

# Just War Theory and the Privatization of Military Force

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Since the 1990s there has been a marked growth in the private military industry. Private military companies (PMCs) have been taking on an ever-increasing number of roles traditionally performed by the regular military. These range from supplying training, logistics, and other support services to engaging occasionally in actual fighting. This is most notable in Iraq, where the U.K. and U.S. governments have employed a host of “security” companies, such as Aegis, Blackwater, Control Risks Group, Erinys, Vinnell, and KBR. The use of these companies has by no means been limited to Iraq, however. Nor is it only the U.K. and the U.S. that have made use of their services. Other states, multinational companies, NGOs, and even the U.N. have hired PMCs.

Although there are many reputable PMCs, the sharp increase in the use of such firms has raised a number of normative concerns and, in some quarters, strong opposition. Yet the ethical implications of using PMCs have been generally under-theorized in the current literature.<sup>1</sup> The aim of this article is to begin to fill this lacuna. Accordingly, I consider three central normative issues raised by the privatization of military force. These issues are analyzed within a just war theory (JWT) framework, which, given the theory’s rich normative categories and significant historical pedigree, provides the obvious foundation on which to examine the ethical issues raised by the privatization of military force. Yet modern JWT has been largely state-centric and relies heavily on the domestic analogy, which treats states as possessing the same features as individuals (such as unity). For this reason, I will also offer some suggestions on how JWT can be updated so that it continues to be relevant in light of the rise of nonstate actors, such as PMCs.

More specifically, the first section considers the claim that private contractors are inappropriate actors to wage war because they contravene the JWT principle of right intention. The privatization of military force, I suggest, indicates that we

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should move toward a conception of right intention that both differentiates it from right motive and incorporates those using force. The next section asserts that the use of PMCs is largely consistent with the application of the principle of legitimate authority but undermines two of its central rationales. In the third section, I apply the *jus in bello* principle of discrimination to PMC personnel.

Before continuing, two brief points of clarification are necessary. First, the three issues that I focus on are not the only normative challenges posed by the privatization of military force. They simply strike me as the most important. Second, the issues that I consider may not be unique to PMCs. Indeed, other issues (such as terrorism and humanitarian intervention) may also highlight the need for revision of JWT. The privatization of military force simply adds to the case.

One may object straightaway that the use of private military actors is nothing new. Private actors have frequently been prevalent in the international system, from the condottieri to the Dutch and British East India companies. Indeed, certain principles of JWT arose to some extent in response to the problems posed by mercenaries.<sup>2</sup> But this does not necessarily mean that it adequately copes with the challenges posed by the recent rise of PMCs, especially given the state-centrism of modern JWT. Moreover, it is worth noting that PMCs are usually held to differ from mercenaries. There are, of course, many similarities, such as the provision of military services for financial gain. Indeed, although the focus of this article is on PMCs, some of the issues discussed may be relevant to mercenaries as well. However, unlike mercenaries, PMCs have a clear corporate identity. They have boards of directors and shareholders, trade openly (for the most part) on the global marketplace, have ties with governments and other corporations, and offer a broad array of services to a wide range of clients worldwide.<sup>3</sup> Also note that, for the purpose of this article, I adopt Simon Chesterman and Chia Lehnardt's definition of PMCs as "firms providing services outside their home states with the potential for use of lethal force, as well as of training and advice to militaries that substantially affects their war-fighting capacities."<sup>4</sup>

## RIGHT INTENTION

One of the most common objections to the employment of PMCs is that private military personnel have an inappropriate motive for waging war: financial gain.<sup>5</sup> More specifically, the use of PMCs seems to contravene the *jus ad bellum* principle of right intention. This principle asserts that war must be waged for the right

reasons and, in particular, with the aim of securing the just cause. For instance, if a war in response to the mass violation of basic human rights in another state is to be justified, the intervener needs to wage war for humanitarian reasons, and not with an ulterior, perhaps self-interested, motivation. The apparent problem with PMCs is that, as Tony Coady argues, “someone who hires his gun to the highest bidder or, less dramatically, fights predominantly for money will typically lack the motive appropriate to war, as specified by just war theory.”<sup>6</sup> In short, then, the “mercenary motive” of participating in or supporting a military effort for financial gain is intrinsically problematic.

Inasmuch as we tend to think that it is morally acceptable for attorneys, merchant bankers, and stockbrokers to be motivated by generous remuneration, why is it objectionable that PMC personnel may also be motivated by financial gain? The problem is rooted in the combination of financial motivation and military force, which typically involves inflicting harm upon others. Of course, the majority of private military contractors are not engaged in combat operations, and so not all will harm others directly. But the objection can be extended to include those who assist others to harm—for example, by providing security and training. In sum, there are limits to the actions that an individual can legitimately undertake for financial gain, and these limits prohibit harming or assisting others to harm.<sup>7</sup>

It is sometimes replied that this objection to private force has little validity because it also applies to regular soldiers; that is, many regular soldiers are motivated by financial gain. Indeed, Tony Lynch and A. J. Walsh note that “the modern military spends much of its time promoting itself as a ‘career option’ characterised by competitive remuneration and levels of skill acquisition.”<sup>8</sup> A second response is that PMC personnel are not necessarily motivated by financial gain. They may have other motives, such as a sense of adventure and, potentially, a desire to fight for a cause (which, conceivably, they perceive to be just); or they may have been in the military all their adult lives, and so know no other profession. Nevertheless, it would be odd if there were no difference in motivation between PMC personnel and regular soldiers. Since a PMC is a private company, the decision of its board to undertake a contract can be expected to be profit-driven. Similarly, it is likely that high wages will sometimes be an important motivating factor (if not the sole factor) in a private contractor’s decision to accept a contract. Indeed, the high salaries in the private sector are often blamed for the “brawn drain” of regular soldiers from the military. Overall, we can expect that

financial considerations will figure more prominently in the decision-making of PMC personnel than in that of their public counterparts, who may be motivated by other considerations, such as national duty.

