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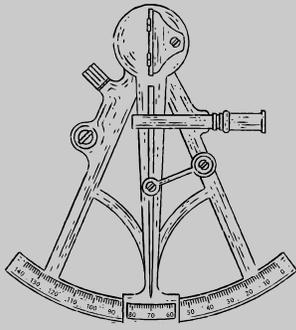
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Sexual Violence in Armed Conflict Under International Law

Aileen S. Kim

Abstract. Since the early 1990s, the international legal community has recognized that rape and other sexually violent acts may constitute torture, war crimes, crimes against humanity, and acts of genocide under international law. During World War II, the Japanese Imperial Army forced more than 200,000 women into sexual slavery where they worked in brothels called “comfort stations.” Although over seven decades have passed, the issues of Japan’s exploitation of comfort women remains unresolved. This article argues that despite the progress that has been made in the treatment of sexually violent acts under international law, jurisdictional problems combined with vague rules have largely excluded comfort women from the international legal system. To support this argument, this article looks first to international humanitarian law, international human rights law, and international criminal law and their treatment of sexual violence against women during armed combat. Second, the article analyzes the case study of comfort women and highlights how little success international treaties, initiatives, and international organizations have had in their attempt to redress violations against them. Finally, suggestions are offered on how to better enforce international laws so that the perpetrators are punished, and comfort women see justice.

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TABLE OF CONTENTS

Introduction	4
I. Sexual Violence and International Law	4
A. Sexual Violence and International Humanitarian Law.....	4
B. Sexual Violence and International Human Rights Law	6
C. Sexual Violence and International Criminal Law	6
II. The Case Study of Comfort Women During World War II	7
A. Treaties that Address the Comfort Women Issue.....	8
B. The Establishment of Tribunals and Initiatives on Behalf of Comfort Women.....	9
C. The United Nations and Sexual Exploitation Initiatives	10
III. Suggestions for Enforcement Mechanisms	11
A. Amendments are Necessary for Better Enforcement	11
1. Include Sexual Crimes in the List of Grave Breaches	12
2. Clarify Ambiguities in the Geneva and the Hague Conventions	12
3. Interplay Between IHL and International Criminal Law	13
B. Enact More Treaties on Behalf of Comfort Women	14
C. Hold the Perpetrators Accountable.....	15
1. Hold Individual Perpetrators Accountable	16
2. Hold the Japanese State Accountable	17
Conclusion	19

INTRODUCTION

Sexual violence in armed conflict has long been a part of the spoils of war. The World Health Organization defines sexual violence as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting. . . .”¹ This includes rape, sexual assault, and sexual harassment.² During World War II, the Japanese Imperial Army utilized government-sanctioned brothels that forced around 200,000 women to sexually service Japanese soldiers.³ Known as “comfort women,” the women were enlisted by Japanese soldiers against their will through methods of deceit and coercion.⁴ The majority of the women came from Korea, but many others came from China, Indonesia, and the Philippines.⁵ Over seven decades later, this history remains a contentious international issue with no viable resolution in sight.⁶ Although international law governing wartime sexual violence has evolved since the adoption of the four Geneva Conventions and the Rome Statute, these provisions are still inadequate. Better enforcement mechanisms are necessary. This paper analyzes existing international humanitarian laws, international human rights laws, and international criminal laws; explores United Nations initiatives; applies the laws and initiatives to the status of surviving comfort women; and offers suggestions for better enforcement of international laws governing sexual violence.

I. Sexual Violence and International Law

Prohibitions against sexual violence have been codified as part of international law since at least the late 1800s, with some warrior codes prohibiting sexual violence as far back as the first century.⁷ In the intervening decades, the ways in which these norms have been defined, adjudicated, and applied have evolved considerably. This section explores the codification of prohibitions against sexual violence during wartime in international humanitarian law, international human rights law, and international criminal law. In particular, this section showcases the inadequacy of international law in its protections against sexual violence.

A. Sexual Violence and International Humanitarian Law

The conclusion of World War II brought the codification of the four Geneva Conventions in 1949. Out of the 429 articles that constitute the Geneva Conventions, only Article 27 of the Fourth Geneva Convention explicitly references the protection of women

¹ Etienne G. Krug et al. eds., *World Report On Violence and Health*, WORLD HEALTH ORGANIZATION [WHO] 147, 149 (2002), https://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf.

² *Id.*

³ David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Army: Japan Eschews International Legal Responsibility?*, 32 COLUM. J. TRANSNAT’L L. 533, 541 (1995).

⁴ *Id.* at 557.

⁵ *Id.* at 541–42.

⁶ *See id.*

⁷ Maria Chiara Parisi, *Sexual Violence and the Law of Armed Conflict*, THE RESP. TO PROTECT STUDENT J., UNIV. OF LEEDS (Nov. 25, 2017), <http://r2pstudentjournal.leeds.ac.uk/2017/11/25/sexual-violence-and-the-law-of-armed-conflict/>.

from rape and forced prostitution.⁸ Article 27 states, “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”⁹ Outside the Geneva Conventions, Additional Protocol I (“AP I”)¹⁰ and Additional Protocol II (“AP II”)¹¹ to the Geneva Conventions of 1977 also contain provisions that prohibits wartime sexual violence. AP I governs international armed conflict and forms part of customary international law that is binding on all States.¹² By contrast, AP II relates to non-international armed conflict.¹³ Regrettably, AP II has not, in its entirety, been accepted as customary international law by all states.¹⁴ This shows the limitations of the Geneva Conventions in providing adequate protection to women for acts of sexual violence.

In addition to establishing the standard for international humanitarian law (“IHL”), the Geneva Conventions also impose individual liability for the most severe violations of its provisions. Known as “grave breaches,” the four Geneva Conventions provide a list of crimes that constitute grave breaches: “willful killing, torture or inhuman treatment, biological experiments, willfully causing great suffering, causing serious injury to body or health, and extensive destruction or appropriation of property.”¹⁵ Notably, sexual crimes are not found on the list, making it difficult to hold individual perpetrators accountable for wartime acts of sexual violence.

In contrast to the Geneva Conventions, the Hague Conventions Respecting the Laws and Customs of War on Land of 1899 and 1907 do not include any mention of sexual violence as a war crime. The only indication of the protection of women from sexual violence is found in Article 46 of the Hague Convention of 1907, which states “Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.”¹⁶ The absence of protections against wartime sexual violence belies the

⁸ *Id.*

⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

¹⁰ Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 76, ¶ 1, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (Recognizing that “[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”).

¹¹ Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4, ¶ 2(e), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II] (Prohibiting “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”).

¹² AP I, *supra* note 10.

¹³ AP II, *supra* note 11.

