combatants*; and (iii) *unlawful combatants*.

The notion of *civilians accompanying the armed forces* places special emphasis on an interpretation of Article 4.A.4 of the Third Geneva Convention³⁷ that favors granting war prisoner status to the following individuals (even though they are not members of the armed forces of the parties to the conflict):

[...] persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.³⁸

Nevertheless, including PMSCs' personnel in this category is controversial. On the one hand, certain directives of the US Department of Defense highlight that applying the notion of *civilians accompanying the armed forces* to PMSCs

35 Cameron, L. and Chetail, V. *Privatizing war: private military and security companies under public international law*, Cambridge University Press, Cambridge, UK; New York, 2013; Urbina, J. J. "Actores no estatales y externalización de las funciones militares en los conflictos armados: los contratistas privados ante el derecho internacional humanitario", In *Anuario Colombiano de Derecho Internacional - ACIDI*, Vol. 8, No. 1, 2015; Koroleva, A. "Las empresas militares y de seguridad privadas en los conflictos armados desde la perspectiva del derecho internacional". Master thesis, Universidad Carlos III de Madrid, 2014; Milkeraitytė, K. "Private Military and Security Companies and their personnel in the context of International Humanitarian Law", Master thesis, Mykolas Romeris University, 2008.

36 Urbina, J.J. above note 35, p. 48.

37 International Committee of the Red Cross (ed.), "Convention (III) relative to the Treatment of Prisoners of War", ICRC, 12 August 1949.

38 Ibid.

would allow the PMSCs' personnel to qualify for certain protections associated with combatant status (such as war prisoner status) through the issuance of an identity card. According to the US Department of Defense, this could be done without subjecting PMSCs to state political control.³⁹

On the other hand, the US Department of Defense's directives show that applying the notion of *civilians accompanying the armed forces* to PMSCs would entail a legal imbalance because it would offer great advantages to PMSCs by providing rights to their personnel and allowing them to evade certain duties set forth in IHL.⁴⁰

The notion of *special non-combatants* includes those individuals who are involved in war without participating directly in operations that lead to causing harm.⁴¹ *Special non-combatants* differ from individuals partially assimilated into certain categories of combatants. This facilitates the differentiation between the various roles of combatants and non-combatants.⁴² Nevertheless, when applying the notion of *special non-combatants* to PMSCs' personnel, there is a problem with the offensive role that they may undertake when compliance with their PMSCs' contracts so require.

Finally, the notion of *unlawful combatants* seeks to deprive individuals who participate directly in hostilities without combatant status of any rights. Consequently, neither war prisoner status would apply to them when they fall into the hands of the enemy, nor would they be considered as protected persons because of their direct participation in hostilities. Moreover, they could be the object of attack at any time.⁴³

As a non-conventional category, the notion of *unlawful combatants* is very controversial and most legal experts and the ICRC do not support it. One of the main reasons for rejecting this notion and its application to PMSCs is the ruthless nature of its legal consequences.⁴⁴

Although the above-mentioned approaches seek to overcome the dichotomy between protected persons and combatants (either by looking for situations of equivalence between both notions (Martens clause) or by proposing intermediate notions), all proposals lead to a dead-end street when it comes to providing for a comprehensive definition of PMSCs and their personnel.

39 Bosch, S. "Private security contractors and international humanitarian law—a skirmish for recognition in international armed conflicts", In *African Security Review*, Vol. 16, No. 4, 2007; Cameron, L. and Chetail, V. above note 35; De Nevers, R. "Private Security Companies and the Laws of War", In *Security Dialogue*, Vol. 40, No. 2, 2009.

40 Cameron, L. and Chetail, V. above note 36, p. 392.

41 Pattison, J. "The legitimacy of the military, private military and security companies, and just war theory", In *European Journal of Political Theory*, Vol. 11, No. 2, 2012, pp. 131–154, at p. 150.

42 Daniels, P. R. Daniels, "Just War and Administrative Personnel in the Private Military Industry", In *Journal of Military Ethics*, Vol. 14, No. 2, 2015, pp. 146–161, at p. 151.