A further response asserts that, even if PMCs are motivated primarily by financial gain and so differ from regular soldiers, this is not necessarily problematic. In fact, it may be argued that regular soldiers' motive of national pride is potentially more dangerous given that, for example, it may lead to the dehumanization of the enemy. Consequently, Lynch and Walsh argue that arguments against private force "which rely on the idea of . . . 'right intention' are inadequate, unless 'right intention' is defined in such a way as to presuppose in a question-begging manner patriotic defence of the nation-state."<sup>9</sup>

This response fails to persuade, however. The objection does not concern the *absence* of a suitable motive, but the *presence* of an unsuitable one. That is, the use of private contractors is not problematic because they lack a virtuous motive in patriotism. Rather, it is that those using or assisting military force should not possess a particularly problematic motive, and a financial motive (along with, for example, sadism, xenophobia, hatred, and revenge) seems to be objectionable in the context of military force. The problem with this motive is perhaps best brought out in an unjust war, where private force is used to assist the achievement of an immoral end. In such cases, private contractors are motivated by financial gain to such an extent that they will knowingly fight for an unjust cause. Consider the example of a PMC member who hires out his services to a drug cartel, a terrorist organization, or a genocidal dictator. To be sure, there is something wrong if regular soldiers are willing to defend abusers of human rights out of misguided patriotism. But it seems particularly egregious if individuals are motivated simply by financial gain to do so. There are two reasons in particular why a financial motive *in general* may seem troublesome. First, the financial motive is individualistic (at best it includes family members). Second, in extreme cases it suggests an amoral approach, and, in particular, indicates few limits on what one might do for personal gain. To be sure, I am *not* claiming that all PMC personnel are self-interested and amoral. Of course, private contractors are likely to have a mix of motives. The point is simply to indicate why a financial motive may be problematic.

Sometimes those who reject this objection about right intention argue (implicitly at least) that motives are of no relevance whatsoever in warfare. For instance, Uwe Steinhoff claims that to insist on right motive in warfare confuses moral judgment "with snooping around in other people's hearts and minds. . . .

Its affinity to totalitarian thought-control gives us every reason to reject it.”<sup>10</sup> But this is too strong. Motives are frequently used in moral judgment. Take the banal example of a man stealing a loaf of bread with the motivation of feeding his starving family. Conversely, we would think it objectionable if an individual is motivated to fight out of bloodlust. Accordingly, motives do, to some extent, seem to matter in warfare—even if, as I suggest below, they may be outweighed by other considerations.

Does this mean that the use of PMCs should be rejected under the JWT principle of right intention? This is too hasty. And it brings us to an important distinction between intention and motive. An individual’s *intention* is the objective or purpose that they wish to achieve with their action. On the other hand, their *motive* is their underlying reason for acting.<sup>11</sup> It follows that an agent with right intention aims to tackle whatever it is that the war is a just response to, such as a humanitarian crisis, military attack, or serious threat. But their underlying reason for having this intention need not also concern the just cause. It could be, for instance, a self-interested reason. To give an example, suppose that a private contractor is employed to protect a governmental official. His *intention* is to protect the official from roadside attacks, suicide bombers, and so on. His *actions* are orientated toward achieving this goal—for instance, he drives his armor-protected vehicle only on certain routes to avoid potentially dangerous situations. His *motive* for this behavior, however, is not that he thinks this official is worth protecting—he is apathetic toward the official. Rather, it is that he knows he is likely to receive another handsomely paid contract if he is successful. Thus, there is a difference between the intention of the contractor (to protect the official) and his motive (to win another contract). This distinction is sometimes obscured in accounts of right intention; yet once it is made, we can see that the objection to PMCs concerns motives rather than intentions.

Notwithstanding, we may think that an individual’s motives are, generally speaking, of little, if still *some*, concern in the overall rectitude of war. In short, they do not seem to be as important as other concerns. To flesh this out further, although the Kantian-inspired arguments for the importance of right motivation may be persuasive for certain moral questions, the force of such arguments largely (but not completely) dissipates in the context of military force. This is because the intrinsic importance of an individual’s having a right motive is outweighed by the much higher moral consequences at stake. That is, it pales into insignificance when contrasted with other values that *are* important to the

justice or injustice of a war, such as responding to a just cause, using force proportionately, following *jus in bello*, and having a reasonable prospect of success. An individual's mindset seems far less important than these other qualities. In the example above, for instance, what is morally important is not that the contractor is motivated by financial gain, but that his intention is to protect the governmental official (presumably a just cause), and that he does so effectively and without violating rules of *jus in bello*. Note that this is not simply a point about the motives of those deploying or assisting in the deployment of force. The motives of decision-makers also seem to be morally insignificant.<sup>12</sup> Nor is this a point about the triviality of the financial motive in particular. The moral importance of individuals' possessing other potentially egregious motives, such as bloodlust, would also be outweighed by greater consequences at stake in warfare.

Intrinsically, then, right motives do not seem to be of the utmost relevance. Although it may be regrettable that some private contractors are motivated by financial gain, this is insignificant in the grand scheme of war. Of course, having a proper motive could be instrumentally important. In fact, it might be argued that the motivation of PMCs is problematic for instrumental reasons. For example, Fred Schreier and Marina Caparini assert that "the profit motive and the inflexibility of contracts and personnel also contribute to their lack of commitment to the overall objectives of the military mission."<sup>13</sup> Yet such instrumental concerns can largely be captured by focusing on the intentions of private contractors. Indeed, we may think that the use of PMCs is problematic not because of the *motivations* of private contractors, but because of these individuals' *intentions*.

My reasoning is as follows. When a state employs a PMC, it uses an independent, private agent to help fulfill its goal. The company may, however, possess objectives that differ from those of the state contracting its services. This is because PMCs are ultimately accountable to their shareholders. In fact, a state may authorize a private company to undertake a certain action, but in practice have little or no control over whether that action is actually achieved. The contracts that are signed between states and PMCs do little to alter this situation: they often are unmonitored and ambiguous, and so do not ensure state control of the PMC activities in the field.<sup>14</sup> Moreover, it is unlikely that the market acts as a strong disincentive for firms that deviate from or terminate their contractual obligations. For instance, DynCorp went on to hold lucrative deals with various

U.S. administrations even though it broke a contract, leaving the U.S. State Department in difficulty in Liberia after heavy fighting.<sup>15</sup> Thus, it seems that there are two key problems with PMCs in this regard. First, they may contravene the JWT principle of right intention themselves, given that some companies pursue financial gain rather than respond to just causes. Second, the use of PMCs can undermine the good intentions of the employing state, given the potential for discrepancy between the intentions of the state and those of the PMC.