¹⁴ Jonathan Cuénould, *40th Anniversary of the Additional Protocols of 1977 of the Geneva Conventions of 1949*, BLOG OF THE EUR. J. OF INT’L L. (June 8, 2017), <https://www.ejiltalk.org/40th-anniversary-of-the-additional-protocols-of-1977-of-the-geneva-conventions-of-1949/>.

¹⁵ The list of grave breaches is specified in all four Geneva Conventions. Specifically, they are mentioned in article 50 of the First Geneva Conventions, article 51 of the Second Geneva Conventions, article 130 of the Third Geneva Conventions, article 147 of the Fourth Geneva Conventions, article 11 of AP I, and article 85 of AP II. *How “Grave Breaches” Are Defined in the Geneva Conventions and Additional Protocols*, FAQ, INT’L COMM. OF THE RED CROSS (Apr. 6, 2004), <https://www.icrc.org/en/doc/resources/documents/faq/5zmgf9.htm>.

¹⁶ Convention (IV) respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 46, Oct. 18, 1907, <https://ihl-databases.icrc.org/applic/ihl/ihl.ns>

severity of these crimes. The description of rape and forced prostitution as assaults against the “honour” of women in both the Geneva Conventions and the Hague Conventions also give the impression that such acts are not serious crimes; rather, such crimes are offenses upon personal dignity.

B. Sexual Violence and International Human Rights Law

International human rights law (“IHRL”) addresses the fundamental individual rights applicable to wartime sexual violence. No core human rights instrument makes specific reference to rape or sexual violence.¹⁷ However, sex offenses can fall within the sphere of Article 5 of the Universal Declaration of Human Rights (“UDHR”),¹⁸ Article 7 of the International¹⁹ Article 3 of the European Convention on Human Rights (“ECHR”),²⁰ and Article 5 of the American Convention on Human Rights (“ACHR”).²¹ The International Covenant on Civil and Human Rights (“ICCPR”) protects against “torture or [] cruel, inhuman or degrading treatment or punishment.”²² Because sex offenses are acts that violate a person’s physical integrity, sexual violence can also be considered inhuman or degrading.

Despite the UDHR’s recognition of the “equal rights of men and women,”²³ and the U.N. Charter’s prohibition on sex-based discrimination,²⁴ they do not acknowledge the specific experiences of women during wartime. Furthermore, whereas the ICPR, ECHR, ACHR, and the U.N. Charter are treaties, the UDHR is a declaration, meaning it is not legally binding. It can be concluded, therefore, that the right to be free from wartime sexual violence has not been formally recognized as a basic human right.²⁵

C. Sexual Violence and International Criminal Law

In the decades since the Geneva Conventions, it has become common to rely on international criminal law as the primary enforcement mechanism for IHL when it comes to wartime sexual violence.²⁶ The Rome Statute²⁷ and the International Criminal Court’s (“ICC”) Elements of Crimes (“EOC”)²⁸ reflect these recent trends in the treatment of sexual

f/Article.xsp?action=openDocument&documentId=E719FBF0283E98E3C12563CD005168BD [hereinafter Hague Conventions].

¹⁷ See American Convention on Human Rights “Pact of San Jose, Costa Rica,” Nov. 22, 1969, S. Treaty Doc. No. 95-21, 1144 U.N.T.S. 123, [hereinafter ACHR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171, [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221, [hereinafter ECHR]; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

¹⁸ UDHR, *supra* note 17, at art. 5.

¹⁹ ICCPR, *supra* note 17, at art. 7.

²⁰ ECHR, *supra* note 17, at art. 3.

²¹ ACHR, *supra* note 17, at art. 5.

²² UDHR, *supra* note 17, at art. 5; ICCPR, *supra* note 17, at art. 7; ECHR, *supra* note 17, at art. 3; ACHR, *supra* note 17, at art. 5.

²³ UDHR, *supra* note 17, at Preamble.

²⁴ U.N. Charter Preamble.

²⁵ Beth Stephens & MaryAnn Dadisman, *Women and the Atrocities of War*, 20 HUM. RTS. 12, 13 (1993).

²⁶ Wolfgang Schomburg & Ines Peterson, *Genuine Consent to Sexual Violence Under International Criminal Law*, 101 AM. J. INT’L L. 121, 121 (2007).

²⁷ Rome Statute of the International Criminal Court, arts. 7–8, Jul. 17, 1998, 2187 U.N.T.S. 90, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> [hereinafter Rome Statute].

²⁸ Int’l Criminal Court, *Elements of Crimes*, ICC-PIDS-LT-03-002/11_Eng (2011), [https://www.icc-cpi.int/iccdocs/PID S/publications/ElementsOfCrimesEng.pdf](https://www.icc-cpi.int/iccdocs/PID%20Publications/ElementsOfCrimesEng.pdf) [hereinafter *Elements of Crimes*].

violence.²⁹ Acts of sexual violence are prohibited in Article 7 and Article 8 of the Rome Statute, and are considered to be crimes against humanity and war crimes.³⁰ Article 7(1)(g) lists rape and sexual slavery as a crime against humanity if it is “committed as part of a widespread or systemic attack directed against any civilian population”³¹ Similarly, Article 7(1)(g) of the EOC specifically criminalizes rape, sexual slavery, and enforced prostitution.³²

The Rome Statute is also the most recent international instrument to recognize sexual violence as a war crime.³³ The EOC defines enforced prostitution as the perpetrator engaging in “one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power”³⁴ Similarly, the EOC defines sexual slavery as a perpetrator exercising “any or all of the powers attaching to the right of ownership over one or more persons, such as purchasing, selling, lending or bartering . . . or by imposing on them a . . . deprivation of liberty.”³⁵

Despite the recent addition of the Rome Statute and the ICC, these additions neither account for the severity of sexual violence nor provide justice for victims. The greatest obstacle lies in the absence of sexual violence in the list of grave breaches in the Geneva Conventions. Crimes listed under grave breaches impose criminal liability on the perpetrators and provide international courts universal jurisdiction to review those cases.³⁶ Because sexual violence is not listed under the grave breaches, it is a great challenge to bring such cases to the ICC in the first place.³⁷ In her book, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, Leena Grover suggests that the clauses prohibiting sexual violence in the Rome Statute were mere residual clauses that only potentially prohibited sexual misconduct by granting courts broad jurisdiction over any sex offenses of comparable gravity.³⁸ This shows that even though international laws governing wartime sexual violence have evolved since World War II, there are still obstacles to using the available laws to their full potential.

II. The Case Study of Comfort Women During World War II

Over the past decade, several comfort women have come forward seeking redress for the horrific acts committed against them. But they have obtained very little success. This section explores why very little progress has been made in resolving their grievances and

²⁹ The EOC complements the Rome Statute by setting out the legal requirements of each crime in the Rome Statute and acts as a guide to judges in international courts. *Id.*

³⁰ Rome Statute, *supra* note 27, at arts. 7–8.

³¹ *Id.* at art. 7(1)(g).

