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## Half Monk, Half Hitman: Applying Just War Theory to Private Military and Security Companies in the Context of Humanitarian Intervention

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# **HALF MONK, HALF HITMAN: APPLYING JUST WAR THEORY TO PRIVATE MILITARY AND SECURITY COMPANIES IN THE CONTEXT OF HUMANITARIAN INTERVENTION**

*Robert J. Peters\**

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## I. INTRODUCTION

### A. *We Could Have Saved Lives*

In only a hundred days, 800,000 men, women, and children were slaughtered in the Rwandan genocide.<sup>1</sup> Future U.S. Ambassador to the United Nations Samantha Power called it “the fastest, most efficient killing spree of the twentieth century.”<sup>2</sup> A plane carrying Rwandan President Habyarimana was shot down, sparking the violence.<sup>3</sup>

Though U.S. officials claimed ignorance of the full scope of the atrocities, it was apparent the morning after the plane crash that the minority Tutsi ethnic group was being systematically targeted.<sup>4</sup> In 2004, classified documents were released showing the administration’s knowledge of a “final solution to eliminate all Tutsis” “well in advance of the genocide.”<sup>5</sup> Regardless, the Clinton Administration ordered its spokesmen “not to describe the deaths there as genocide,” since it “could inflame public calls for action the Administration is unwilling to take.”<sup>6</sup> Officials shunned “the g-word” to avoid incurring obligations under the Genocide Convention, as well as to avoid harming U.S. credibility by acknowledging and then ignoring the crimes.<sup>7</sup>

The United States opposed requests by U.N. General Romeo Dallaire for reinforcements; the rationale was that inciting an engagement with foreign troops “would end as a large and costly [engagement] by Americans.”<sup>8</sup> This fear had its roots in Somalia, where U.S. troops were killed while attempting to aid Pakistanis.<sup>9</sup> As a result the United States supported removing the entire U.N. peacekeeping force, in order to prevent future U.S. involvement.<sup>10</sup>

Even when genocide was manifest, “when bodies were shown choking the Kagera River on the nightly news,” U.S. policy was only influenced “in a negative way.”<sup>11</sup> Once Americans were evacuated,

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1. Samantha Power, *Bystanders to Genocide*, ATLANTIC, Sept. 1, 2001, at 84.

2. *Id.*

3. Jon Rosen, *The President’s Assassins*, SLATE MAG. (Apr. 4, 2014), [http://www.slate.com/articles/news\\_and\\_politics/roads/2014/04/rwandan\\_genocide\\_20th\\_anniversary\\_touring\\_juv\\_nal\\_habyarimana\\_s\\_crash\\_site.html](http://www.slate.com/articles/news_and_politics/roads/2014/04/rwandan_genocide_20th_anniversary_touring_juv_nal_habyarimana_s_crash_site.html) (last accessed Feb. 21, 2015).

4. Power, *supra* note 1, at 86.

5. *Bill Clinton: We Could Have Saved 300,000 Lives in Rwanda* (Mar. 13, 2013), CNBC, <http://www.cnbc.com/id/100546207#> (last accessed Feb. 21, 2015); Rory Carroll, *US Chose to Ignore Rwandan Genocide*, THE GUARDIAN, Mar. 31, 2004, at 14.

6. Douglas Jehl, *Officials Told to Avoid Calling Rwanda Killings “Genocide,”* N.Y. TIMES, June 10, 1994, at A.8.

7. Power, *supra* note 1, at 96.

8. *Id.* at 98.

9. *Id.*

10. *Id.*

11. *Id.* at 96.

Rwanda “largely dropped off the radar” of the Clinton Administration.<sup>12</sup>

Documents released in 2014 from the Clinton library show the administration’s sensitivity to the suggestion that Somalia played a role in the U.S. response to Rwanda.<sup>13</sup> A memorandum suggested that the Clinton administration believed that the United States “did the right thing,” “put Somalia behind us and moved into Rwanda in full force.”<sup>14</sup> Years later, however, Clinton expressed regret, stating that if the United States had intervened, “we could have saved” 300,000 lives.<sup>15</sup> Clinton said that this failure to act informed the creation of the Clinton Foundation.<sup>16</sup>

### B. Overcoming Political Inaction

In recent decades, several humanitarian crises arose that could not have been stopped without the use of force. Rwanda is a sober reminder that sometimes, regardless of the lives at risk, politics trumps all. In Rwanda, this took the form of concerns of political capital. Future U.S. Ambassador Power credited “risk averse policy choices” as contributing to the U.S. failure to intervene.<sup>17</sup> Perceived disapproval by the American people is another possible factor.<sup>18</sup> Political inaction could also be interpreted as a failure of the public at large; perhaps if the broader public were more educated and vocal about the Rwandan genocide, it could have exerted meaningful political pressure. The reality is that “all possible sources” of political pressure: “U.S. allies, Congress, editorial boards, and the American people—were mute when it mattered for Rwanda.”<sup>19</sup> Michael Sheehan, Peacekeeping Advisor to then-Secretary of State Madeleine Albright, recalls that “there was no one within the United States political spectrum in that period . . . There was almost a silence on that issue at the time.”<sup>20</sup>

Private military and security companies<sup>21</sup> are certainly not a panacea for international human rights issues, and as we will discuss, in some instances they have been the perpetrators of abuse. However, a lack of

12. *Id.* at 97.

13. Dana Hughes, *Bill Clinton Regrets Rwanda Now (Not So Much In 1994)*, ABC NEWS (Feb. 28, 2014), <http://abcnews.go.com/blogs/politics/2014/02/bill-clinton-regrets-rwanda-now-not-so-much-in-1994/> (last accessed Feb. 21, 2015).

14. *Id.*

15. CNBC, *supra* note 5.

16. *Id.*

17. Power, *supra* note 1, at 86.

18. *See supra* Part I; Power, *supra* note 1, at 104.

19. Power, *supra* note 1, at 104.

20. *Ghosts of Rwanda: America’s Response to the Genocide*, PBS FRONTLINE (Apr. 1, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/ghosts/themes/response.html>.

21. Hereinafter referred to as “PMSCs.”

political will on the part of nation-states to intervene in cases of genocide and gross violations of human rights could possibly be mitigated through delegation to private actors, for a variety of reasons that this article will explore. It is unlikely that the mere option of a PMSC would have changed the outcome in Rwanda, since the Pentagon rejected substantially less objectionable tactics, such as jamming radio signals to frustrate the systematic killing. One PMSC actually did consider “contracting with the United Nations” to stop the genocide in Rwanda.<sup>22</sup> This of course did not happen.

Likewise, it is beyond the scope of this article to discuss whether usage of PMSCs would have been effective in other instances of genocide.<sup>23</sup> However, the PMSC may be an effective tool in future crises where political will is in question, particularly in the context of humanitarian intervention.