On certain formulations of the JWT principle of right intention, the focus should be on the intentions of the decision-makers. This approach challenges the relevance of (certain) PMCs' apparent lack of right intention, since the intentions of those carrying out (and assisting in) the use of force are irrelevant. Furthermore, one may object that this account of the principle of right intention does not fit within *jus ad bellum*. The problem is that it involves the intentions of PMCs and their personnel *during* warfare (the realm of *jus in bello*) on, for instance, particular missions, whereas *jus ad bellum* is concerned with the prewar period—when it is permissible to launch a war. Hence, the just war theorist Brian Orend notes that normally “the *jus ad bellum* criteria are thought to be the preserve and responsibility of political leaders whereas the *jus in bello* criteria are thought to be the province and responsibility of military commanders, officers and soldiers.”<sup>16</sup>

Yet the privatization of military force indicates that such a conception of the JWT principle of right intention is outmoded. When using PMCs there can be a significant disjuncture between the intentions of those authorizing the use of force and the intentions of those undertaking or assisting the use of force. For this reason, we may need to roll out the principle of right intention to cover both those authorizing force and those using it (or assisting in its use). That is, if we hold that the JWT principle of right intention is important, it is also vital that those *undertaking* the use of force possess right intention.<sup>17</sup> Although this view of right intention may not fit neatly into *jus ad bellum*, this does not undermine the fact that we need to be concerned with the intentions of those undertaking (and assisting) force during war. If we limit this principle to the preserve of the prewar period, we risk rendering obsolete the concerns that it highlights. In fact, this may give us reason to extend our thinking on *jus in bello*, particularly to develop Orend's under-analyzed notion of internal *jus in bello* (discussed below). We should consider the intentions of those undertaking the use of force *during* war as well.

## LEGITIMATE AUTHORITY

Let us now turn to the challenges that PMCs pose to the principle of legitimate authority, which typically holds that war must be authorized by a legitimate body. For example, St. Augustine's formulation requires that "the natural order conducive to human peace demands that the power to counsel and declare war belongs to those who hold the supreme authority."<sup>18</sup> In practice, this means that war can be authorized only by certain institutions—in particular (according to current international law), by states themselves or by international institutions, such as the U.N. Security Council.

There have been a number of recent criticisms of the moral importance of legitimate authority. For instance, in light of the Iraq war, Fernando Tesón suggests that the Security Council suffers from notable deficiencies because some of those who sit on it do not meet requirements of political legitimacy.<sup>19</sup> Indeed, it may be questioned whether being authorized by a legitimate authority is a necessary condition of the justice of a war. A relevant example in this context is NATO's intervention in Kosovo, which lacked Security Council authorization but was widely held to be morally justifiable. Notwithstanding, we may still hold that legitimate authority has *some* moral significance. That is, it is an important, if not necessary, factor in the overall justice of a war. There are two central reasons for the moral importance of legitimate authority: the enabling of the regulation of warfare; and the facilitation of democratic control over the use of force. Significantly, the use of PMCs undermines these two central rationales.

### *The Regulation of Warfare*

By restricting which particular agents can use force, the principle of legitimate authority makes it possible to establish legal and political instruments that govern and regulate warfare. These include the U.N. Charter, the Geneva Conventions, and the U.N. Security Council. These provisions help to provide a common framework to reduce the horrors, and frequency, of military force. Not only do they reinforce the notion that only legitimate institutions can wage war, they also affirm a number of other JWT principles, most notably those concerning just cause. For instance, the U.N. Charter asserts that military force is impermissible except in cases of individual or collective self-defense, or when authorized by the Security Council.

The effective upholding of such measures necessitates the limiting of the number and types of actors that can legitimately engage in warfare. Indeed, what they



have in common is that they regulate the use of force by states and intergovernmental institutions. For instance, James Cockayne suggests that “international humanitarian law relies on territorial control and hierarchical administration as the cornerstones of the system of responsible provision of humanitarian goods, services and treatment.”<sup>20</sup> A more permissive international system in which a wide variety of actors use force makes it more difficult to sustain effective legal and political instruments to govern warfare.

The employment of PMCs is largely consistent with the principle of legitimate authority, traditionally conceived, since states—and not PMCs—tend to authorize the use of force. However, the use of PMCs undermines one of the key justifications of the principle of legitimate authority: the limiting of the frequency and the awfulness of warfare. This is because the privatization of military force introduces a set of nonstate actors that do not fit into state-based systems of regulation. Although a state that employs PMCs is still subject to international law that proscribes certain types of behavior (such as aggressive war), the use of PMCs means that it is harder to enforce such prohibitions.

First, the use of PMCs makes it difficult to apply the current restrictions on when war can be waged and who can wage it. They provide a way for governments to deploy military force without the blatancy of state action—for instance, by enabling foreign policy by proxy. Moreover, the privatization of military force increases the number of actors able to use military force in the international arena. PMCs improve the abilities of otherwise militarily incapable states and can also aid nonstate actors to use force. In this context, Schreier and Caparini assert that “PMCs have worked for . . . rebel groups, drug cartels, and before 9/11, two al Qaeda-linked jihadist groups.”<sup>21</sup> Hence, the rise of PMCs means that there are more actors and less control in the international system, and this increases the likelihood of instability.

Second, the privatization of military force can lead to what are, in effect, more horrific wars—that is, wars in which *jus in bello* is violated (such as the principle of noncombatant immunity). Whereas regular soldiers are subject to a number of laws that restrict the conduct of warfare, PMC personnel operate largely outside the effective jurisdiction of national and international law.