³² *Elements of Crimes*, *supra* note 28, at art. 7(1)(g)-1 to -3.

³³ Rome Statute, *supra* note 27, at art. 8(2)(b)(xxii).

³⁴ *Elements of Crimes*, *supra* note 28, at art. 7(1)(g)-3(1).

³⁵ *Id.* at art. 7(1)(g)-2(1).

³⁶ Ward Ferdinandusse, *The Prosecution of Grave Breaches in National Courts*, 7 J. OF INT’L CRIM. JUST. 723, 724 (2009).

³⁷ INT’L COMM. OF THE RED CROSS, *supra* note 15, at 14.

³⁸ See LENNA GROVER, *INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 55 (2014).

examines treaties dealing with their claims, tribunals established on behalf of surviving comfort women, and the double-edged sword of U.N. peacekeeping missions.

A. Treaties that Address the Comfort Women Issue

In its 1994 Mission Report, *Comfort Women: An Unfinished Ordeal*, the International Commission of Jurists determined that the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 was not applicable *ratione temporis*³⁹ to acts by the Japanese military against the comfort women.⁴⁰ In other words, because the Geneva Convention did not exist during the period of World War II, it does not apply to Japan's crimes during this period. As the Geneva Convention is prevailing law in IHL, the International Commission of Jurists' decision set dangerous precedent moving forward.

The San Francisco Peace Treaty ("Peace Treaty") was another treaty that was used against comfort women seeking redress. The Peace Treaty was signed by Japan and forty-eight other nations in 1951 in an effort to settle claims for reparations, but the treaty itself gave no direct focus to the claims of comfort women.⁴¹ For example, Article 4(a) states, "... the disposition [of their] claims, including debts, against the authorities presently administering such areas . . . against Japan . . . shall be the subject of special arrangements between Japan and such authorities."⁴² Moreover, Article 14(b) states, "... the Allied Powers waive all reparations claims of the Allied Powers . . . and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war . . ."⁴³ Because neither Article 4(a) nor Article 14(b) mentions comfort women, the Peace Treaty can be interpreted as waiving their claims. While it can be inferred from Article 4(a) that the Peace Treaty at least recognized the right of comfort women to press individual charges against Japan, this was not how it was interpreted in U.S. courts.

In *Hwang Geum Joo v. Japan*,⁴⁴ fifteen former comfort women filed suit in the United States Court of Appeals for the District of Columbia ("D.C. Circuit") "seeking money damages for [allegedly] having been subjected to sexual slavery and torture before and during World War II" under the Alien Tort Statute.⁴⁵ The D.C. Circuit held that the suit raised "a nonjusticiable political question, namely, whether the governments of the appellants' countries resolved their claims in negotiating peace treaties with Japan," and thus that the court was not authorized to hear the case.⁴⁶ The court also concluded that Japan "would have been afforded absolute immunity from suit" given that Congress did not intend for the commercial activity exception under the Foreign Sovereign Immunity Act ("FSIA") "to

³⁹ *Jurisdiction ratione temporis*, or temporal jurisdiction, refers to the jurisdiction of a court of law where the court can lose temporal jurisdiction because the deadline for a particular litigation expired. *Jurisdiction Ratione Temporis Law and Legal Definition*, USLEGAL (2019), <https://definitions.uslegal.com/j/jurisdiction-ratione-temporis/>.

⁴⁰ Ustinia Dolgopol & Snehal Paranjape, *Comfort Women: An Unfinished Ordeal*, INT'L COMM'N OF JURISTS 156-58 (1994), <https://www.icj.org/wp-content/uploads/1994/01/Japan-comfort-women-fact-finding-report-1994-eng.pdf>.

⁴¹ Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

⁴² *Id.* at 50.

⁴³ *Id.* at 64.

⁴⁴ *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005).

⁴⁵ *Id.* at 46.

⁴⁶ *Id.* at 52-53.

apply retroactively to events prior to May 19, 1952,” when FSIA was adopted.⁴⁷ The court reasoned that Article 14 of the San Francisco Peace Treaty, “expressly waives . . . ‘all claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war.’”⁴⁸ One scholar has noted that the D.C. Circuit’s treatment of forced prostitution as an exercise of the sovereign state’s legitimate military powers not only dehumanized comfort women, but also legally equated them with property.⁴⁹ The court’s opinion focuses purely on legal analysis without giving sufficient treatment to the actual role that comfort women played during wartime.

The most recent instrument dealing with comfort women is the 2015 Japan-ROK Agreement. On December 2015, South Korea and Japan approved the agreement, claiming to settle “finally and irreversibly” the bilateral dispute over comfort women.⁵⁰ In the deal, Japan agreed to “apologize” and contribute around \$8.3 million to set up a foundation under the South Korean government to support survivors.⁵¹ The move proved overwhelmingly unpopular with the South Korean public.⁵² Although South Korea sought to revise the deal, Japan considered the accord as final.⁵³ The Japan-ROK agreement is an example of how comfort women are still used as a tool to satisfy the political ambitions of the two governments.

B. The Establishment of Tribunals and Initiatives on Behalf of Comfort Women

These treaties, various tribunals and initiatives established to serve the interests of comfort women also failed. In December 2000, the Women’s International War Crimes Tribunal (“the Women’s Tribunal”) convened in Tokyo to hear cases of former comfort women.⁵⁴ Primarily comprised of legal scholars, the Women’s Tribunal heard testimony and gathered extensive documentary evidence.⁵⁵ Applying international law, the judges issued a non-binding judgment that attributed legal responsibility to the state of Japan and a list of recommendations for reparations.⁵⁶ Due to the scholarly repute of the judges⁵⁷ who issued it, the opinion could be deemed to bear significant persuasive authority in international law. However, the Women’s Tribunal also serves as a reminder to the failures of authorized institutions of international law, such as the ICC, to hear comfort women cases.

⁴⁷ *Id.* at 47.

⁴⁸ *Id.* at 49.

⁴⁹ Mary De Ming Fan, *The Fallacy of the Sovereign Prerogative to Set De Minimis Liability Rules for Sexual Slavery*, 27 *YALE J. INT’L L.* 395, 406 (2002).

⁵⁰ *Announcement by Foreign Ministers of Japan and the Republic of Korea at the Joint Press Occasion*, MINISTRY OF FOREIGN AFF. OF JAPAN (Dec. 28, 2016), https://www.mofa.go.jp/a_o/na/kr/page4e_000364.html.

⁵¹ Kwanwoo Jun & Alexander Martin, *Japan, South Korea Agree to Aid for ‘Comfort Women’*, WALL ST. J. (last update Dec. 28, 2015 1:45 PM), <https://www.wsj.com/articles/japan-south-korea-reach-comfort-women-agreement-1451286347>.