In Part II, this Article will discuss potential benefits of private military companies. Part III will address and acknowledge criticisms of PMSCs. Part IV provides a brief legal context, and Part V will discuss the just war theory criteria relevant to PMSCs in the context of humanitarian intervention. This section will examine why PMSC humanitarian intervention may be permissible in certain circumstances. The PMSC Executive Outcomes will serve as a dual case study; on the one hand, it would have been authorized by just war theory to contract with the United Nations to intervene in Rwanda. However, Executive Outcomes also considered contracting with the Hutu government, the perpetrators of the genocide, which would be a gross violation of just war theory.<sup>24</sup> Part VI will argue for the express integration of just war criteria into PMSC operating guidelines; this is crucial for the moral, political, and perhaps legal legitimacy of PMSC actors.

## II. ADVANTAGES OF PRIVATE MILITARY AND SECURITY COMPANIES

There are political advantages to PMSCs. The public will typically oppose “putting ‘the troops’ in harm’s way” for a humanitarian intervention, but PMSC usage is unlikely to generate such controversy.<sup>25</sup> This is a particularly crucial advantage given the political inertia

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22. Adam Ebrahim, *Going to War with the Army You Can Afford: The United States, International Law, and the Private Military Industry*, 28 B.U. INT’L L.J. 181, 216 (2010) (citing P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 185 (Robert J. Art, et al. eds., Cornell Univ. Press 2008) (2003)).

23. See SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2002) (discussing the U.S. role in 20th century genocide).

24. Ebrahim, *supra* note 22, at 216 n.246.

25. *Id.* at 216.

surrounding Rwanda. One critic of privatization characterized PMSC usage as being not about saving money, but “avoiding tough political choices”;<sup>26</sup> though perhaps morally objectionable, this does highlight a tactical advantage in the context of humanitarian intervention. Besides, if nation-states are “unwilling or unable to act in the worst conflict-driven humanitarian crises in a decade (Rwanda and Darfur), the use of [PMSCs] should be at least contemplated.”<sup>27</sup> Furthermore, PMSCs can be an indispensable method for states to defend against atrocities by insurgent troops; Nigeria has used “hundreds of mercenaries from South Africa” in a “decisive role” against the Islamic militant group Boko Haram, which has been responsible for horrific atrocities in the region.<sup>28</sup>

PMSCs are capable of humanitarian intervention “at a lower cost than the public sector.”<sup>29</sup> PMSC Executive Outcomes estimated that a “wholly privatized six-month intervention” at the beginning of the Rwandan genocide would cost \$600,000 daily.<sup>30</sup> In contrast, the U.N. intervention ultimately cost about \$3 million per day, and was too late to stop the genocide.<sup>31</sup> Additional cost savings accrue following hostilities, when contractors are no longer necessary.<sup>32</sup>

This is not to suggest that privatization is necessarily a cost-saver; for example, private contractors in charge of “enhanced” interrogations cost “about double the salary of a Federal employee.”<sup>33</sup> Additionally, the non-competitive structure of government contracts often increases the cost of outsourcing military functions.<sup>34</sup> Peter Singer claims the idea that “outsourcing saves money” is “a common myth.”<sup>35</sup>

PMSCs offer a great deal of flexibility, and can be contracted for smaller personal security services, broader intervention, or as a response to international piracy.<sup>36</sup> Congressman Ron Paul proposed that Congress “issue letters of marque and reprisal” to PMSCs to address Somalian

26. P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B3.

27. Oldrich Bures, *Private Military Companies: A Second Best Peacekeeping Option?*, 12 INT’L PEACEKEEPING 533, 543 (2005).

28. Adam Nossiter, *Mercenaries Join Nigeria’s Military Campaign Against Boko Haram*, N.Y. TIMES (Mar. 12, 2015), [http://www.nytimes.com/2015/03/13/world/africa/nigerias-fight-against-boko-haram-gets-help-from-south-african-mercenaries.html?\\_r=2](http://www.nytimes.com/2015/03/13/world/africa/nigerias-fight-against-boko-haram-gets-help-from-south-african-mercenaries.html?_r=2).

29. Ebrahim, *supra* note 22, at 216.

30. *Id.* (citing SINGER, *supra* note 22, at 185-86).

31. *Id.*

32. Theodore T. Richard, *Reconsidering the Letter of Marque: Utilizing Private Security Providers Against Piracy*, 39 PUB. CONT. L.J. 411, 414 (2010).

33. Simon Chesterman, *Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones*, 11 CHI. J. INT’L L. 321, 338 (2011).

34. DAVID ISENBERG, *PRIVATE MILITARY CONTRACTORS AND U.S. GRAND STRATEGY* 23 (Int’l Peace Research Inst., Oslo (PRIO) ed., 2009).

35. Singer, *supra* note 26, at B3.

36. Richard, *supra* note 32, at 413.

pirates.<sup>37</sup> This was intended to “avoid increasing the size” of the Navy, which Paul perceived “as unable to suppress piracy without being ‘nearly omnipresent on the seas.’”<sup>38</sup> There is flexibility even in deployment: in Somalia, PMSCs could defend individual ships at owner’s expense, hunt down pirates for payment, or assume a patrolling or policing capacity.<sup>39</sup> Quality is another advantage; PMSCs “can handpick from a pool of proven combat veterans.”<sup>40</sup> Widespread usage of PMSCs by corporations, governments, non-governmental organizations, and even the United Nations itself, indicates the ability of PMSCs to effectively perform humanitarian intervention.<sup>41</sup>

Private actors also avoid the bureaucratic burdens faced by the public sector,<sup>42</sup> such as civil service rules and unionized workforce constraints.<sup>43</sup> Though lack of accountability is a frequent criticism of PMSCs, in some circumstances private security “has been celebrated as more accountable than its public counterpart,”<sup>44</sup> since private security must “answer to the discipline of the market,” and there are a variety of accountability problems in public police forces.<sup>45</sup> There are related philosophical arguments in favor of private actors.<sup>46</sup> One scholar suggests that given existing domestic problems, accountability under international law can be actually be maintained and increased through privatization.<sup>47</sup>

37. *Id.* at 413-14.

38. *Id.* at 414 (internal citations omitted) (quoting Ron Paul, *Responses to Piracy*, CAMPAIGN FOR LIBERTY (Apr. 21, 2009), <http://www.campaignforliberty.com/article.php?view=58>).

39. Richard, *supra* note 32, at 415 (citing Rajesh Joshi, *Why the Time Has Come to Arm Crews*, LLOYD’S LIST 5 (Mar. 27, 2009), available at <http://www.loydslist.com/ll/epaper/ll/contents.htm?issueNo=59891>; Brooke A. Bornick, Comment, *Bounty Hunters and Pirates: Filling in the Gaps of the 1982 U.N. Convention on the Law of the Sea*, 17 FLA. J. INT’L L. 259, 260-61 (2005)).

40. Herbert Howe, *Private Security Forces and African Stability: The Case of Executive Outcomes*, 36 J. MOD. AFR. STUDS. 307, 309 (1998).

41. Oldrich Bures, *Private Military Companies: A Second Best Peacekeeping Option?*, 12 INT’L PEACEKEEPING 533, 543-44 (2005), available at [http://www.academia.edu/6169589/Private\\_military\\_companies\\_A\\_second\\_best\\_peacekeeping\\_option](http://www.academia.edu/6169589/Private_military_companies_A_second_best_peacekeeping_option) (last visited Feb. 22, 2015).