In particular, as Sarah Percy claims, there are no specific legal instruments concerning PMCs.<sup>22</sup> The three main legal instruments prohibiting the use of mercenaries (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. Furthermore, the status of PMC personnel under international humanitarian law is ambiguous. For example, it is unclear whether contractors can legally be understood to be “combatants” and therefore have a right to prisoner-of-war status under Article 4 of the Third Geneva Convention.

Moreover, the states in which PMCs *operate* frequently lack the ability (and sometimes the willingness) to prosecute contractors who commit wrongdoing. In Iraq, for example, the Coalition Provisional Authority Order Number 17 specifies that Iraqi laws or regulations do not apply to contractors.<sup>23</sup> In addition, the regulation of PMCs by the states in which the firms are *based* varies from state to state, and is generally limited. For instance, although the Military Extraterritorial Jurisdictional Act (MEJA) applies to nonmilitary personnel associated with the U.S. military abroad, it excludes misdemeanors and relies on the will of prosecutors to bring a case to court. This will is often lacking because of the complexity and expense of extraterritorial prosecutions.<sup>24</sup>

The problem is that this lack of effective legal accountability results in impunity. In Iraq, for instance, a number of PMC employees have been implicated in human rights abuses of civilians, but almost none have been prosecuted. More specifically, in his testimony to the House Appropriations Subcommittee, the investigative journalist Jeremy Scahill claims that while there have been sixty-four courts-martial of regular soldiers on murder-related charges in Iraq, only two private contractors have faced criminal prosecution.<sup>25</sup> Similarly, in Bosnia, Dyn-Corp 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>26</sup> Of course, not all PMCs and private contractors take advantage of the lack of effective legal accountability (and, in addition, regular soldiers may not always be adequately prosecuted for abuses). The point, rather, is that there is currently no effective system of accountability to govern the conduct of PMC personnel, and this can lead to cases where the horrors of war—most notably civilian casualties—go unchecked. One widely reported example occurred in September 2007, when Blackwater employees allegedly opened fire on civilians in Nisour Square, in central Baghdad, killing seventeen Iraqis.<sup>27</sup>

The defenders of PMCs cite the fact that there is some self-regulation by the private military industry as firms have become increasingly concerned about their public image. Furthermore, Doug Brooks, president of the International

Peace Operations Association, a U.S. trade association, argues that private companies have been exemplary in their behavior because they employ elite troops from highly trained militaries.<sup>28</sup> Moreover, according to Brooks, PMCs can be expected to be inherently lawful because transgressions will affect their reputation and, therefore, their profitability. However, as industry expert P. W. Singer argues, the need to retain a positive reputation may simply mean that PMCs cover up, rather than report, violations of human rights by their employees.<sup>29</sup> Moreover, violating principles of *jus in bello* may cut costs and therefore be in the financial interests of the company.

### *Democratic Control*

The second rationale for the principle of legitimate authority is that it increases the opportunities for democratic control over the use of force. This is because such control is currently feasible, for the most part, only within a state-based framework.

Democratic control over the use of force is morally valuable for a number of reasons. First, it is intrinsically valuable for reasons of self-government and individual autonomy. If the U.K. population is to be self-governing, for instance, it is important that British citizens have some say in when and how *their* state wages war.<sup>30</sup> Second, as claimed by democratic peace theorists, democratic control is instrumentally valuable since it leads to more peaceful behavior, particularly in relations with other democracies.<sup>31</sup>

Again, the privatization of military force challenges this central rationale of the principle of legitimate authority. That is, although the use of PMCs is largely consistent with traditional notions of legitimate authority, it undermines democratic control over the use of force.<sup>32</sup> To start with, governments can employ PMCs to bypass many of the constitutional and parliamentary constraints on the decision to send troops into action. Using private companies gives the government more scope to initiate war covertly or to extend the size of state involvement without public debate beforehand. For example, PMCs were employed in Bosnia to circumvent the cap of 20,000 U.S. troops imposed by Congress.<sup>33</sup> The use of PMCs can make military operations more palatable to domestic publics, since contractor casualties rarely make the headlines and are not counted in official death tolls.<sup>34</sup> Moreover, the privatization of military force introduces an additional set of actors into the battlefield. This potentially blurs the lines of command and control from state leaders to the troops on the ground, especially

if PMCs are not fully integrated into the military hierarchy and, as discussed above, have intentions that differ from those of the state employing their services.<sup>35</sup>

### *Solutions*

I want to consider briefly three revisions to JWT that will help to solve these challenges to the central rationales of legitimate authority. The first is to reaffirm not only the importance of legitimate authority but also the principle of public declaration of war, which holds that war needs to be declared openly and in accordance with the constitutional and parliamentary conventions on waging war. This principle has been frequently ignored in recent accounts of *jus ad bellum*. However, the Kantian notion that just war requires the majority backing of elected representatives is important for the instrumental and intrinsic reasons outlined above. The fact that PMCs offer governments a politically convenient way of waging war without proper declaration means that we need to take this principle more seriously. As such, this first solution focuses on *those authorizing the use of force*. By contrast, the next two solutions concern *those being authorized*.

As argued above, the use of PMCs is, to a certain extent, consistent with the JWT principle of legitimate authority, yet undermines two of its central justifications—the regulation of warfare and the opportunity for democratic control. The second solution is to think of the principle of legitimate authority as comprising not only those who authorize force, but also those who are undertaking it or assisting in its use. And, on this broader principle, only legitimate, state-based actors can perform the waging of war.

The third solution is to develop a new category of *jus in bello*. Here I build on a distinction made by Orend, who argues that we can differentiate between external and internal principles of *jus in bello*.<sup>36</sup> External *jus in bello* concerns the principles that a state should follow in connection with the opposition and its armed forces. This is what we normally think about when discussing *jus in bello* (that is, principles of noncombatant immunity, proportionality, and so on). Internal *jus in bello*, by contrast, concerns the principles that a state should follow in connection with its citizens and soldiers.

What sorts of principles should be included under internal *jus in bello*? The privatization of military force highlights, in particular, the need for a principle that restricts the sorts of soldiers a state can justifiably employ when waging war.<sup>37</sup> It seems clear that a state cannot use child soldiers to pursue its aims. It may be argued that similar restrictions should be placed on the use of PMCs.