⁵² *See id.*

⁵³ *See* Joyce Lee & Hyonhee Shin, *South Korea Says ‘Comfort Women’ Deal Flawed, But Japan Warns Against Change*, REUTERS (Dec. 27, 2017), <https://www.reuters.com/article/us-southkorea-japan-comfortwomen/south-korea-says-comfort-women-deal-flawed-but-japan-warns-against-change-idUSKBNIEM056>.

⁵⁴ Christine Levy, *The Women’s International War Crimes Tribunal, Tokyo 2000: A Feminist Response to Revisionism*, 39 *CLIO* 125 (2014).

⁵⁵ *Id.* at 135.

⁵⁶ Indai Sajor, *Put Wrong on the Scaffold and Truth on the Throne: The Women’s International War Crimes Tribunal* (Nov. 2004), pp. 7–8, <https://www.oise.utoronto.ca/cwse/UserFiles/File/PutWrongontheScaffold.pdf>.

⁵⁷ *See* Levy, *supra* note 54, at 132.

Additionally, the Asian Women's Fund ("the Fund") represented Japan's first concrete attempt to reconcile with surviving comfort women between 1995 and 2002.⁵⁸ The Fund was created to pay survivors "atonement money," gather information from historic records, institute welfare programs for survivors, and develop activities addressing violence against women.⁵⁹ However, the Fund was widely criticized. South Korea criticized the Fund as an attempt to buy comfort women's silence and end negative publicity for the state.⁶⁰ The failure of the Fund speaks to the bitter feelings and distrust between comfort women and the Japanese government that has still not been resolved over seven decades later.

C. The United Nations and Sexual Exploitation Initiatives

Over the last two decades, there has been a growing expectation that the international community—especially the United Nations ("U.N.")—should react and intervene to protect civilians when there is a risk of massive levels of violence against civilians.⁶¹ This was manifested in the U.N. Security Council's authorization of the use of force to protect civilians, and in the adopted principle of the Responsibility to Protect ("R2P") by the General Assembly.⁶² With the emerging protection norm, there is a greater emphasis on civilian suffering in armed conflict. While civilian victimization has long been conceptualized as deadly violence against civilians, there has been increasing attention paid to sexual exploitation.

The United Nations takes a three-pronged approach in its mission to prevent sexual exploitation and abuse: (1) prevention, (2) response, and (3) victim assistance.⁶³ The United Nations seeks to enforce the three-pronged approach through mechanisms ranging from trust funds to victim advocacy programs.⁶⁴ Trust funds are one of many U.N. initiatives designed to financially assist survivors of sexual exploitation.⁶⁵ For example, in 2019, The Trust Fund in Support of Victims of Sexual Exploitation and Abuse raised \$2 million since 2016 to support victims of sexual violence.⁶⁶ Over 3,000 victims of sexual abuse "have been given support to recover from or help put an end to the scourge of sexual exploitation or abuse."⁶⁷

⁵⁸ Jamie S. Jeffords, *Will Japan Face Its Past? The Struggle for Justice for Former Comfort Women*, 2 REGENT J. INT'L L. 145, 155 (2004).

⁵⁹ *Id.*

⁶⁰ See Chris Hogg, *Japan's Divisive "Comfort Women" Fund*, BBC NEWS (Apr. 10, 2007, 13:20 GMT), <http://news.bbc.co.uk/2/hi/asia-pacific/6530197.stm>.

⁶¹ Roland Paris, *The 'Responsibility to Protect' and the Structural Problems of Preventive Humanitarian Intervention*, 21 INT'L PEACEKEEPING 569, 569 (2014), <https://www.tandfonline.com/doi/full/10.1080/13533312.2014.963322>.

⁶² *Id.*

⁶³ *Preventing Sexual Exploitation and Abuse*, UNITED NATIONS (2020), <https://www.un.org/preventing-sexual-exploitation-and-abuse/>.

⁶⁴ *Id.*

⁶⁵ See *Trust Fund in Support of Victims of Sexual Exploitation and Abuse*, UNITED NATIONS (2020), <https://www.un.org/preventing-sexual-exploitation-and-abuse/content/trust-fund>; see also U.N. Secretary-General, *Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach*, ¶ 34, U.N. DOC A/71/818 (Feb. 28, 2017), https://peacekeeping.un.org/sites/default/files/sg_report_a_71_818_special_measures_for_protection_from_sexual_exploitation_and_abuse.pdf.

⁶⁶ *Righting a Wrong: U.N. Fund Helps Thousands of Sex Abuse Survivors Rebuild Their Lives*, U.N. NEWS (June 21, 2019), <https://news.un.org/en/story/2019/06/1041051>.

⁶⁷ *Id.*

In addition to trust funds, victim advocacy programs are another way in which the United Nations supports victims of sexual exploitation. Furthermore, in his report, *Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach*, the U.N. Secretary-General pledged that the U.N. would put the “rights and dignity of victims first.”⁶⁸ For example, in South Sudan, the U.N. provided legal, medical, and psychological support to victims of sexual exploitation.⁶⁹ One way they did this was by holding forums where U.N. peace officers trained victims of sexual assault on how to deter unwanted advances.⁷⁰ The focus of victim advocacy programs was on restorative justice rather than on retributive justice.

However, U.N. peacekeeping operations are imperfect—the very officers sent to provide relief to the victims were also the perpetrators. For example, The Hill recounted the story of a Haitian woman who was offered a “lift” by a U.N. peacekeeping officer and then raped.⁷¹ Such stories have become common.⁷² The fallout of U.N. peacekeeping operations due to sexual abuse allegations against its peace officers calls into question their effectiveness and the strength of their protocols.

III. Suggestions for Enforcement Mechanisms

Even though IHL has evolved considerably since World War II, particularly with the advent of international criminal laws that hold perpetrators accountable for sexually violent acts, international norms are still poorly enforced and have failed to properly address crimes of sexual violence during wartime. In response, this section suggests: (1) adopting amendments to core international laws; (2) enacting more treaties to give states the incentive to resolve crimes of sexual violence, and (3) identifying mechanisms to hold both individuals and states accountable.

A. Amendments Are Necessary for Better Enforcement

Although the prohibition of sexual violence during wartime is codified in IHL, the Geneva Conventions are the only major laws in IHL that explicitly proscribe it. This section examines how the absence of sexual violence under the list of grave breaches of the Geneva Conventions and ambiguous language pertaining to sexually violent acts create obstacles to the proper enforcement of laws prohibiting sexual violence against women.

⁶⁸ U.N. Secretary-General, *Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach*, § 3, U.N. DOC A/71/818 (Feb. 28, 2017), https://peacekeeping.un.org/sites/default/files/sg_report_a_71_818_special_measures_for_protection_from_sexual_exploitation_and_abuse.pdf.