42. Richard, *supra* note 32, at 414 (citing Claude Berube, *Blackwaters for the Blue Waters: The Promise of Private Naval Companies*, 51 ORBIS 601, 611 (2007); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1189 (1998); David A. Wallace, *The Future Use of Corporate Warriors with the U.S. Armed Forces: Legal, Policy, and Practical Considerations and Concerns*, 51 DEF. ACQUISITION REV. J. 123, 129 (2009)).

43. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1189 (1998).

44. *Id.*

45. *Id.*

46. “[T]he production of security should not be removed from the jurisdiction of free competition; and if it is removed, society as a whole suffers a loss.” Gustave de Molinari, *Security an Exception?*, THE PRODUCTION OF SECURITY (2006), <http://mises.org/library/production-security#4> (last visited Feb. 22, 2015).

47. Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the*

PMSCs may be a more attractive option for assembling international coalitions, since some nations “are more inclined to provide funding” than actual forces.<sup>48</sup> It is conceivable that PMSCs could reduce blowback in areas where the United States does not have a visible military presence. For example, if humanitarian intervention is necessary in a hostile area, accomplishing it without U.S. troops could frustrate (or at least not encourage) terrorist recruitment.

### III. DISADVANTAGES AND CRITICISMS OF PRIVATE MILITARY AND SECURITY COMPANIES

PMSCs have limitations; they cannot independently “nation-build” or solve deep-rooted societal problems, and are best used to accomplish military objectives “ideally accompanied by a wider political and humanitarian effort.”<sup>49</sup> Thus a larger state or NGO-engineered initiative would be ideal, with the PMSC focusing on the force and stabilization aspects of the effort.<sup>50</sup>

There is a potential for abusive actions by PMSC personnel. This was illustrated by the Abu Ghraib atrocities, in which “more than a third of the improper incidents involved contractor personnel.”<sup>51</sup> This raised the question of whether intelligence in general, and interrogation in particular, “is an inherently governmental function.”<sup>52</sup> While the contractor conduct is inexcusable, soldiers also perpetrated abuse, and military leadership failed to properly supervise the Abu Ghraib prison.<sup>53</sup> Contractor abuse is not limited to Abu Ghraib; Blackwater personnel

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*Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 141-45 (2005).

48. Richard, *supra* note 32, at 415 (citing Jian Chen, Foreign Assistance “More Plausible” to Combat Somali Pirates: MOFA, Taiwan News, Jan. 14, 2009, [http://www.etaiwannews.com/etn/news\\_content.php?id=838250&lang=eng\\_news](http://www.etaiwannews.com/etn/news_content.php?id=838250&lang=eng_news)).

49. Krzysztof Kotarski & Samuel Walker, *Privatizing Humanitarian Intervention? Mercenaries, PMCs and the Business of Peace*, in 7 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 239, 267 (R. Provost & P. Akhavan, eds., 2011).

50. *Id.*

51. Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL’Y REV. 549, 555 (2005).

52. *Id.*

53. See generally George Fay, AR 15-6 Investigation of the Abu Graib Detention Facility and 205th Military Intelligence Brigade 52 (2004), <http://news.findlaw.com/nytimes/docs/dod/fay82504rpt.pdf> (last visited Feb. 22, 2015).



killed 17 Iraqi civilians in 2007,<sup>54</sup> and were sentenced in 2015.<sup>55</sup>

Beyond the abusive actions themselves, Abu Ghraib demonstrated the problem of “insufficient contractor oversight.”<sup>56</sup> According to the Fay Report, up to 35% of contractors “lacked formal military interrogation training,”<sup>57</sup> but it must be remembered that the same training issues plagued military personnel.<sup>58</sup> CACI International, the PMSC which provided over half of the interrogators at Abu Ghraib, also failed to “conduct adequate background investigations” prior to hiring the contractors.<sup>59</sup> Contract administrators at Abu Ghraib did “well to keep up with the paperwork, and simply have no time to actively monitor contractor performance.”<sup>60</sup> This problem evidenced a broader inability of the U.S. government to properly manage its contracts in Iraq.<sup>61</sup> Even broader mismanagement of government contractors led one scholar to ask whether procurement policy constitutes “responsible delegation or abdication of responsibility?”<sup>62</sup> There is no shortage of similar critiques of PMSCs, from accountability shortcomings to normative democratic concerns.<sup>63</sup>

Valid and serious concerns of accountability arise in the context of sex trafficking and abuse by military and PMSC personnel.<sup>64</sup> In Bosnia,

54. David Johnston & John Broder, *FBI Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES (Nov. 14, 2007), [http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?pagewanted=all&_r=0) (last visited Feb. 22, 2015). The FBI found that “at least 14 of the shootings were unjustified and violated deadly-force rules in effect for security contractors in Iraq.” *Id.*

55. Wesley Bruer & Michael Pearson, *Ex-Blackwater Contractors Sentenced in Nusoor Square Shooting in Iraq*, CNN, (Apr. 15, 2015), <http://www.cnn.com/2015/04/13/us/blackwater-contractors-iraq-sentencing/> (last visited Apr. 18, 2015).

56. Schooner, *supra* note 51, at 556 (citing George Fay, *supra* note 53, at 49).

57. *Id.*

58. *Id.*

59. *Id.* at 556-57.

60. Fay, *supra* note 53, at 52.

61. Schooner, *supra* note 51, at 558.

62. *Id.* at 570.

63. See Winston P. Nagan & Craig Hammer, *The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process*, 60 ME. L. REV. 429 (2008); Juan Carlos Zarate, *The Emergence of A New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT’L L. 75 (1998) (acknowledging the effectiveness of private actors in swift tactical solutions, but viewing this as problematic); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1026 (2005); Ryan M. Scoville, *Toward an Accountability-Based Definition of “Mercenary,”* 37 GEO. J. INT’L L. 541 (2006); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1003 (2004).

64. Margaret Maffai, *Accountability for Private Military and Security Company Employees That Engage in Sex Trafficking and Related Abuses While Under Contract with the United States Overseas*, 26 WIS. INT’L L.J. 1095 (2009).