Given the problems of regulation and democratic control discussed above, there may be reasons to limit the use of private contractors in certain roles at least (such as engaging in, or assisting, combat).<sup>38</sup> The argument is not that we should rule out the use of PMCs because of intrinsic problems with their use, as is the case with child soldiers. Rather, the point is a pragmatic one: it concerns the problems of international instability, the violation of noncombatant immunity, and the potential to undermine the democratic use of military force, which are largely caused by the ineffectively regulated and murky environment in which PMCs currently operate. Until there is a stronger system of regulation governing PMCs that penalizes—and ultimately reduces—abuse and achieves greater governmental transparency over the use of these firms, a state that employs private contractors to engage in, or directly assist, combat should be considered to be violating (internal) *jus in bello*.<sup>39</sup>

## DISCRIMINATION

The third issue to be considered is the (external) *jus in bello* principle of discrimination, which asserts that military and civilian targets should be distinguished. Why is it that combatants are liable to attack but noncombatants are not? Michael Walzer defends the “moral equality of soldiers”: regardless of the justice of the cause for which they are fighting, soldiers are morally equal in that they are all dangerous men—they all possess the potential to harm—and therefore can be appropriate targets.<sup>40</sup> Conversely, civilians are generally illegitimate targets since they have done nothing that entails the loss of their rights.

Private contractors working for PMCs do not fit neatly into the distinction between combatant and noncombatant (nor civilian and soldier). It is not clear whether certain contractors, such as those providing logistical support, should be viewed as combatants. Indeed, many PMCs describe themselves as “private security companies,” and in doing so downplay their military role. Moreover, as indicated above, it is not clear that private contractors, even those engaged in combat operations, are legally combatants. Are private contractors therefore legitimate targets in warfare?

Contrary to their proclamations, certain PMCs have engaged, and do engage, in combat operations. Examples of this include the involvement of Executive Outcomes in Sierra Leone and, arguably, DynCorp in Colombia and Blackwater in Iraq.<sup>41</sup> And contractors who work for PMCs engaged in combat roles have, it

can be presumed, consented to fight, often with substantial financial reward. Unlike that of conscripts, I shall assume that this consent is without duress. *Prima facie*, then, private contractors who are engaged in combat roles are morally liable to attack.

A trickier issue is whether those contractors who are engaged in noncombat operations, such as security services, training, and logistics, are acceptable targets. Walzer grapples with the same problem for regular armies.

Vast numbers of workers must be mobilized before an army can even appear in the field: once they are engaged, soldiers are radically dependent on a continuing stream of equipment, fuel, ammunition, food, and so on. . . . But to attack behind the lines is to make war against people who are at least nominally civilians.<sup>42</sup>

His seemingly plausible solution is to distinguish between those who make what soldiers need to fight (for example, in a munitions factory) and those who make what they need to live (for example, in a food-processing plant). A similar distinction can be made with PMC personnel using Singer's often-cited "tip of the spear" typology.<sup>43</sup> This typology distinguishes between the range of services in the industry by considering the closeness to the actual fighting. We can say that those working for firms near the tip—what Singer calls "military provider firms"—are legitimate targets, since they are engaged in combat operations (for instance, as specialists or in command-and-control of field units). Similarly, those working for firms further down the "spear"—in particular what Singer calls "military consultant firms" (and some of what he calls "military support firms")—may still be liable to attack, even if not to the same degree as those at the tip. This is because these firms offer services, such as intelligence, technical support, and military transportation, that are necessary for soldiers to harm—or increases their capability to harm—rather than what they "need to live." By contrast, those working for firms still further down the spear (military support firms providing catering, medical services, housing, and so on) are not liable to attack.

One may reply that if we hold that private contractors working for firms near the tip of the spear are legitimate targets because of their free consent, it follows that those working for firms further down the spear, given their free consent, are legitimate targets as well. This is questionable, however. What matters is *what is being consented to*, rather than simply the act of consent. There is a difference between (a) those who consent to work for firms that provide services near the tip of the spear, which either directly involve fighting or are indirectly necessary for

military action per se, and (b) those who consent to work for firms that provide services further down the spear that are not specifically needed for military force. Whereas the former are “dangerous men” who have the potential to harm (or provide services that are necessary for harming per se), the latter consent only to provide general services that do not necessarily involve or assist harm. This account combines the intuition that a private contractor’s consent renders him a legitimate target with Walzer’s notion that only those who provide what is necessary for warfare per se are liable to attack.<sup>44</sup>

Thus far, I have been, à la Walzer, largely treating questions of *jus in bello* as distinct from questions of *jus ad bellum*. According to Jeff McMahan, such a separation is mistaken.<sup>45</sup> McMahan argues that whereas soldiers fighting for unjust causes are morally responsible for the threat they pose and are therefore liable to attack, those who fight for just causes are not morally responsible and therefore cannot be legitimately targeted. The same reasoning can be applied to PMCs. If their cause is a just one, it does not seem acceptable to target even private contractors working for firms near the tip of the spear. Although they are engaged in harm (or are assisting others to harm) and give their free consent, because they are fighting for a just cause they do not surrender their right not to be killed. This revision of the moral equality of soldiers (or, in this case, of contractors) helps to explain a number of moral intuitions that we might hold. For instance, it seems right that a murderous rebel faction cannot legitimately target private contractors who bolster a just humanitarian intervention.

One might respond that, by agreeing to a contract, private contractors freely give up their right not to be killed and, as a result, can be legitimately targeted. Thomas Hurka argues that the volunteering of soldiers “is like that of boxers who, in agreeing to a bout, permit each other to do in the ring what would be forbidden outside it . . . in both cases there is a voluntary permitting of what would otherwise be a serious violation of rights.”<sup>46</sup> But contractors, like boxers, can pick and choose their fights, and it is not clear that those who choose to fight for *just causes* surrender their right not to be killed, even though they may appreciate the dangerousness of the mission they are accepting. Furthermore, as McMahan argues, a person’s consenting to be attacked is not sufficient to make it permissible to kill him. For example, it is generally wrong “to kill a person in a duel even if he has consented to participate.”<sup>47</sup> There needs to be a further reason (for example, responsibility for an unjust war) why an individual surrenders his right not to be killed.