⁶⁹ Office of the Victim’s Rights Advocate, *Prioritizing the Rights and Dignity of Victims*, UNITED NATIONS 5 (2018), https://www.un.org/preventing-sexual-exploitation-and-abuse/sites/www.un.org.preventing-sexual-exploitation-and-abuse/files/ovra_annual_report_2018.docx_feb_19_final_with_signature.pdf.

⁷⁰ *See id.*

⁷¹ Skye Wheeler, *UN Peacekeeping Has a Sexual Abuse Problem*, THE HILL (Jan. 11, 2020, 3:00 PM), <https://thehill.com/opinion/international/477823-un-peacekeeping-has-a-sexual-abuse-problem>.

⁷² Krista Larson & Paisley Dodds, *UN Peacekeepers in Congo Hold Record for Rape, Sex Abuse*, ASSOCIATED PRESS (Sept. 23, 2017), <https://apnews.com/69e56ab46cab400f9f4b3753bd79c930>; Agence France-Presse; *UN Peacekeepers Accused of Child Rape in South Sudan*, THE GUARDIAN (Apr. 23, 2018, 11:04 PM), <https://www.theguardian.com/world/2018/apr/24/un-peacekeepers-accused-of-child-in-south-sudan>; Michael Brice-Saddler, *U.N. Peacekeepers Fathered, Then Abandoned, Hundreds of Children in Haiti, Report Says*, WASH. POST (Dec. 18, 2019, 9:42 PM), <https://www.washingtonpost.com/world/2019/12/18/un-peacekeepers-fathered-then-abandoned-hundreds-children-haiti-report-says/>.

1. Include Sexual Crimes in the List of Grave Breaches

The Geneva Conventions and Additional Protocol I allow states to impose criminal liability on perpetrators for crimes listed as “grave breaches.”⁷³ However, rape and other sexually violent crimes are not explicitly listed within the category of grave breaches.⁷⁴ This absence has created controversy and confusion about whether sexual offenses are war crimes and whether such offenses are justiciable under the grave breaches provisions.⁷⁵

Despite both Nazi Germany’s and Japan’s practice of forced prostitution and rape during World War II, for example, the International Military Tribunal overlooked the crime of rape.⁷⁶ Rape, however, is specifically prohibited under Article 27 of the Fourth Geneva Convention.⁷⁷ Additionally, Article 8(2)(b)(xxii) of the Rome Statute criminalizes “any other forms of sexual violence also constituting a grave breach of the Geneva Conventions.”⁷⁸ Although this residual clause appears to acknowledge sexual crimes as a grave breach, the language nevertheless permits a contrary reading of “any other form of sexual violence.”⁷⁹

The International Committee of the Red Cross (“ICRC”) has expressed in its Aide-Mémoire⁸⁰ that acts of sexual violence could fall under the language of “willfully causing great suffering or serious injury to body or health” or “torture or inhuman treatment” and thereby constitute grave breaches.⁸¹ The Aide-Mémoire compelled the ICRC to prioritize informing all parties to armed conflicts that rape, under Article 27, of the Fourth Geneva Convention is indeed a serious violation of IHL and could amount to a grave breach.⁸²

Therefore, one key way to improve enforcement of Article 27 is by including acts of sexual violence in the list of grave breaches. The absence of sexual violence in the list makes it difficult to hold perpetrators accountable for committing such egregious acts, and to fully engage international criminal courts in hearing cases on wartime sexual violence.

2. Clarify Ambiguities in the Geneva and the Hague Conventions

Another way in which international laws governing wartime sexual violence can be improved is by clarifying existing language in the Geneva Conventions and the Hague Conventions by making them more explicit and targeted towards acts of sexual violence. For

⁷³ Marko Divac Oberg, *The Absorption of Grave Breaches into War Crimes Law*, 91 INT’L REV. OF THE RED CROSS 163, 167 (2009), <https://www.icrc.org/en/doc/assets/files/other/irrc-873-divac-oberg.pdf>.

⁷⁴ INT’L COMM. OF THE RED CROSS, *Grave Breaches Specified in the 1949 Geneva Conventions and in Additional Protocol I of 1977* (Jan. 31, 1998), <https://www.icrc.org/en/doc/resources/documents/misc/57jp2a.htm>.

⁷⁵ *See id.*

⁷⁶ In the proceedings before the Tokyo Tribunal, by contrast, evidence of rape and “violence against women” was considered as one of the factors to support convictions of war criminals. Levy, *supra* note 54, at 130.

⁷⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁷⁸ Rome Statute of the International Criminal Court, arts. 7–8, Jul. 17, 1998, 2187 U.N.T.S. 90, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> [hereinafter Rome Statute].

⁷⁹ *Id.*

⁸⁰ The ICRC issued the Aide-Mémoire in 1992 to clarify the status of rape under IHL, stating that the grave breach regime in Article 147 of the Fourth Geneva Conventions, “obviously covered not only rape but also any other attack on a woman’s dignity.” Judith Gardam, *Women, Human Rights and International Humanitarian Law*, 80 INT’L REV. OF THE RED CROSS 398, 429 (1998).

⁸¹ Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT’L L. 424, 426 (1993).

⁸² Karima Bennoune, *Do We Need New International Law to Protect Women in Armed Conflict?*, 38 CASE W. RES. J. OF INT’L L. 363, 386 (2007).

example, although Article 27 prohibits “rape, enforced prostitution, or any form of indecent assault,”⁸³ “any form of indecent assault” is too broad. Like the Rome Statute, Article 27 would benefit from being more explicit about what other forms of indecent assault are prohibited, such as “enforced sterilization” or “forced pregnancy.”⁸⁴ Article 27 also undercuts the severity of these crimes by referring to acts of sexual violence as assaults against “honour,”⁸⁵ without defining “honour.” Instead, like the Rome Statute, Article 27 should explicitly include acts of sexual violence as war crimes and crimes against humanity.⁸⁶ Additionally, Article 4 of AP I prohibits “outrages upon personal dignity . . .”⁸⁷ But, like Article 27 of the Fourth Geneva Convention, the word “outrages” is ambiguous in that it does not clarify which acts constitute “outrages” against a woman’s “personal dignity.”⁸⁸

Similar to the Geneva Conventions, Article 46 of the Hague Conventions states that “family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.”⁸⁹ Article 46 tries to do too many things at once, in that it protects a vast array of subjects, including families, a person’s honor, private property, and religious beliefs. This breadth is unfortunate, considering Article 46 is the only provision in the Hague Conventions that alludes to the protection of women during wartime, and it would benefit from specificity.

In other words, both the Geneva Conventions and the Hague Conventions would benefit from being more explicit about *which* acts of sexual violence they are trying to protect against, and *who* they are trying to protect, rather than implying it through ambiguous language.