43 Cameron, L. and Chetail, V. above note 35, pp. 423–425.

44 Milkeraitytė, K. Above note 35, pp. 48–50.

This situation is more evident in non-international armed conflicts, in which PMSCs are more active and IHL has fewer tools to regulate them. According to conventional law, the notion of combatant is not applicable in non-international armed conflicts. As a result, common Article 3 of the four Geneva Conventions and Additional Protocol II are insufficient to regulate PMSCs.

Faced with this situation, legal scholars have sought to increase the range of available options in non-international armed conflicts by distinguishing among: (i) members of the parties to the conflict (whom they also refer to as 'fighters' to avoid any confusion with the notion of combatants); (ii) protected civilians who take no direct part in hostilities; and (iii) civilians who temporarily take direct part in hostilities.⁴⁵

Moreover, according to the *Interpretative Guide*, '[i]n non-international armed conflicts, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function)".⁴⁶

As a consequence, the question of the status of PMSCs' personnel in non-international armed conflicts is closely linked to the notion of *direct participation in hostilities*. As a result, following the guidelines provided in the *Interpretative Guide*, and considering that the existence of a continuous combat function must be assessed on a case by case basis in light of the specific functions performed by PMSCs' personnel, PMSCs could be considered in some situations as parties to the conflict and their personnel as members of the parties to the conflict.⁴⁷

3. CONTRIBUTION TO THE DEFINITION OF PMSCS BY OTHER DISCIPLINES

The role played by PMSCs on the international stage in recent years and the effects of their involvement in multiple conflict zones have generated interest among academics from several disciplines, particularly political science, international relations, and military science. Several scholars from these fields share with their counterparts in international law a concern to contribute to an operational definition of PMSCs which would help understand this phenomenon and to propose measures to resolve the problems deriving from their actions.

One of the most cited authors regarding PMSCs is American political scientist Peter W. Singer, who is a strategist at the *New America Foundation*. He stands out for his *tip-of-the-spear* typology of military and security com-

45 Ibid., pp. 52–54.

46 Cameron, L. and Chetail, V., above note 36, p. 415.

47 Ibid., p. 46.

panies.⁴⁸ This typology is based on the analysis of the portfolio of services provided by said companies, which range from small consulting firms run by retired generals to transnational corporations capable of leasing combat aircraft and commando battalions.⁴⁹ The more imminent the possibility of company personnel becoming involved in combat or operations at the tactical level, the closer they are to the *tip of the spear*. In contrast, the *shaft of the spear* represents military activities far from combat action, ranging from transporting weaponry and guarding captured enemies to preparing food.⁵⁰

Based on the foregoing perspective, Singer identifies three types of companies:

1. Companies providing military services, commonly known as PMSCs or private security companies, which offer direct military tactical assistance, including combat involvement.
2. Companies providing military consulting services, which rely on experienced, non-commissioned officers to provide military advice and training but not to conduct operations.