PMSC DynCorp “was implicated in a sex-slave scandal, but none of its employees has been put on trial, and the company later fired the whistle-blowers.”<sup>65</sup> Trafficking and exploitation “flourish in situations with weak law enforcement,” and “the demand for prostitution . . . increases with the presence of military troops” and other “international personnel” with access to income, such as PMSC contractors.<sup>66</sup> Thus humanitarian intervention by PMSC personnel inherently poses a great risk to the vulnerable population that the personnel are ostensibly there to protect. Even outside the context of humanitarian intervention, issues of PMSC accountability may have grave humanitarian effects,<sup>67</sup> and existing domestic and international law is inadequate to oversee and punish perpetrating PMSC employees.<sup>68</sup>

PMSCs choose their employers, and do not always do so morally, working for “rebel groups, drug cartels, and before 9/11, two al Qaeda-linked jihadist groups.”<sup>69</sup> This Article seeks to partially address this wrong by urging the PMSCs to limit operations to jus ad bellum frameworks.<sup>70</sup>

Perception of PMSCs can certainly be a disadvantage, given the “historical prejudices against the private use of force” and “the almost visceral distaste for mercenaries” that affects modern PMSCs.<sup>71</sup> However, PMSCs should be judged on “what they actually do,” not on what they may do.<sup>72</sup> If PMSCs were successfully used to prevent genocide or used for other humanitarian purposes, then the “historical disdain” for private force is inapt.<sup>73</sup>

While proper safeguards could be developed to alleviate concerns and criticisms of PMSCs, there is certainly merit in the suggestion that these should be developed prior to PMSC deployment.<sup>74</sup> Accountability, transparency, quality assurance, vetting of personnel, and express

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65. James Pattison, *Just War Theory and the Privatization of Military Force*, 22 ETHICS & INTERNATIONAL AFFAIRS 143, 152, 161 n.26 (2008) (citing Oldrich Bures, *Private Military Companies: A Second Best Peacekeeping Option?*, 12 INT’L PEACEKEEPING 541-42 (2005)).

66. OFFICE OF THE UNDER SEC’Y FOR GLOBAL AFFAIRS, U.S. DEP’T OF STATE, PUB. NO. 11057, *TRAFFICKING IN PERSONS REPORT* 166 (2003), <http://www.state.gov/documents/organization/21555.pdf>.

67. Maffai, *supra* note 64, at 1097-98 n.10.

68. *Id.* at 1099.

69. James Pattison, *Just War Theory and the Privatization of Military Force*, 22 ETHICS & INT’L AFF. 143, 151, 161 n.21 (2008) (quoting Schreier & Caparini, *Privatising Security* at 68).

70. See *infra* Parts V and VI.

71. Krzysztof Kotarski & Samuel Walker, *Privatizing Humanitarian Intervention? Mercenaries, PMCs and the Business of Peace*, in 7 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 239, 267 (R. Provost & P. Akhavan eds., 2011).

72. *Id.*

73. *Id.*

74. Bures, *supra* note 27, at 543 (citing Peter W. Singer, *Peacekeepers, Inc.*, 119 POL’Y REV. (2003), [www.policyreview.org/jun03/singer.html](http://www.policyreview.org/jun03/singer.html)).

acknowledgment of legal jurisdiction over PMSC personnel are essential.<sup>75</sup>

#### IV. LEGAL CONTEXT OF PMSCS

A comprehensive treatment of relevant positive law is beyond the scope of this Article. PMSCs present unique legal and political issues, and their reappearance as a global phenomenon has changed the nature of warfare in recent decades.<sup>76</sup> According to one scholar, “there are no specific legal instruments concerning PMCs.”<sup>77</sup> Indeed, concerns over legal accountability and a perceived gap in the law has led the United Nations Working Group on the use of mercenaries to advocate for an international treaty ensuring effective monitoring of abuses and means of compensation for victims.<sup>78</sup> Under this view, the OAU Convention for the Elimination of Mercenaries in Africa, Article 47 of Protocol I Additional to the Geneva Conventions, and the U.N. International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries “do not clearly apply to PMCs,” rendering their status legally ambiguous.<sup>79</sup>

This view has a significant assumption: that PMSCs are distinct, for definitional and legal purposes, from mercenaries. It is crucial for the viability of PMSCs to maintain this distinction, from a positivist standpoint if not from a realist or historical perspective. The central argument of this article, that PMSCs should adopt *jus ad bellum* as well as *jus in bello* norms within their operating guidelines, therefore has a pragmatic appeal to PMSCs. Explicitly utilizing *jus ad bellum* criteria to screen contracts, accepting only those which comport with just war

75. *Id.* at 543-44.

76. Kathy Gilsinan, *How Mercenaries Are Changing Warfare*, ATLANTIC (Mar. 25, 2015), <http://www.defenseone.com/threats/2015/03/how-mercenaries-are-changing-warfare/108436/> (last accessed Apr. 21, 2015).

77. Pattison, *supra* note 69, at 151, 161 (citing SARAH PERCY, *REGULATING THE PRIVATE SECURITY INDUSTRY* 41-44 (N.Y. ed. 2006)). *But see Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict* (2008), [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf).

78. *Blackwater Sentencing – UN Experts on Mercenaries Call for International Regulation of Private Security*, U.N. HUM. RTS., Display News (Apr. 14, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15840&LangID=E>.

79. Pattison, *supra* note 69, at 151-52. One such ambiguity is whether PMSC contractors constitute “combatants,” entitling them to “prisoner-of-war status under Article 4 of the Third Geneva Convention.” *Id.* at 152. According to the Montreux Document, which is not legally binding, “the status of PMSC personnel in armed conflicts is determined on a case-by-case basis . . . the status of PMSC personnel depends on the contract under which they are employed and on the services they provide.” *Montreux*, *supra* note 77, at 36.

theory, would distinguish PMSCs in a significant way from mercenaries, who in the traditional conception only fight for money, and may be bought by the highest bidder. It also takes PMSCs one step farther from the positive law prohibitions on mercenaries, which, if enforced, could cripple the industry.<sup>80</sup>

## V. JUST WAR THEORY AND PRIVATE HUMANITARIAN INTERVENTION

The criteria comprising just war theory can be divided into two categories: *jus ad bellum*,<sup>81</sup> or the “justifiability of going to war,” and *jus in bello*,<sup>82</sup> “the justice of the means for fighting in war.”<sup>83</sup> Many PMSC protocols discuss *jus in bello*, but as Part VI will discuss, *jus ad bellum* is a crucial (and frequently absent) framework in determining the legitimate use of force. It is beyond the scope of this article to comprehensively defend humanitarian intervention by PMSCs as acceptable under just war theory; rather, the purpose is to briefly discuss a few relevant classical and contemporary positions in this context. This cursory examination concludes that in some circumstances, PMSC intervention may be permissible; that is, it is plausible that PMSCs could comply with just war theory in the context of humanitarian intervention.

*Jus in bello* has two<sup>84</sup> key elements: noncombatant discrimination and proportionality of means. The principle of noncombatant discrimination is straightforward: military personnel are to distinguish between combatants and non-combatants; targeting of civilians, or using civilians as “human shields” is prohibited.<sup>85</sup> Proportionality of means requires “highly contextualized judgments . . . that fit the value and difficulty of securing or defeating a particular target, and no more.”<sup>86</sup> This principle reflects both the importance of minimizing collateral damage and the inherent dignity existing even within an enemy.<sup>87</sup>

*Jus ad bellum* is composed of eight<sup>88</sup> criteria: just cause, legitimate authority, right intention, end of peace, last resort, proportionality of

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80. See generally *International Code of Conduct for Private Security Service Providers* (2013), [http://www.geneva-academy.ch/docs/publications/briefing4\\_web\\_final.pdf](http://www.geneva-academy.ch/docs/publications/briefing4_web_final.pdf) (defining mercenary and excerpting from statutes criminalizing mercenary behavior).