3. Interplay Between IHL and International Criminal Law

The recent development of IHL and international criminal law has witnessed considerable progress in the investigation, prosecution, and adjudication of the crime of sexual violence. The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) became the main tribunals responsible for the contemporary evolution of jurisprudence on acts of wartime sexual violence.⁹⁰

In 1998, the ICTR issued a landmark decision convicting Jean-Paul Akeyesu, a Hutu tribe member, of the crime of genocide based on his and his subordinates’ acts of rape

⁸³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 77, at art. 27.

⁸⁴ See, e.g., Rome Statute, *supra* note 78, at art. 7(1)(g).

⁸⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 77, at art. 27.

⁸⁶ Rome Statute, *supra* note 78, arts. 7–8.

⁸⁷ Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4, ¶ 2(e), June 8, 1977, 1125 U.N.T.S. 609.

⁸⁸ *Id.*

⁸⁹ Convention (IV) respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 46, Oct. 18, 1907, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E719F8F0283E98E3C12563CD005168BD>.

⁹⁰ *Kosovo Backgrounder: Sexual Violence as International Crime*, HUM. RTS. WATCH (May 10, 1999), <https://www.hrw.org/legacy/backgrounder/eca/kos0510.htm>.

and sexual violence.⁹¹ This marked the first time in ICTR jurisprudence where acts of sexual violence were equated with crimes against humanity and genocide.⁹²

The *Akeyasu* decision created a ripple effect across international legal jurisprudence. *Akeyasu* was one of many cases decided by an ad hoc tribunal, paving the way for future prosecution in the ICC. For example, the *Akeyasu* decision prompted the Rome Statute to expand the definition of sexual violence to include “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, [and] enforced sterilization.”⁹³ Additionally, *Akeyasu* enabled other international tribunals to use its precedent in cases dealing with wartime sexual violence.⁹⁴

This pattern, however, has received criticism from scholars. One view suggests that spotlighting the offense of rape deflected from other gender-based discrimination violations.⁹⁵ Furthermore, Gardam and Jarvis note that recent decisions by the ICTR and the ICTY are premised on women as “victims,” with little effort made to challenge the gendered aspects of IHL, such as its conception of collateral damage and military necessity.⁹⁶

Akeyasu is an example where justice was provided for victims of sexual violence by equating such acts with genocide. This reasoning can apply to comfort women as well. In addition to acts of sexual violence, comfort women were also brutally massacred for refusing services to Japanese soldiers and running away.⁹⁷ However, *Akeyasu* was a case that covered acts that happened during a non-international armed conflict, while the comfort women issue happened during an international armed conflict.⁹⁸ Regardless, *Akeyasu* is important precedent that can be used for future cases of sexual violence.

B. Enact More Treaties on Behalf of Comfort Women

More treaties that punish and demand reparations for acts of wartime sexual violence against women are necessary. The intent of the drafters when drafting a treaty bears significance. As mentioned, Article 27 of the Fourth Geneva Convention is significant because it is the only provision of the four Geneva Conventions that prohibits acts of sexual

⁹¹ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998).

⁹² *When Rape Becomes Genocide*, N.Y. TIMES (Sept. 5, 1998), <https://www.nytimes.com/1998/09/05/opinion/when-rape-becomes-genocide.html>.

⁹³ See Rome Statute, *supra* note 78, at arts. 7(1)(g), 8(2)(b)(xxii); see also Valerie Oosterveld, *Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, 12 NEW ENG. J. INT’L & COMP. LAW 119, 123-24 (2005), https://www.peacewomen.org/sites/default/files/itrc_oosterveld_2005_0.pdf.

⁹⁴ *Kosovo Background: Sexual Violence as International Crime*, *supra* note 90.

⁹⁵ JUDITH G. GARDAM & MICHELLE J. JARVIS, WOMEN, ARMED CONFLICT, AND INTERNATIONAL LAW 760 (2001).

⁹⁶ *Id.*

⁹⁷ *Video Evidence Surfaces Showing Korean Comfort Women Were Massacred by Japanese Military*, HANKYOREH (Feb. 28, 2018, 17:10 KST), http://english.hani.co.kr/arti/english_edition/e_international/834094.html.

⁹⁸ Common Article 2 of the Geneva Conventions state that the rules of international armed conflict apply to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties” Comfort women were abused during World War II, so Japan’s use of comfort women falls under the rules of international armed conflict. *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, INT’L COMM. OF THE RED CROSS (2008), <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>.

violence during wartime.⁹⁹ According to the commentary for Article 27, it was drawn from the proposals of the International Abolitionist Federation and the International Council of Women. Although the drafters should have had comfort women in mind, the commentary reveals that the addition of “rape, enforced prostitution, or any form of indecent assault” was late.¹⁰⁰ In other words, specifying what acts constituted sexual violence was not an initial undertaking. Better enforcement mechanisms should begin at the drafting process.

Treaties can also be misinterpreted. In *Hwang v. Japan*, the D.C. Circuit used Article 14 of the San Francisco Peace Treaty¹⁰¹ to hold that Japan was not liable for its wartime atrocities against comfort women during World War II.¹⁰² This was not how the provision was intended. Article 14 of the Peace Treaty was intended to outline the ways victims of Japan’s wartime atrocities could receive reparations from Japan.¹⁰³ However, Article 14(b)—the provision that the court relied on—includes language that may be interpreted as waiving claims of wartime reparations by the Allied Powers. Article 14, in its entirety, deals with “property” claims.¹⁰⁴ Yet, the court interpreted Article 14 as excusing Japan from paying reparations to comfort women, who were individuals.¹⁰⁵ *Hwang* serves as an example of the importance of making the intent of each provision of a treaty clear at the outset to avoid misunderstandings—and injustice.

Finally, more agreements like the Japan-ROK Agreement are necessary, but with additional precautions. The Japan-ROK Agreement is an example of a great idea gone awry due to faulty intentions. When it passed, the comfort women were outraged that the Korean government never consulted them in the drafting process.¹⁰⁶ It seems that the agreement was drafted for political gain by both the Korean and Japanese governments. While the agreement brought two countries together to redress human rights abuses, the actual survivors were not at the forefront of the discussion. The result has been a prolonging of the dispute, rather than a resolution.

C. Hold the Perpetrators Accountable

States have a moral and legal responsibility to hold perpetrators accountable for sexually violent acts against women.¹⁰⁷ This section analyzes how the international system

⁹⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

¹⁰⁰ Anna Crowe, “All the Regard Due to Their Sex”: Women in the Geneva Conventions of 1949, HRP 16-001 5 (2016), https://hrp.law.harvard.edu/wp-content/uploads/2016/12/Anna-Crowe_HRP-16_001.pdf.

¹⁰¹ The original intent of the San Francisco Peace Treaty was to resolve all remaining claims between the Allied Powers and Japan based on Japan’s wartime atrocities, including the use of comfort women. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

¹⁰² *Hwang Geum Joo v. Japan*, 413 F.3d 45, 49 (D.C. Cir. 2005).