One may also argue that PMCs are legitimate targets in warfare, given their alleged mercenary motives. On this view, a private contractor, even if working for a just cause, can be legitimately targeted because he is fighting for financial gain. However, not only does this risk putting too much weight on an individual's motives (in addition to the problems highlighted above, there may be epistemological difficulties in determining a contractor's motivation), but the logic of the argument would suggest that regular soldiers who are motivated by financial gain are legitimate targets as well. Perhaps more significantly, it would be acceptable to target a private contractor (or regular soldier) who agrees to fight only for just causes. This seems counterintuitive. It does not seem acceptable, for instance, to target a private contractor who works only for U.N. peacekeeping missions. Instead, the focus should be on *intentions*, which is consistent with McMahan's argument that, to determine liability, we should look to the justice of the cause being fought for. This is because intentions are key to classifying actions. That is, a chief way to determine what a particular agent is actually doing—its *action*—is to look at its *intentions*.<sup>48</sup> Note here that it may not be sufficient to rely on the intentions of the employing state. Given the potential discrepancy between a decision-maker's intentions and the intentions of a PMC noted above, we may need to consider the PMC's intentions as well (and perhaps the intentions of individual contractors).

Many PMCs claim to act only in just causes and highlight that they are engaged in humanitarian and peace operations. Does this mean that private contractors could never be legitimate targets? This is doubtful. The claims that PMCs work solely for just causes are overblown. Sandline International, for instance, considered working for President Mobutu of Zaire and Executive Outcomes explored contracts fighting for the genocidal Rwandan government in 1994 against the Tutsi rebel force.<sup>49</sup>

A seemingly bigger difficulty for these revisions is that both sides will perceive their cause to be just and themselves innocent. This is a concern if we are to amend the principle of noncombatant immunity to take into account *jus ad bellum* (so that morally culpable civilians are legitimate targets). Those fighting for unjust causes may mistakenly perceive that they are fighting a just war against an unjust enemy, and, as a consequence, target civilians on the other side whom they wrongly view as morally culpable. Indeed, McMahan admits that his challenge to noncombatant immunity should be regarded as part of the "deep morality of warfare." The relevance of having a deep morality is



to design institutions that would make it feasible to promulgate legal and conventional norms that would not only serve to mitigate the general destructiveness of war but would also require greater respect for individual moral rights than the current laws and norms do.<sup>50</sup>

But he admits that until the international community adopts such laws, there are clear practical (or, more precisely, epistemic and consequentialist) reasons for following the principle of noncombatant immunity. Similarly, there is reason to maintain a prohibition on targeting private contractors who work for PMCs that provide what is “necessary to live,” even if such firms seem to be working for unjust causes.

Should we also regard the revision to the moral equality of soldiers as a currently impracticable part of the deep morality of warfare? Perhaps not. Unlike the revision of noncombatant immunity, which *removes* a restriction on warfare, the revision to the moral equality of soldiers provides an *additional* restriction on the use of force. If one side mistakenly perceives that it is fighting a just war, the result may be the regrettable targeting of certain soldiers or contractors. But such soldiers or contractors could have been legitimately targeted anyway under the unrevised principle. Accordingly, the practical reasons for rejecting the revision to the principle of noncombatant immunity do not hold for the moral equality of soldiers.

In fact, one can argue that, among those fighting for just causes, private contractors possess even less liability than regular soldiers. Part of the reason for private contractors to agree to a particular contract may be the justice of the cause, whereas regular soldiers have less choice in which wars they fight. In reality, such occasions may be infrequent, and this may place too much importance on contractors’ motives, but the central point still holds: We should abandon the principle of the moral equality of soldiers when private contractors are fighting for clearly just causes. It can also be argued that private contractors who are engaged in an unjust war and are near the tip of the spear may possess additional liability. Orend asserts that many regular soldiers have a choice not to fight in aggressive wars and therefore should (sometimes) be held responsible for their participation in them.<sup>51</sup> It would seem to follow that there is even greater reason to hold private contractors in unjust wars as morally responsible and therefore legitimate targets, given that they not only *fail to refuse* to fight but *willingly accept* such missions.

## CONCLUSION

If the tradition of JWT is to remain relevant, it must continually be updated to respond to the main challenges posed by contemporary international politics. There is a clear need to rethink some of the principles of JWT to take into account the privatization of military force. In particular, the increasing prevalence of PMCs suggests the need, first, to roll out the principle of right intention. This is because there can be a notable difference between the intentions of those authorizing the use of force and the intentions of those undertaking it (or assisting in its use). Second, given that the use of PMCs can undermine two of the central rationales of the principle of legitimate authority (the regulation of warfare and democratic control over the use of force), it may be necessary to reaffirm the principle of public declaration of war, to view the principle of legitimate authority as comprising both those who authorize force and those who undertake it (or assist in its use), and to develop a stronger account of internal *jus in bello*. Third, it is important to update the notion of discrimination, and in particular the moral equality of soldiers, to take into account the increasing prevalence of private contractors. These three sets of revisions do not mean that we need to rule out the use of PMCs outright, but it is important to update our moral thinking about the justice of war to ensure that we have the normative architecture available to us to respond to the issues that the privatization of military force raises.