48 Boone, M. D. "Private military companies and state sovereignty: an english school approach to regulation and its consequences", Master thesis, Dalhousie University, 2011; Clark, M. K. "In The Company of Soldiers: Private Security Companies' Impact on Military Effectiveness and The Democratic Advantage", Doctoral thesis, Cornell University, 2008; Coufal, L. "More than mercenaries? : mercenaries, Sierra Leone, and the rise of private military companies", Master thesis, University of British Columbia, 2007; Drutschmann, S. "Motivation, Markets and Client Relations in the British Private Security Industry", Doctoral thesis, King's College London, 2014; Ellington, S. "The Rise of Battlefield Private Contractors", In *Public Integrity*, Vol. 13, No. 2, 2011; Ettinger, A. "After the gold rush: Corporate Warriors and The Market for Force revisited", In *International Journal: Canada's Journal of Global Policy Analysis*, Vol. 69, No. 4, 2014; Hansen, J. "Rethinking the Regulation of Private Military and Security Companies Under International Humanitarian Law", In *Fordham International Law Journal*, Vol. 35, No. 3, 2012; Heinecken, L. "Outsourcing Public Security: The Unforeseen Consequences for the Military Profession", In *Armed Forces & Society*, Vol. 40, No. 4, 2014; Jackson, P. "War is much too serious a thing to be left to military men': Private military companies, combat and regulation", In *Civil Wars*, Vol. 5, No. 4, 2002; Joachim, Jutta, and Schneiker, A. "All for one and one in all: private military security companies as soldiers, business managers and humanitarians", In *Cambridge Review of International Affairs*, Vol. 27, No. 2, 2014; Laboire Iglesias, M. *La privatización de la seguridad: Las empresas militares y de seguridad privadas en el entorno estratégico actual*, Instituto Español de Estudios Estratégicos, Madrid, 2012; Macías, A. "The Impact of PMSC on the Role of Today's Military", In *OPERA*, No. 12, 2012; Pozo Serrano P. and Hernández Martín, L. "El marco jurídico de las CMSP. Reflexiones a propósito de la experiencia en Irak", In *Anuario Español de Derecho Internacional*, Vol. 23, 2018; Rothe, D. L. and Ross, J. I. , above note 18; Schreier, F. and Caparini, M. "Privatising Security: Law, Practice and Governance Private Military and Security Companies.", *Geneva Centre for the Democratic Control of Armed Forces (DCAF): Occasional Paper*, No. 6, 2004.

49 Singer, P. W. "Humanitarian Principles, Private Military Agents: Implications of the Privatized Military Industry for the Humanitarian Community", In *The Brown Journal of World Affairs*, Vol. 13, No. 1, 2006, pp. 105–121, at p. 106.

50 Ettinger, A., above note 49, p. 563.

3. Companies providing military support, which provide logistics, intelligence and maintenance services.⁵¹

Singer's typology uses two variables to determine whether a company belongs to one of the three categories mentioned above: (i) the range of services; and (ii) the level of force required.⁵² According to Singer's typology, PMSCs are among the military and security companies that are closest to the *tip of the spear* because their portfolio of services includes direct military assistance and combat involvement.

The widespread acceptance of Singer's typology does not exempt it from criticism. On the one hand, Singer's *tip-of-the-spear* typology can be seen as anachronistic within the context of contemporary warfare. Phenomena such as terrorism and insurgent warfare have relativized the idea of 'battlefield' as a place far from urban centres and civilians, making the notion of imminence that is inherent to the *tip-of-the-spear* typology irrelevant.⁵³

On the other hand, a typology as clearly built as Singer's assumes the existence of a unified and coherent private security market. Nevertheless, the variety of services provided by military and security companies means that they all could fall, one way or another, into the three categories of Singer's typology. In addition to this operational difficulty, there are also services that cannot be adequately included in any of the three categories, such as those related to intelligence.⁵⁴

To address this issue, Deborah Avant considers the ability of companies to innovate and expand their services, and therefore suggests drawing an initial distinction between companies offering internal security services (such as, protecting facilities by armed or unarmed means, preventing crime and doing intelligence work) and companies providing external security services (including operational and logistical support activities and military advice and training). For Avant, PMSCs belong to the second group of companies.⁵⁵

A key contribution of Avant's typology is the prioritization of the analysis of PMSCs' contracts over the analysis of Mpscs' distinctive traits.⁵⁶ This approach makes it possible to focus the analysis on the specific PMSCs' services hired by contractors instead of generalizing about PMSCs based on obsolete notions regarding the services that they provide.

51 Singer, P. W. Above note 50, p. 106.

52 Ettinger, A. above note 49 p. 563.

53 Clark, M. K. above note 49, p. 17.

54 Boone, M. D. above note 48; Clark, M. K. above note 48; Sebastian Drutschmann, above note 48.

55 Avant, D. D. *The Market for Force: The Consequences of Privatizing Security*, Cambridge University Press, New York, 2005, p. 16.