¹⁰³ Treaty of Peace with Japan, *supra* note 101, art. 14.

¹⁰⁴ *Id.*

¹⁰⁵ See *Hwang Geum Joo*, 413 F.3d at 49. (stating that the D.C. Circuit had stated in a previous opinion that article 14 of the San Francisco Peace Treaty “expressly waives . . . ‘all claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war.’”).

¹⁰⁶ See Sangmi Cha, *South Korea’s Top Court Dismisses “Comfort Women” Petition Against Deal With Japan*, REUTERS (Dec. 27, 2019), <https://www.reuters.com/article/us-southkorea-japan-comfortwomen/south-koreas-top-court-dismisses-comfort-women-petition-against-deal-with-japan-idUSKBN1YV0J7>.

¹⁰⁷ See Nathalie I. Johnson, *Justice for Comfort Women: Will the Alien Tort Claims Act Bring Them the Remedies They Seek*, 20 ST. INT’L L. REV. 253, 262 (2001), <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1535&context=psilr>.

has failed to hold the abusers of comfort women accountable at both the individual and the state levels. Just as the Rome Statute cannot aid comfort women because it does not apply retroactively, international tribunals that have pioneered important precedent against sexual violence still cannot hear the cases of these women. This section suggests how the international system can hold the state of Japan accountable for perpetrating the comfort women system.

1. Hold Individual Perpetrators Accountable

The ICTR and the ICTY pioneered holding perpetrators accountable for acts of sexual violence under international law. Although comfort women have not been represented in these tribunals, an equivalent tribunal would serve as an ideal forum for them.

Using the Geneva Conventions and the ICTY statute,¹⁰⁸ the ICTY tribunal in *Prosecutor v. Delalic* held that rape was a form of torture.¹⁰⁹ The tribunal first acknowledged that the Geneva Conventions prohibited rape and sexual violence, citing to Article 27 of the Fourth Geneva Convention, Article 76 of Additional Protocol I, and Article 4 of Additional Protocol II.¹¹⁰ The tribunal then analyzed the definition of “rape,” as defined in *Akeyasu*,¹¹¹ and applied the ICTY statute to equate rape as a “grave breach” under the categories of “torture or inhuman treatment” and “willfully causing great suffering or serious injury to body or health,” as stated in the Geneva Conventions.¹¹²

According to the standards set by the ICTR and the ICTY, the sexual violence committed against the comfort women by the Japanese government constitute crimes against humanity and war crimes. Furthermore, by using IHL and international criminal law, a strong case can now be made that comfort women were subjected to rape, enforced prostitution, and sexual slavery. Another strong case can be made under the Rome Statute because Article 8(a)¹¹³ would apply to make the case that acts of sexual violence inflicted on the comfort women were war crimes.

Sadly, such outcomes are implausible right now. For one, the Rome Statute is not retroactive and, because it was enacted in 2002, the ICC lacks jurisdiction to even hear comfort women cases, which occurred during World War II.¹¹⁴ The lack of historical documentation of comfort women and constant denials by the Japanese government further stymies a firm, just resolution.

¹⁰⁸ Statute of the ICTY, U.N. Doc. S/25704 (1993), https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

¹⁰⁹ *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, ¶ 496 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 16, 1998).

¹¹⁰ *Id.* at ¶ 476.

¹¹¹ *Id.* at ¶ 478.

¹¹² The grave breaches of the Geneva Conventions were codified in article 2 of the Statute of the ICTY. Statute of the ICTY, U.N. Doc. S/25704 (1993) arts. 2(b)-(c); *Delalić*, Case No. IT-96-21-T, ¶ 506-44.

¹¹³ Article 8(a) of the Rome Statute governs war crimes in an IAC context, whereas article 8(b) governs war crimes in a NIAC context. Rome Statute, art. 8(2), Jul. 17, 1998, 2187 U.N.T.S. 90.

¹¹⁴ Rome Statute, *supra* note 27, art. 24.

Another way to bring individual perpetrators accountable is through transitional justice mechanisms,¹¹⁵ namely truth commissions.¹¹⁶ For example, the Truth Commission on Forced Mobilization under Japanese Imperialism was formed under President Roh Moo-hyun in 2006 in South Korea.¹¹⁷ The commission failed to do the comfort women any justice, however, by formally clearing 83 of the 146 convicted Korean war criminals because they were deemed to be “victims of Japanese imperialism and forced mobilization.”¹¹⁸ According to Michael Breen, author of *The New Korean*, the reason for the commission’s decision to clear the 83 war criminals was because the commission only “considered people to be collaborators . . . if they were in certain positions or over a certain rank.”¹¹⁹ Ironically, the Truth Commission treated the war criminals as the victims, rather than the comfort women. This outcome betrays the cruel reality that comfort women do not have a place in either international courts, tribunals, U.S. courts, or transitional justice mechanisms.

2. Hold the Japanese State Accountable

It is even more difficult to hold a state accountable for wartime sexual violence because one must situate acts of sexual violence within the legitimate sphere of state activity and the official capacity of a state.¹²⁰ Nevertheless, there is evidence that the Japanese government strictly regulated comfort stations and that the stations were operated by the military.¹²¹ The military determined each comfort station’s rules, ranging from hygiene, hours of operation, and prohibition of the use of alcohol.¹²² Despite such regulations, instances of sexually transmitted diseases, violence towards the women, and alcohol use reveal that the rules were poorly enforced.¹²³

Many women perished in comfort stations.¹²⁴ If the brutality of their work did not kill them, the violence of war and the anger of soldiers did. Even more women died at the end of the war when Japanese soldiers forced the comfort women to commit suicide or else massacred them to hide their own crimes.¹²⁵ Those who survived were forced to live under

¹¹⁵ Transitional justice is rooted in accountability and redress for victims in non-judicial forums for crimes against humanity, genocide, and mass atrocities against individuals or groups of individuals. *What is Transitional Justice?*, INT’L CENT. FOR TRANSITIONAL JUST. (2009), <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>.

¹¹⁶ Truth commissions are non-judicial bodies established to determine facts, root causes, and societal consequences of past human rights violations. *See Truth and Reconciliation Commissions*, INT’L JUST. RESOURCE CTR. (last visited Nov. 7, 2020), <https://ijrcenter.org/cases-before-national-courts/truth-and-reconciliation-commissions/>.

¹¹⁷ MICHAEL BREEN, *THE NEW KOREANS: THE STORY OF A NATION* 166 (2017).

¹¹⁸ *Id.* at 165.

¹¹⁹ *Id.*

¹²⁰ *See* Sompong Sucharitkul, *State Responsibility and International Liability Under International Law*, 18 LOY. L.A. INT’L & COMP. L. J. 821, 821–22 (1996).