81. GARY M. SIMPSON, WAR, PEACE, AND GOD: RETHINKING THE JUST-WAR TRADITION 27-28 (2007) (emphasis added Latin phrase for “justice to war.”).

82. *Id.*

83. *Id.*

84. “While there is no official, single index of criteria” for just war theory, this article will proceed under the criteria quantity and phrasing from the Simpson book. *Id.*

85. *Id.*

86. *Id.* at 33.

87. *Id.*

88. *Id.*

ends, probability of success, and public declaration. I will discuss the *jus ad bellum* criteria individually within the context of private humanitarian intervention, such as through a PMSC. These criteria deserve a fuller treatment than that given *jus in bello* since, as Part VI suggests, *jus in bello* criteria have already been officially integrated to some extent into PMSC protocols. *Jus ad bellum* provides a moral framework to determine when war is morally defensible. Given the historical, political, and moral complexity facing private actors in modern crises, this framework is timely, relevant, and indispensable.

### A. *Just Cause*

The criteria of just cause was implicitly recognized as far back as Cicero, who asserted the existence of a “natural right to repel force by force.”<sup>89</sup> Just cause typically requires the perpetration of a real injury.<sup>90</sup> For example, St. Augustine condemned waging war for religious purposes, such as to create the “city of God” on earth.<sup>91</sup> Hugo Grotius, the father of international law, grounded the constraint of unjust violence within our common humanity: “a blood relationship has been established among us by nature; consequently it is wrong for a man to set a snare for a fellow man.”<sup>92</sup> Grotius affirmed the requirement of just cause to do violence, and extended it to the context of war:

On the contrary war ought not to be undertaken except for the enforcement of rights; when once undertaken, it should be carried on only within the bounds of law and good faith. Demosthenes well said that war is directed against those who cannot be held in check by judicial processes.<sup>93</sup>

While Grotius’ ideas now have mainstream acceptance (and indeed form the basis of our modern international system), they were revolutionary for their time. The perpetrators of the Rwandan genocide committed innumerable violations of human rights, to the extent that the United Nations created the International Criminal Tribunal for Rwanda to prosecute the violations.<sup>94</sup> In Grotius’s terms, humanitarian

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89. *Id.* at 40.

90. *Id.*

91. *Id.* Unfortunately Augustine was not consistent in this position, and laid the intellectual foundation for religious wars in the coming centuries.

92. Hugo Grotius, *Prolegomena to the Law of War and Peace*, in ARTHUR F. HOLMES, WAR AND CHRISTIAN ETHICS: CLASSIC AND CONTEMPORARY READINGS ON THE MORALITY OF WAR 231 (2d ed. 2005).

93. *Id.* at 234.

94. See U.N. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/> (last visited Apr. 20, 2015).

intervention in Rwanda would be “for the enforcement of rights,” and “directed against” thousands of genocidal perpetrators who could not “be held in check by judicial processes,” due to the complicity of the state.<sup>95</sup>

Grotius’ view is echoed by earlier and contemporary classical writers. For example, Grotius approved of St. Augustine’s definition of just wars as those “which are made to avenge injuries,”<sup>96</sup> and insisted that just cause required “an injury, by which [he] meant a wrong or a violation of rights.”<sup>97</sup> Francisco de Vitoria observed that a ruler does not have greater authority over foreigners than his own citizens, “but he may not draw the sword against his own subjects unless they have done some wrong.”<sup>98</sup> From this, Vitoria reasoned that rulers may not commit unprovoked violence against the citizens of other kingdoms: “we may not use the sword against those who have not harmed us; to kill the innocent is prohibited by natural law.”<sup>99</sup> Vitoria famously supported the Spaniards’ use of force in the New World “if necessary to protect the rights of new converts there to remain Christian,”<sup>100</sup> or to prevent human sacrifices.<sup>101</sup> Emmerich de Vattel had a similar requirement.<sup>102</sup> Rwanda would also meet Thomas Aquinas’s requirement “that those who are to be warred upon should deserve to be warred upon because of some fault.”<sup>103</sup>

Contemporary just war theory, while largely limiting just cause to “defense against aggression,” allows for “the possible exception of the prevention of large-scale violations of human rights, such as genocide.”<sup>104</sup> Humanitarian intervention has been comprehensively

95. Grotius, *supra* note 92.

96. Jeff McMahan, *Just Cause for War*, 19 ETHICS & INT’L AFF. 1, 8, n.12 (2005) (quoting HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 76 (A.C. Campbell, A.M. ed., 1901)). Grotius characterized St. Augustine as having “taken the word avenge in a general sense of removing and preventing, as well as punishing aggressions.” *Id.*

97. *Id.* at 8.

98. *Id.* at 9 (quoting Francisco de Vitoria, *On the Law of War*, in POLITICAL WRITINGS 303-04 (Anthony Pagden & Jeremy Lawrence eds., 1991)).

99. *Id.* at 9.

100. DAVIS BROWN, THE SWORD, THE CROSS, AND THE EAGLE: THE AMERICAN CHRISTIAN JUST WAR TRADITION 171 (2008) (citing FRANCISCO DE VITORIA, DE INDIS ET DE LURE BELLI RELECTIONES ed., Ernest Nys iii, 13 (1917)).

101. *Id.* (citing FRANCISCO DE VITORIA, DE INDIS ET DE LURE BELLI RELECTIONES ed., Ernest Nys iii, 15 (1917)).

102. Emmerich de Vattel believed “the foundation, or cause of every just war is injury, either already done or threatened.” McMahan, *supra* note 96, at 8 (quoting EMMERICH DE VATTEL, THE LAW OF NATIONS 302 (Joseph Chitty trans., Philadelphia: Johnson & Co. 6th ed. 1844) (1758)).

103. Jonathan Barnes, *The Just War*, in THE CAMBRIDGE HISTORY OF LATER MEDIEVAL PHILOSOPHY 777 (Norman Kretzmann et al. eds., 1982) (quoting Thomas Aquinas, *Summa Theologiae*, q. 40, art. 2).

104. One scholar limits the just causes of war to “the prevention or correction of wrongs that are serious enough to make the perpetrators liable to be killed or maimed.” McMahan, *supra* note 96, at 11. Perhaps in contrast, classical just war theorists “typically offer a short list of just causes for war, [including] defense against unjust threats; recovery of or indemnity for what has been

defended as consistent with just war theory, historicity, and natural law.<sup>105</sup> Jeff McMahan believes “military intervention by third parties may also be justified on behalf of the victims.”<sup>106</sup> For McMahan, an important requirement is that the intervention is requested, “or there must at least be compelling evidence that the intended beneficiaries would welcome rather than oppose intervention by the particular intervening agent or agents.”<sup>107</sup> In Rwanda, the requests for international help were frequent—yet mostly ignored. McMahan concludes that other objections to humanitarian intervention fail to show “that certain aims of humanitarian intervention cannot be just causes for war.”<sup>108</sup> Therefore, if the PMSC Executive Outcomes intervened in Rwanda, they would have acted in accordance with the just cause criterion under classical just war theory as well as contemporary scholarship.<sup>109</sup> However, if they assisted the Rwandan government in the genocide, they would obviously have lacked such a just cause.