## NOTES

- <sup>1</sup> The exceptions include Deane-Peter Baker, “Of ‘Mercenaries’ and Prostitutes: Can Private Warriors Be Ethical?” in Andrew Alexandra, Deane-Peter Baker, and Marina Caparini, eds., *Private Military and Security Companies: Ethics, Policies and Civil-Military Relations* (New York: Routledge, 2008), pp. 30–42; Mervyn Frost, “Regulating Anarchy: The Ethics of PMCs in Global Civil Society,” in *ibid.*, pp. 43–55; Asa Kasher, “Interface Ethics: Military Forces and Private Military Companies,” in *ibid.*, pp. 235–46; James Pattison, “Outsourcing the Responsibility to Protect: Humanitarian Intervention and Private Military Companies,” in Hartmut Behr, ed., *Beyond National Security: New Regional and Global Perspectives on Non-State Violence* (Lynne Rienner, forthcoming); Kateri Carmola, “It’s All Contracts Now: Private Military Firms and a Clash of Legal Culture,” *Brown Journal of World Affairs* 13, no. 1 (2006), pp. 161–73; Sarah Percy, “Morality and Regulation,” in Simon Chesterman and Chia Lehnardt, eds., *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (New York: Oxford University Press, 2007), pp. 11–28; and P. W. Singer’s excellent *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, N.Y.: Cornell University Press, 2003), pp. 216–29.
- <sup>2</sup> One example is the principle of legitimate authority, which, according to Mark Evans, “was invoked to prohibit the waging of ‘war’ by just any group of people (for example, mercenaries).” Mark Evans, “In Humanity’s Name: Democracy and the Right to Wage War,” in Mark Evans, ed., *Just War Theory: A Reappraisal* (Edinburgh: Edinburgh University Press, 2005), p. 78.
- <sup>3</sup> See, further, Fred Schreier and Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, Occasional Paper No. 6 (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2005), pp. 7–9; available at [www.isn.ethz.ch/pubs/ph/details.cfm?lng=en&id=14077](http://www.isn.ethz.ch/pubs/ph/details.cfm?lng=en&id=14077); and Singer, *Corporate Warriors*, pp. 40–48.
- <sup>4</sup> Simon Chesterman and Chia Lehnardt, “Introduction,” in Chesterman and Lehnardt, eds., *From Mercenaries to Market*, p. 3. As Chesterman and Lehnardt note, this definition does not rely on the

- dubious distinction between “offensive” and “defensive” operations, which is sometimes used to distinguish between “private military companies” and “private security companies.” In addition, the definition is more precise, since the focus is on firms operating in conflict zones (in a military setting) rather than on those providing security in a stable environment.
- <sup>5</sup> Those who discuss this issue include Baker, “Of ‘Mercenaries’”; C. A. J. Coady, “Mercenary Morality,” in A. G. D. Bradney, ed., *International Law and Armed Conflict* (Stuttgart: Franz Steiner Verlag, 1992), pp. 55–69; Ian Scobbie, “Mercenary Morality: A Reply to Professor Coady,” in *ibid.*, pp. 71–91; Tony Lynch and A. J. Walsh, “The Good Mercenary?” *Journal of Political Philosophy* 8, no. 2 (2000), pp. 133–53; Percy, “Morality”; and Schreier and Caparini, *Privatising Security*.
- <sup>6</sup> Coady, “Mercenary Morality,” p. 63.
- <sup>7</sup> The objection seems to have less force against PMC personnel providing support services, such as housing, that are not necessary to harm per se, but simply to live. I develop an analogous point below.
- <sup>8</sup> Lynch and Walsh, “The Good Mercenary?” p. 135.
- <sup>9</sup> *Ibid.*, pp. 133–34.
- <sup>10</sup> Uwe Steinhoff, “Ethics, Mercenaries and African States” (paper presented to the Ethics and Africa Conference, University of Cape Town, May 29–31, 2006), p. 8; available at [www2.gsu.edu/~wwwphl/ethics/africa\\_conference/papers.html](http://www2.gsu.edu/~wwwphl/ethics/africa_conference/papers.html).
- <sup>11</sup> This distinction is common in the literature on humanitarian intervention. See, e.g., Terry Nardin, “Introduction,” in Terry Nardin and Melissa Williams, eds., *NOMOS XLVII: Humanitarian Intervention* (New York: New York University Press, 2006), pp. 9–11; James Pattison, “Humanitarian Intervention and International Law: The Moral Significance of an Intervener’s Legal Status,” *Critical Review of International Social and Political Philosophy* 10, no. 3 (2007), pp. 1–19; and Fernando Tesón, “Ending Tyranny in Iraq,” *Ethics & International Affairs* 19, no. 2 (2005), pp. 1–20. Scobbie, “A Reply,” also notes this distinction.
- <sup>12</sup> See my “Representativeness and Humanitarian Intervention,” *Journal of Social Philosophy* 38, no. 4 (2007), pp. 569–87.
- <sup>13</sup> Schreier and Caparini, *Privatising Security*, p. 46.
- <sup>14</sup> See *ibid.*; and Singer, *Corporate Warriors*.
- <sup>15</sup> Christopher Spearin, “Between Public Peacekeepers and Private Forces: Can There Be a Third Way?” *International Peacekeeping* 12, no. 2 (2005), p. 246.
- <sup>16</sup> Brian Orend, *The Morality of War* (Ontario: Broadview Press, 2006), pp. 31–32.
- <sup>17</sup> There may also be reason to prefer this formulation when concerned with the regular military. The differing intentions of various factions within a multinational force, for instance, may mean that we need to consider the intentions of those undertaking force as well.
- <sup>18</sup> Thomas Aquinas, *Summa Theologiae*, Vol. 35, *Consequences of Charity*, Thomas R. Heath, trans. (New York: Blackfriars, 1972), p. 83.
- <sup>19</sup> Tesón, “Ending Tyranny.” Also see my “Humanitarian Intervention and International Law,” pp. 1–19.
- <sup>20</sup> James Cockayne, “The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law,” *International Review of the Red Cross* 88, no. 863 (2006), p. 478.
- <sup>21</sup> Schreier and Caparini, *Privatising Security*, p. 68.
- <sup>22</sup> Sarah Percy, *Regulating the Private Security Industry* (New York: Routledge, 2006), pp. 41–44.
- <sup>23</sup> Coalition Provisional Authority Order Number 17 (Revised), June 27, 2004; available at [www.cpa-iraq.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf).
- <sup>24</sup> Percy, *Regulating the Private Security Industry*, p. 29. Although the United States has recently extended the Uniform Code of Military Justice to PMC personnel, it is not clear whether this will be enforced. See P. W. Singer, “The Law Catches Up to Private Militaries, Embeds,” *Defense Tech*, January 3, 2007; available at [www.defensetech.org/archives/003123.html](http://www.defensetech.org/archives/003123.html).
- <sup>25</sup> Jeremy Scahill, “Outsourcing the War,” *Nation*, May 28, 2007; available at [www.thenation.com/doc/20070528/scahill](http://www.thenation.com/doc/20070528/scahill).
- <sup>26</sup> Oldrich Bures, “Private Military Companies: A Second Best Peacekeeping Option?” *International Peacekeeping* 12, no. 4 (2005), pp. 541–42.
- <sup>27</sup> James Glanz and Alissa J. Rubin, “From Errand to Fatal Shot to Hail of Fire to 17 Deaths,” *New York Times*, October 3, 2007; available at [www.nytimes.com/2007/10/03/world/middleeast/03firefight.html?scp=2&sq=nisour+square&st=nyt](http://www.nytimes.com/2007/10/03/world/middleeast/03firefight.html?scp=2&sq=nisour+square&st=nyt).
- <sup>28</sup> Doug Brooks, “Messiahs or Mercenaries? The Future of International Private Military Services,” *International Peacekeeping* 7, no. 4 (2000), pp. 129–44. Brooks also argues that what worries the international community about PMCs is not any particular past incident, but simply the *potential* to harm.
- <sup>29</sup> Singer, *Corporate Warriors*, p. 222.
- <sup>30</sup> See, further, my “Representativeness and Humanitarian Intervention.”
- <sup>31</sup> Notable defenders of the democratic peace thesis include Michael Doyle, “Kant, Liberal Legacies, and Foreign Affairs: Part I,” *Philosophy & Public Affairs* 12, no. 3 (1983), pp. 205–35, and “Kant, Liberal Legacies, and Foreign Affairs: Part II,” *Philosophy & Public Affairs* 12, no. 4 (1983), pp. 323–53; and