56 Avant, D. D. above note 56.

David Shearer⁵⁷ proposes another typology that is based upon the analysis of the services provided by each company, which may include: (i) combat involvement (support and participation in military operations); (ii) military assistance (coverage armament) and training (in particular, training on tactical and force structures to special forces and elite groups); (iii) logistics (equipment dispatch, humanitarian protection of UN missions, infrastructure restoration and de-mining); (iv) commercial security protection (surveillance of goods and personnel); (v) risk analysis (assessment of insecure and unstable areas in connection with investment projects); (vi) research and intelligence (fight against extortion and fraud and assessment of political interference in commercial activities); and (vii) response to kidnapping (negotiation and advice).

Shearer's typology based on services has helped other authors differentiate PMSCs from PSCs and private military companies (PMCs).

According to Peter Bjoveit⁵⁸, PMSCs are tactically superior to PSCs (which use light weaponry for combat and intelligence work), PMCs (which supply the needs of national armies without combat involvement) and Private Low Intensity Security Companies (which are responsible for the security of shopping malls, corporate offices and homes), because PMSCs handle heavy weaponry and have highly trained personnel.

Doug Brooks⁵⁹ who uses a typology similar to that of Shearer, considers PMSCs as entities with a more offensive vocation and which are closer to direct combat. For Brooks, it is necessary to distinguish between the services provided by PMSCs and the services provided by PSCs which (i) are limited to activities such as de-mining and logistical support for military operations; and (ii) are offered to unstable states or private clients (as opposed to PMSCs, which provide their services to public institutions and international organizations).

The distinction between public and private is also relevant for Christopher Kinsey.⁶⁰ Kinsey proposes a typology of PMSCs that is based upon the distinction between variables relating to the 'object to be secured' and to the 'means to secure that object'. The object can be of a public or private nature, while the means can vary between lethal and non-lethal. From Kinsey's typology, a quadrant can be inferred wherein the combination of both variables determines the nature of the military force used. Thus, the use of lethal force is reserved for national armies (public) and military supply companies (private),

57 Shearer, D. "The expansion of the private military sector", In *The Adelphi Papers*, Vol. 38, No. 316, 1998, pp. 23-37, at pp. 25-26.

58 Bjoveit, P. "Treath or Asset? : How Private Security Companies and Private Military Companies affect the US Monopoly on Legitimate Force", Master thesis, Universitet i Oslo, 2008, pp. 25-29.

59 Books, D. "Messiahs or mercenaries? The future of international private military services", In *International Peacekeeping*, Vol. 7, No. 4, 2000, pp. 129-144, at p. 130.

60 Kinsey, C. *Corporate soldiers and International Security*, Routledge, New York, 2006, p. 12.

while non-lethal force is reserved for police forces (public) and consulting or support companies (private).

Kinsey's typology enriches the debate because it: (i) adds the public/private and the lethal/non-lethal criteria; and (ii) moves beyond typologies that focus solely on companies, contracts and services as units of analysis. Furthermore, Kinsey's variable of means to secure the work⁶¹ opens the door to a tactical-strategic criterion for the categorization of military and/or security companies.

For María Ángeles Cano,⁶² the offensive or defensive nature of a company's actions is a useful criterion to distinguish between PMSCs and PSCs. Thus, while PMSCs' actions are more offensive and include the use of lethal force, PSCs' actions have a defensive purpose and are usually taken in situations where human life is not at imminent risk. Nevertheless, for Schreier and Caparini⁶³ this criterion is problematic because most companies carry out offensive and defensive actions as a result of the variety of services that they offer.

Mario Laborie Iglesias⁶⁴ acknowledges the inherent difficulties for applying this criterion but supports its application due to its ethical connotations. Furthermore, for Iglesias, the application of said criterion should be based on the motivation of the institution or organization that hires the military and/or security company.

To end the analysis of the definitions of CMSPs proposed by non-legal scholars, it is convenient to review the definitions put forward by Carlos Ortiz, Simon Chesterman and Chia Lehnardt and Sarah Percy. Ortiz⁶⁵ points out that CMSPs are legally established international companies that provide services involving the systematic use of armed force by military and paramilitary means. Ortiz's definition emphasizes that CMSPs pay taxes, are sometimes listed on stock exchanges, and establish contractual links with governments, international and non-governmental organizations, and transnational corporations. Therefore, the ravages caused by PMSCs' personnel should not affect their legal status as legally established companies.