### B. Legitimate Authority

The criterion of legitimate authority poses a greater challenge to

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wrongfully taken, or compensation for the violation of rights; and punishment of wrongdoing, not solely for the purpose of retribution but to prevent or deter further wrongful action by the culprit or by others.” *Id.*

105. See generally Jason Daniel Medinger, *The Holy See, Historicity, and Humanitarian Intervention: Using Integrative Jurisprudence to Inform Contemporary Practice*, 41 TEX. INT’L L.J. 39 (2006).

106. McMahan, *supra* note 96, at 13.

107. *Id.* McMahan believes this illustrates how the American invasion of Iraq contradicted just war theory:

there was no evidence that ordinary Iraqis wanted to be freed from the Ba’athist dictatorship by the United States—a country that a little more than a decade earlier, and under the leadership of the current president’s father, had bombed their capital, decimated their civilian infrastructure, and successfully pressed for the institution and perpetuation of sanctions that subsequently resulted in many thousands of deaths among civilians.

*Id.*

108. McMahan, *supra* note 96, at 13-14.

109. Adam Ebrahim, *Going to War with the Army You Can Afford: The United States, International Law, and the Private Military Industry*, 28 B.U. INT’L L.J. 181, 216 (2010). Certainly many just war theorists would be opposed to such an intervention, but the thrust of the disagreement would more accurately be focused on other criteria, such as legitimate authority or right intention; in other words, they may disagree that the intervening PMSC possessed the right to intervene, or that the injury is not the PMSC’s to avenge; the disagreement is not over the existence of the wrong itself, but who was wronged, and who has the right and authority to avenge the wrong. For example, Emmerich de Vattel argued that “to determine what is to be considered as an injury, we must be acquainted with a nation’s rights . . . Whatever strikes at these rights is an injury, and a just cause of war.” VATTEL, *supra* note 101, at 302.

reconciling PMSC humanitarian intervention with just war theory. For example, Aquinas explicitly required the authority of a sovereign to declare a just war, responding to the “proliferation of war instigated by wealthy private individuals” contracting with medieval PMSCs.<sup>110</sup> St. Augustine insisted that “the power to counsel and declare war belongs to those who hold the supreme authority,”<sup>111</sup> which led to the modern understanding that ideally, “war can be authorized only by . . . states themselves or by international institutions, such as the U.N. Security Council.”<sup>112</sup>

While thorough consideration of the legitimate authority challenge is not possible here, a few considerations are warranted. First, the historical context for Aquinas and St. Augustine differs in relevant ways from modernity: the state-based international system was nonexistent. Aquinas could not have anticipated the multiplicity of private actors currently employed by hundreds of nation-states and non-governmental organizations for security and military purposes. Second, if the PMSC contracts directly with a state, then it acts under the legal authority of that state, and solely within the contractual parameters. It thus acts solely through that state’s authority, and if the state is exercising legitimate authority, it is difficult to see how that legitimate authority becomes inherently diluted by the PMSC. If the contract itself dilutes legitimate authority, then this extends equally to standing armies, given the contractual relationship between governments and non-PMSC military contractors, to say nothing of troop reimbursement. There are certainly important normative problems posed by PMSC usage,<sup>113</sup> but these seem inapposite to the legitimate authority criterion when the state directly contracts with the PMSC. All of this assumes that non-governmental organizations or private citizens can never constitute legitimate authority, an assertion belied by United Nations practice,<sup>114</sup> its public condemnation of mercenaries notwithstanding.<sup>115</sup> Additionally, some classical perspectives allowed for the defense of others by third parties; although

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110. SIMPSON, *supra* note 81, at 48.

111. James Pattison, *Just War Theory and the Privatization of Military Force*, 22 ETHICS & INT’L AFF. 143, 150 (2008) (quoting THOMAS AQUINAS, SUMMA THEOLOGIAE, VOL. 35, *Consequences of Charity* 83, trans. Thomas Heath (1972)).

112. *Id.* at 150.

113. See generally *supra* Part III.

114. See LOU PINGEOT, DANGEROUS PARTNERSHIP: PRIVATE MILITARY & SECURITY COMPANIES AND THE UN (2012), [https://www.globalpolicy.org/images/pdfs/GPF\\_Dangerous\\_Partnership\\_Full\\_report.pdf](https://www.globalpolicy.org/images/pdfs/GPF_Dangerous_Partnership_Full_report.pdf) (last accessed Apr. 20, 2015) (discussing the use of private military and security companies).

115. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Dec. 4, 1989, U.N. Doc. A/RES/44/34, <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/547/93/IMG/NR054793.pdf?OpenElement> (last accessed Apr. 20, 2015).



Grotius believed the sole just cause for war was self-defense,<sup>116</sup> he wrote “If . . . it should be granted that even in extreme need subjects cannot justifiably take up arms . . . , nevertheless it will not follow that others may not take up arms on their behalf.”<sup>117</sup>

McMahan deconstructs an additional and frequent objection to humanitarian intervention in this context - that sovereignty and “national self-determination” forbid it:

This objection is specious, however, when the intervention is desired by the victims of governmental persecution. For in such cases the gulf between victims and perpetrators is typically so wide that there is no longer (if there ever was) a single collective “self” whose autonomy is threatened, but rather two or more distinct collective selves, one of which is engaged in wrongful action that is not protected by its right of self-determination.<sup>118</sup>

McMahan’s position looks beyond the legal fiction of a homogenous entity given its obvious demise when the “homogenous entity” is slaughtering its own people, thus violating the key responsibility of governments to protect their citizens. How could one argue that the Tutsis’ right to self-determination would be violated solely if a PMSC prevented their systematic annihilation?

The very criterion of legitimate authority has received criticisms, with one scholar concluding that “it may be questioned whether being authorized by a legitimate authority is a necessary condition of the justice of a war.”<sup>119</sup> This skepticism flowed from the political illegitimacy of Security Council members, as well as the “morally justifiable” NATO intervention in Kosovo “which lacked Security Council authorization but was widely held to be morally justifiable.”<sup>120</sup> The same scholar conceded, however, that legitimate authority “has *some* moral significance,”<sup>121</sup> and explored how PMSCs challenge two central rationales of the criterion: the “regulation of warfare,” and “democratic control over the use of force.”<sup>122</sup>

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116. SIMPSON, *supra* note 81, at 48 (emphasis added).

117. Grotius, *De Jure Belli ac Pacis* ii, 25, 8, 3, *as cited in* DAVIS BROWN, *THE SWORD, THE CROSS, AND THE EAGLE: THE AMERICAN CHRISTIAN JUST WAR TRADITION* 256, n.31 (2008).

118. McMahan, *supra* note 96, at 13 (citing Jeff McMahan, *Intervention and Collective Self-Determination*, 10 *ETHICS & INT’L AFF.* 1 (1996)).

119. Pattison, *supra* note 65, at 150.

120. *Id.*

121. *Id.* (emphasis in original).

122. *Id.* at 150-53.