John M. Owen, "How Liberalism Produces Democratic Peace," *International Security* 19, no. 2 (1994), pp. 97–125.

<sup>32</sup> I say "largely" (rather than wholly) consistent with traditional notions of legitimate authority because Anna Leander argues that PMCs can directly and indirectly affect a state's decision to use military force. Not only do they influence the definition of national interests by lobbying, they also create a link between the public and private that is ripe for political corruption—and can result in hawkish behavior by governmental officials. Anna Leander, *Eroding State Authority? Private Military Companies and the Legitimate Use of Force* (Rome: Centro Militare di Studi Strategici, 2006), p. 108.

<sup>33</sup> Schreier and Caparini, *Privatising Security*, p. 68.

<sup>34</sup> Leander, *Eroding State Authority?* p. 107.

<sup>35</sup> Note that this issue is not solely a concern for democratic states; there may also be a blurring of the lines of command and control when PMCs are employed by nondemocracies.

<sup>36</sup> Orend, *Morality*, pp. 127–37.

<sup>37</sup> Orend lists a number of principles under internal *jus in bello*, including adherence to the external rules, the respect for domestic human rights (which involves a rejection of conscription), and the upholding of soldiers' rights.

<sup>38</sup> As suggested above, the traditional principle of legitimate authority does not address those down the chain of command (the focus instead is on state leaders). The extension of our understanding of legitimate authority to cover those authorizing force and the development of a stronger account of internal *jus in bello* will also help to redress JWT's general neglect of those down the chain of command (and those outside it, such as PMCs).

<sup>39</sup> Note that JWT is increasingly being viewed as a "scalar" approach, according to which the overall justice of a war is a matter of degree, rather than a "checklist," according to which all criteria of *jus ad bellum*, *jus in bello*, and *jus post bellum* must be met for a war to be just. As such, although these three solutions may provide extra restrictions on warfare, they do not mean that the bar for a just war will be set unattainably high (i.e., by adding extra "boxes to tick"). For further discussion of the scalar and checklist approaches, see Orend, *Morality*, pp. 105–06; and my "Legitimacy and Humanitarian Intervention: Who Should Intervene?" *International Journal of Human Rights* 12, no. 3 (2008), pp. 395–413 and *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford University Press, forthcoming)

<sup>40</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006).

<sup>41</sup> Although Blackwater are officially employed to guard officials and perform other defensive functions in Iraq, they have, according to some accounts, conducted a number of offensive operations. For instance, the Democratic Majority Staff of the House Committee on Oversight and Government Reform suggest that the vast majority of Blackwater weapons discharges have been preemptive: "Blackwater personnel have participated in 195 incidents in Iraq from January 1, 2005, through September 12, 2007, that involved firearms discharges by Blackwater personnel . . . on 163 occasions (84% of the shooting incidents), Blackwater personnel were the first to fire." Democratic Majority Staff of the House Committee on Oversight and Government Reform, *Memorandum: Additional Information about Blackwater USA*, October 1, 2007, p. 6. For details of DynCorp's alleged combat roles in Colombia, see Singer, *Corporate Warriors*, p. 208.

<sup>42</sup> Walzer, *Just and Unjust Wars*, p. 145.

<sup>43</sup> Singer, *Corporate Warriors*, pp. 91–100.

<sup>44</sup> In practice, there may be a blurring of the distinction between those who consent to work for PMCs that provide services near the tip of the spear and those who consent to work for PMCs that provide services not necessary for military force per se. Contractors may also be misled about the roles they will be performing. As a result, in certain cases it may be unclear whether contractors are liable to attack. However, although the distinction may blur at times, it is nevertheless a morally important one for the reasons suggested. And, even though there may be times when the distinction does blur, there may also be many clear-cut cases.

<sup>45</sup> Jeff McMahan, "The Ethics of Killing in War," *Ethics* 114 (2004), pp. 693–733.

<sup>46</sup> Thomas Hurka, "Liability and Just Cause," *Ethics & International Affairs* 21, no. 2 (2007), p. 210.

<sup>47</sup> Jeff McMahan, "On the Moral Equality of Combatants," *Journal of Political Philosophy* 14, no. 4 (2006), p. 381.

<sup>48</sup> Tesón, "Ending Tyranny," p. 5.

<sup>49</sup> Singer, *Corporate Warriors*.

<sup>50</sup> Jeff McMahan, "The Sources and Status of Just War Principles," *Journal of Military Ethics* 6, no. 2 (2007), p. 104.

<sup>51</sup> Orend, *Morality*, pp. 108–09.