For Ortiz, PMSCs are international companies due to the scope of their services and their ability to do business with both national and foreign clients. Furthermore, PMSCs' services are not capital intensive (as with the manufacture of equipment or weapons) because PMSCs focus on training in the handling of equipment and providing security. Moreover, enlisting former military

61 Ibid.

62 Cano Linares, M^a Á. "El Derecho internacional humanitario frente al uso de la fuerza como actividad empresarial. ¿El fin de un monopolio?", In *Anuario Español de Derecho Internacional*, Vol. 24, 2018, pp. 47-77, at p. 61.

63 Schreier, F. and Caprini, M. above note 49, p. 41.

64 Laboire Iglesias, M. above note 49, p. 76.

65 Ortiz, C. *Private armed forces and global security: a guide to the issues*, Contemporary military, strategic, and security issues, Praeger, Santa Barbara, Calif, 2010, p. 48.

and police officers provides PMSCs with a workforce experienced in the use of lethal force, which is capable of providing armed protection in high-risk places (as opposed to ordinary security guards).⁶⁶

Chesterman and Lehnardt⁶⁷ define PMSCs as companies that provide services outside their home states with the potential both to use lethal force and to train and advise military personnel to improve their combat capabilities. Chesterman and Lehnardt acknowledge the difficulty of clearly distinguishing between offensive and defensive operations in contexts of low intensity conflicts and seek to include those companies that have been the focus of concern for regulators and humanitarian entities in the definition of PMSCs. Furthermore, they use the term ‘military’ to differentiate between: (i) companies that carry out military functions in conflict zones (CMSPs); and (ii) companies that guarantee a stable environment for protected personnel and objects (PSCs).⁶⁸

Finally, Sarah Percy⁶⁹ believes that CMSPs are corporate entities that specialize in the provision of military capabilities for governments: training, planning, intelligence, risk assessment, operational support and technical skills (for Percy, ‘operational support’ has to do with the imminence of direct participation in hostilities). Providing military capabilities for governments implicitly refers to the fact that PMSCs are hired by different states.

For Percy, the ‘corporate structure’ of PMSCs corresponds to that of organized groups that work for some States without any specific reason other than the economic compensation they receive from them. As a result, PMSCs submit to the hiring state authority for the time set in the contract. Therefore, PMSCs submit to two types of state control: (i) the control of the states where PMSCs have been legally established, because such states have the power to not authorise PMSCs to operate abroad; and (ii) the control of the hiring states, which directly control PMSCs’ actions.⁷⁰

From the analysis of the definitions of PMSCs proposed by non-legal scholars, it can be concluded that, together with the relevance for their definition of the type of military services PMSCs provide and their direct participation in hostilities, there are three additional elements (referred to in this work as “externalities”) which should be included in the definition of PMSCs.

First, PMSCs are characterized by a geographical externality with respect to the war theater in which they operate. This is explicitly stated in the definitions of Ortiz and Chesterman and Lenhardt. This is also implicit in Percy’s

66 Ibid.

67 Chesterman, S. and Lenhardt, C. (eds.), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, Oxford University Press, New York, 2007, p. 3.

68 Oxford University Press, New York, above note 66.

69 Percy, S. *Mercenaries: The History of a Norm in International Relations*, Oxford University Press, New York, 2007, p. 60.

70 Ibid.

definition. PMSCs are part of the numerous private companies that, under the aegis of commercial globalisation, have taken advantage of the porosity of national borders during past decades, both to recruit military experts from many countries and to increase the number of territories in which they have a strong presence.

Second, both the contract (particularly considered by Avant), from which the set of services provided by PMSCs is derived, and the core elements of the typologies of Joveit, Brooks, Kinsey, Ortiz and Shearer, require a link between PMSCs and the political authority (an argument reinforced by Percy's definition). Thus, a sort of political externality is perceived because, in contrast to national armies, PMSCs are independent from states (this does not preclude, however, that, through the contract, PMSCs submit voluntarily and temporarily to the control of the hiring states).