### C. Right Intention<sup>123</sup>

The sole acceptable intention is “the desire to restore a peace that is better than the precipitating situation of aggression.”<sup>124</sup> The right intention criterion is grounded in a rich tradition of moral imperatives. Bishop Ambrose was a “bridge figure between Cicero and [St.] Augustine,” and introduced the latter to the principle that “Courage reflects justice when it... defends the weak and the oppressed.”<sup>125</sup> Ambrose grounded this obligation in the premise that “Whoever does not ward off a blow to a fellow man, when he can, is as much at fault as the striker.”<sup>126</sup> This flowed from Cicero’s principles of justice: “Passive (negative) justice is to do no harm; active (positive) justice is to do good. Active injustice is to do harm to another; passive injustice is to neglect to do good to another when you can.”<sup>127</sup> Further, Ambrose believed that “failure to protect is the equivalent of murder.”<sup>128</sup> These are all high burdens, and while the subjective requirement seems harsh, that alone demonstrates how modern warfare has greatly strayed from these “inalienable moral obligation[s)].”<sup>129</sup> The application to PMSCs is straightforward: the agents who wage war must do so for the weak and oppressed, from a sense of moral responsibility, and from a moral obligation to do good and not harm. The perceived inability of a PMSC to accomplish this is not fatal unless one demonstrates first, that PMSCs inherently pose an insurmountable barrier to right intention, and second, that subjective right intention exists in all state actors who wage war. Neither of those seems plausible.

One objection to right intention is the inherently financial motive of PMSCs in waging war. However, given the existence of military careers (many of which pay very well), it is unclear how this critique does not also apply to state actors. It is also unclear that finances are necessarily the motive of PMSC agents, especially within a hypothetical PMSC solely engaging in humanitarian intervention, or PMSCs specializing in

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123. My usage of right intention is identical to Simpson’s, referring to the subjective side of intentionality: “the motivational goal (*finis*) of the agent (*operantis*) who wages war.” SIMPSON, *supra* note 81, at 29. Right intention often combines the subjective with the objective, which “involves the intention of the overall goal of a political-military action.” *Id.* at 28. For the purposes of this Article, the objective component is dealt with separately as the “end of peace” criterion, *infra*.

124. SIMPSON, *supra* note 81, at 29.

125. *Id.* at 40-41.

126. Ambrose, *On the Duties of the Clergy*, 1.28, 1.27, 1.36, as cited in SIMPSON, *supra* at 41, 104 n.2.

127. Cicero, *On Duties*, 1.7, 9 (Apr. 21, 2015), [http://www.constitution.org/rom/de\\_officiis.htm](http://www.constitution.org/rom/de_officiis.htm), construed in SIMPSON, *supra* note 81, at 41, 104 n.2.

128. *Id.* at 41.

129. *Id.* at 54.

the disruption of human trafficking. Martin Luther distinguished between “acting in one’s own self-interest and acting in the interest of a neighbor”;<sup>130</sup> entering Rwanda to prevent the wholesale slaughter of civilians, knowing the full extent of the danger, could very well be a sacrificial, even heroic, act, regardless of financial compensation. Such an intervention would meet Luther’s conception of justice: “to help the poor, the orphans and the widows to justice, and to further their cause.”<sup>131</sup>

Indeed, the context of humanitarian intervention may dodge another frequent criticism of PMSCs: the profiteering objection, which argues that PMSCs profit from the destruction and death of others.<sup>132</sup> Though technically true in a hypothetical Rwandan intervention, it is hardly a comprehensive account or an adequate moral characterization. It should be noted that the profiteering objection also applies to state actors, particularly in the rise of defense suppliers and contractors in the last few decades.

#### D. End of Peace

The end of peace is related to right intention. Whereas right intention focused on the subjective intent of the actor, the end of peace focuses on the objective “intention of the overall goal of a political-military action.”<sup>133</sup>

Ambrose asserted that “the pursuit of peace based on justice” is “the only justification for waging war.”<sup>134</sup> Ending the Rwandan genocide creates no problems here. It is possible, of course, that humanitarian intervention is a mere pretext for geopolitical gain or other impermissible purpose, which would violate this criterion. It has been suggested that this criterion is the “preserve and responsibility of political leaders.”<sup>135</sup> If so, and the PMSC has contracted with a state, then the end of peace criterion poses no additional hurdles for PMSCs, since whether the actor is the standing army or a PMSC, the sole consideration is the intention of the political leadership. Even if the requirement included PMSC and/or NGO leadership, it is at least plausible that this could be satisfied in a Rwanda hypothetical.

130. *Id.*

131. Martin Luther, *The Large Catechism*, in THE CONFESSIONS OF THE EVANGELICAL LUTHERAN CHURCH 13:53 (Robert Kolb & Timothy Wengert eds., 2000), as cited in SIMPSON, *supra* note 81, at 83, 107 n.4.

132. Cecile Fabre, *In Defence of Mercenarism*, 40 BRIT. J. POL. SCI. 539-59 (Apr. 21, 2015), <http://www.mercenary-wars.net/pdf/defence-of-mercenaries.pdf>.

133. SIMPSON, *supra* note 81, at 28.

134. *Id.* at 40-41.

135. James Pattison, *Just War Theory and the Privatization of Military Force*, 22 ETHICS & INT’L AFF. 143, 149 (2008) (citing BRIAN OREND, THE MORALITY OF WAR 31-32 (2006)).

### E. *Last Resort*

The criterion of last resort requires the exhaustion of other reasonable means of settlement, and must be pursued in good faith.<sup>136</sup> The Rwanda situation poses some interesting questions, largely because the international community did so little. Can it be said that the United States, for example, exhausted other reasonable means of settlement when it refused to even label the slaughter a genocide?<sup>137</sup> Perhaps the exigent circumstances, specifically the daily slaughter of thousands, would justify action despite U.S. failure to address the crisis at an earlier stage. Regardless, it is plausible that genocide would be perpetrated despite reasonable means of avoiding the atrocities by other states meeting the last resort criterion. Another interesting question is raised as to whether the PMSC must directly seek settlement, or whether the refusal to settle with a state, NGO, or other private party is sufficient to satisfy last resort.

### F. *Proportionality of Ends*

The proportionality of ends criterion mandates that the original injury is not outweighed by the damage of waging war.<sup>138</sup> One just war theorist argued “humanitarian intervention should play a significant role in the debate of the U.S. invasion of Iraq in 2003 to depose Saddam Hussein, whose regime was at least as bad as that of Idi Amin.”<sup>139</sup> Saddam Hussein was a mass murderer and a brutal dictator, but it cannot be asserted that the ends of the Iraq War outweighed the damages. In 2013, one study found that the Iraqi death toll reached 500,000 since the 2003 invasion.<sup>140</sup> This fails to account for the countless atrocities committed by ISIS since then. In the first eight months of 2014 alone, ISIS injured or killed over 24,000 civilians, recruited 12-year-old soldiers, and forced women and girls into sex slavery.<sup>141</sup> It is difficult to see how intervening in Rwanda would produce similarly disastrous consequences (though unintended consequences was exactly the problem in Iraq), but careful considerations of the costs and a profound appreciation for the horrors of war are

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136. SIMPSON, *supra* note 81, at 30.

137. *See supra* Part I.

138. SIMPSON, *supra* note 81, at 30.

139. DAVIS BROWN, *THE SWORD, THE CROSS, AND THE EAGLE: THE AMERICAN CHRISTIAN JUST WAR TRADITION* 173 (2008).

140. Kerry Sheridan, *Iraq Death Toll Reaches 500,000 Since Invasion, New Study Says*, HUFFINGTON POST, (Oct. 15, 2013, 09:26 PM), [http://www.huffingtonpost.com/2013/10/15/iraq-death-toll\\_n\\_4102855.html](http://www.huffingtonpost.com/2013/10/15/iraq-death-toll_n_4102855.html).

141. Samuel Smith, *UN Report on ISIS: 24,000 Killed, Injured by Islamic State; Children Used as Soldiers, Women Sold as Sex Slaves*, CHRISTIAN POST, (Oct. 9, 2014), <http://m.christianpost.com/news/un-report-on-isis-24000-killed-injured-by-islamic-state-children-used-as-soldiers-women-sold-as-sex-slaves-127761/>.

mandated.

### G. *Probability of Success*

The probability of success criterion requires a reasonable likelihood that the purpose of war can be accomplished.<sup>142</sup> This requirement forbids utopian goals, and limits warfare to the realm of “realistic, and sustainable peace.”<sup>143</sup> In Rwanda, intervening parties would need to be relatively secure in their ability to successfully mitigate or end the slaughter.

### H. *Public Declaration*

The final criterion is a public declaration for the reasoning and necessity of waging war. The rationale for this criterion is to encourage accountability from the international community, encouraging third parties to determine the justifiability of the war, and expose impermissible rationale, such as “war realism [ ]or holy war/crusade[s].”<sup>144</sup> Unfortunately, modern practice often violates this requirement, diminishing crucial accountability and discourse in a globally connected world. It is possible that PMSCs tempt political leaders to forego public declarations for political reasons, since they can more discreetly accomplish military objectives without expending political capital. As discussed in Parts I and II, this can be a helpful political tool in the context of humanitarian intervention. However, it can also violate the public declaration criterion. While PMSCs could (and often do) contribute to the erosion of this criterion,<sup>145</sup> it is not a logical necessity, and it is plausible for leadership to both employ PMSCs and comply with this requirement.

## VI. INTEGRATING JUST WAR THEORY CRITERIA INTO PMSC OPERATING GUIDELINES

PMSCs do not typically integrate *jus ad bellum* criteria into their official operating guidelines, but many do reference *jus in bello* criteria. Constellis Group is one example; the Code of Business Ethics and Conduct contains a section on “Rules for the Use of Force,” which expressly implicates proportionality of means and impliedly references

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142. SIMPSON, *supra* note 81, at 27.

143. *Id.* at 30.

144. *Id.* at 31.

145. Pattison, *supra* note 134, at 154.

the discrimination principle.<sup>146</sup> *Jus ad bellum*, its criteria, and any corporate decision-making process in determining where to utilize the use of force are never mentioned, although the Code repeatedly urges conformity with national and international law.

The Code claims compliance with 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, the International Code of Conduct for Private Security Service Providers, and the ANSI/ASIS PSC/1 Management System for Quality of Private Security Company Operations.<sup>147</sup> The Montreux Document, while detailed and an important affirmation of PMSC accountability, does not explicitly reference *jus ad bellum* or criteria, or place any responsibility on PMSCs to abide by them.<sup>148</sup> The International Code of Conduct (ICOC), however, does oblige signatory PMSCs to refrain from contracting with an entity “in a manner that would be contrary to United Nations Security Council sanctions.”<sup>149</sup> ICOC further prohibits PMSCs from participation in or benefitting from “any national or international crimes including but not limited to war crimes, crimes against humanity, [and] genocide . . .”<sup>150</sup> This seems to imply some sort of highly permissive just cause criterion, and while obviously important, it does not come close to encompassing *jus ad bellum*.

The fact that *jus ad bellum* criteria are frequently, if not typically, omitted is highly problematic, and the inclusion of *jus in bello* criteria within PMSC operating guidelines does little to morally alleviate the omission. As McMahan has demonstrated, *jus in bello* “cannot—except in rare instances—be satisfied in the absence of a just cause.” Indeed, they are “logically independent.”<sup>151</sup> “[J]ust as a war that one is justified in fighting may be fought in an unjust manner, so a war that is itself unjustified may nevertheless be fought in a just manner . . .”<sup>152</sup> A just war fought in an unjust manner renders the war unjust. Similarly, an unjust war fought justly is not thereby transformed into a just war. Therefore, *jus in bello* cannot logically exist absent *jus ad bellum*, yet such a fiction persists within many PMSC protocols. Integration of *jus ad bellum* norms

146. CONSTELLIS GROUP, CODE OF BUSINESS ETHICS AND CONDUCT 32 (Jan. 16, 2015), [http://docs.constellisgroup.com/Group\\_Code\\_of\\_Conduct.pdf](http://docs.constellisgroup.com/Group_Code_of_Conduct.pdf).

147. *Id.* at 10, 30-31.

148. See generally 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 (Sept. 17, 2008), [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf).

149. International Code of Conduct for Private Security Service Providers (Aug. 26, 2013), [http://www.geneva-academy.ch/docs/publications/briefing4\\_web\\_final.pdf](http://www.geneva-academy.ch/docs/publications/briefing4_web_final.pdf).

150. *Id.*

151. McMahan, *supra* note 97, at 5-7.

152. *Id.* at 5-6.

into PMSC operating guidelines is therefore crucial for the moral, political, and perhaps legal<sup>153</sup> legitimacy of PMSC actors.

## VII. CONCLUSION

The nature of warfare is changing, and PMSCs are a key feature of 21st century developments. While PMSCs pose significant issues, they also possess important strengths that should not be glibly disregarded when crafting policy to address widespread humanitarian violations. It is *plausible* for PMSCs to satisfy just war theory criteria, as this Article has demonstrated. It is also important for PMSCs to self-regulate and implement these criteria. While many have integrated *jus in bello* criteria, *jus ad bellum* is impermissibly absent from PMSC policies and operating guidelines, and express integration of these criteria is crucial to bolster the moral, political, and legal legitimacy of PMSC actors.

While the flaws of PMSCs are significant and deserve substantial attention, their capacity to effectively stabilize humanitarian crises should also be considered. Genocide plagued the 20th century, and the first years of the 21st century indicate that widespread violations of human rights are not declining. Crimes against humanity will continue, and humanitarian intervention by a State may not be politically feasible, as the case of Rwanda appallingly demonstrated. Political difficulties did not make intervention any less necessary for the people of Rwanda. In such a scenario, intervention by a PMSC is morally preferable to the massacre of thousands, even assuming the violation of positive law. While PMSCs generate controversy, they have reached international prevalence, and like humanity, are capable of both good and evil. Adoption of *jus ad bellum* criteria, and effective usage of PMSCs for humanitarian intervention, edges PMSCs much closer to the former.

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153. See *supra* Part IV.