Finally, there is a third externality which seems to have been overlooked in the definitions reviewed: the ideological externality. In contrast to national armies and volunteer forces, PMSCs do not engage in armed conflict or provide military services for ideological reasons. As Percy has highlighted their private nature includes profit as the main motivation for PMSCs' actions.

Consequently, the outsourcing of the economy has found in the market of violence a stimulus for the use in the recruitment of experienced armed forces of huge financial resources by states, international organizations, NGOs, transnational corporations and even organised crime groups. This is one of the reasons for the growth and consolidation of PMSCs over the past three decades.⁷¹ Therefore, the ideological externality and the relevance of *animus furandi* must be considered as a basic element of the definition of PMSCs in IHL.

The authors' proposal therefore is to consolidate a definition of PMCs that goes beyond the State-centric optics of international law and understands them as actors having a great capacity to adapt to the social, political, and economic transformations of recent decades. They are actors which can move with versatility between the public and the private, the legal and the illegal, and the defensive and the offensive, and constitute an instrument having the potential to be used for commendable tasks or for impacting seriously on human rights and IHL.

To be succinct, by taking into account the different dimensions of the PMCs offered by international law studies and other disciplines, it is possible to obtain a more comprehensive perspective of this phenomenon as well as different alternatives for its definition and regulation.

71 Urueña Sánchez, M. I. *Leviatanes desnudos, piratas desbocados: Estados fallidos, nuevas guerras y derecho internacional de guerra*, Ediciones Grancolombianas, Bogotá D.C., 2011.

CONCLUSION

The hypothesis of this study is that the type of military services provided by PMSCs, their direct participation in hostilities and the so-called 'three externalities' are the core elements of PMSCs and provide a solid basis for their definition in IHL. This hypothesis has been mostly confirmed in the previous sections.

Regarding the first two elements, the approach of international law to linking the definition of PMSCs to both the military services they provide and the likelihood of their direct participation in hostilities have been addressed. Furthermore, the three externalities (geographical, political and ideological) make it possible to clarify some aspects of the CMSP in relation to the context in which they operate and their leitmotif.

It is striking how, in almost all proposed definitions of PMSCs, there is a transversal variable, which can be referred to as *tactical readiness*, which can be defensive or offensive in nature. In fact, the bulk of the debate on the definition of PMSCs has to do with how offensive or defensive a company has to be in its portfolio of military services and in its actions on the field to be characterized as a PMSC, and to be differentiated from other types of security companies.

The type of military services and direct participation in hostilities also make it difficult to draw up a precise definition of PMSCs. On the one hand, preparing an exhaustive list of military services to define PMSCs is a very costly undertaking and is highly likely to become obsolete in the short term because the forms of violence in armed conflicts change rapidly. On the other hand, the notion of direct participation in hostilities, despite the explanations in the ICRC *Interpretation Guide*, presents too many grey areas in its application to the functions for which PMSCs are contracted.

Finally, concerning the three externalities, each must be addressed independently. The political externality seems to be the most feasible to prove because the provisions of the contract signed between the parties, or the existence of a national law enabling PMSCs to operate, are adequate means of proof to this end.

The ideological externality involves the challenge of proving that the main goal of PMSCs is to make profits. This requirement involves the risk that the protection given by PMSCs to international organizations and NGOs may end up favoring the use by PMSCs of an altruistic speech that seeks to legitimize their other actions and downplays the importance of their for-profit motivation.

Nevertheless, the most complex is the geographic externality because the distinction between 'national' and 'foreign' can be socially constructed without necessarily corresponding to a material reality.

In conclusion, it is important to highlight the relevance of the definition of PMSCs in IHL to characterize a very current phenomenon in the international society and propose effective mechanisms for its regulation. On this

basis, a democratic debate aimed at unravelling the relationship between law and violence in general, and the elements of PMSCs in particular, should be undertaken.

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