¹²¹ *The Life in Comfort Stations*, THE COMFORT WOMEN ISSUE & THE ASIAN WOMEN’S FUND (last visited Nov. 7, 2020), <http://www.awf.or.jp/e1/facts-12.html>.

¹²² U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, Report on the Mission to the Democratic People’s Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime, U.N. Doc. E/CN.4/1996/53/Add.1 (Jan. 4, 1996) (prepared by Radhika Coomaraswamy) [hereinafter Coomaraswamy Report], <http://hrlibrary.umn.edu/commission/country52/53-add1.htm>.

¹²³ *Id.*

¹²⁴ GEORGE HICKS, *THE COMFORT WOMEN: JAPAN’S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR* 20 (1994).

¹²⁵ *Id.*

the brutal societal stigma of having served Japanese soldiers, as well as suffer through the unending physical and psychological trauma of having survived such abuse. That both the Japanese government and the military played an extensive role in regulating comfort stations suggests that the comfort women were an integrated part of the Japanese military.

Therefore, it can be argued that one of the most serious offenses Japan committed was the violation of *jus cogens* norms. *Jus cogens* are peremptory norms of international law that are “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹²⁶ According to international laws, rape and sexual slavery can now be considered torture, which are *jus cogens* violations.¹²⁷ Furthermore, international law also recognizes sexual violence as a war crime itself.¹²⁸ With the exception of Japan’s denial, there is widespread consensus that Japan’s use of comfort women and comfort stations was systemized sexual slavery—another violation of *jus cogens* norms.¹²⁹ In denying legal responsibility, Japan contends that irrespective of whether they violated international laws, surviving comfort women cannot pursue legal remedies because international laws only apply to States and not to individuals.¹³⁰

There are two existing institutions that may provide a possible framework for punishing states: The International Court of Justice (“ICJ”) and the U.N. Security Council.¹³¹ As a judicial organ of the United Nations, the ICJ’s mandate is to make judgments on disputes between states and offer advisory opinions as requested.¹³² When a judgment is passed, states are obligated to abide by it because they signed onto the treaty that created the Court.¹³³ Although the extent to which the ICJ ever renders judgments amounting to actual punishment is questionable, it is promising that the court has ruled that states need to pay reparations in certain cases.¹³⁴ The ICJ also takes a long time to deliberate on its cases, having made relatively few judgments in its half century of existence.¹³⁵ The Security Council also functions as a quasi-judicial institution that renders judgments and imposes punishments, where appropriate.¹³⁶ Although each institution has its shortcomings, the two institutions

¹²⁶ Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

¹²⁷ Patricia Viseur Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 CASE W. RES. J. INT’L L. 287, 294 (2002).

¹²⁸ See Rome Statute, *supra* note 27, art. 8.

¹²⁹ Yayori Matsui, *Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery*, GLOB. ACTION ON AGING (Dec. 12, 2000), <http://globalag.igc.org/elderrights/world/women.htm>.

¹³⁰ *Lawsuits Brought Against Japan by Women of Asian Nations other than Korea, including the Netherlands*, COLUM. L. SCH. (2021), <https://kls.law.columbia.edu/content/lawsuits-brought-against-japan-women-asian-nations-other-korea-including-netherlands>.

¹³¹ *In Hindsight: The Security Council and the International Court of Justice*, SEC. COUNCIL REP. (Dec. 28, 2016), https://www.securitycouncilreport.org/monthly-forecast/2017-01/in_hindsight_the_security_council_and_the_international_court_of_justice.php. [hereinafter *In Hindsight*].

¹³² *Id.*

¹³³ *See id.*

¹³⁴ *See Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Judgement, 2018 I.C.J. 15, ¶ 18 (Feb. 2)

¹³⁵ Meetings Coverage, General Assembly, Amid Global Trust Deficit, International Court of Justice Crucial to Safeguarding Rule of Law, Speakers Say as General Assembly Considers Its Annual Report, U.N. Meetings Coverage GA/12207 (Oct. 30, 2019), <https://www.un.org/press/en/2019/ga12207.doc.htm>.

¹³⁶ *Role of the Security Council*, U.N. PEACE KEEPING (last visited Nov. 7, 2020), <https://peacekeeping.un.org/en/role-of-security-council>.

could work together to hold states accountable for their actions.¹³⁷ For the benefit of former comfort women, one solution would be to create a prosecutorial office for the ICJ, like the current model of the ICC.¹³⁸ The prosecutor either could initiate cases before the ICJ or bring them at the request of the Security Council. Once the Court has made a judgment, the court can expect the Security Council to enforce that judgment.

To illustrate, consider sexual violence as a crime against humanity. While crimes against humanity are often directed toward individual perpetrators, the experiences of comfort women shows that crimes against humanity can be committed by a state. In this sense, the use of comfort women involved state complicity.¹³⁹ If crimes against humanity can be committed by a state, supported by state resources, then Japan's use of comfort women ought to be labeled a state crime. The sexual violence committed against comfort women could then be brought before the ICJ. If the ICJ finds Japan guilty, the Security Council could then enforce punishment.

The next question is: what punishment would be appropriate for the crime? Retributive justice is the principle that "those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment[.]"¹⁴⁰ A state that commits crimes against humanity by means of rape and sexual slavery must accept responsibility and work to correct the wrongs of the past.¹⁴¹ In this case, Japan must formally acknowledge its abuse of comfort women, and admit it was dishonest to the international community about what really happened. Monetary reparations, such as those from the Japan-ROK Agreement, and half-hearted apologies¹⁴² from the Japanese government failed to provide full, restorative justice for surviving comfort women. Therefore, different mechanisms, geared toward holding the Japanese government accountable for its crimes against comfort women is necessary.

CONCLUSION

Since World War II, international law has evolved in its treatment of acts of sexual violence towards women during wartime. The Geneva Conventions and Additional Protocols, as well as the advent of international criminal law, have changed the legal treatment of sexual violence during wartime. However, there remain significant obstacles in using international law to its full potential. The story of comfort women demonstrates the need for better

¹³⁷ *In Hindsight*, *supra* note 131.

¹³⁸ According to the International Criminal Court website, "The Office of the Prosecutor (OTP) is an independent organ of the Court. It is responsible for examining situations under the jurisdiction of the Court where genocide, crimes against humanity, war crimes and aggression appear to have been committed, and carrying out investigations and prosecutions against the individuals who are allegedly most responsible for those crimes." *See Office of the Prosecutor*, INT'L CRIM. CT. (last visited Nov. 7, 2020), <https://www.icc-cpi.int/about/otp>.

¹³⁹ *The Life in Comfort Stations*, *supra* note 121.

¹⁴⁰ *Retributive Justice*, STAN. ENCYCLOPEDIA OF PHIL. § 3.6 (June 18, 2014), <https://plato.stanford.edu/entries/justice-retributive/>.

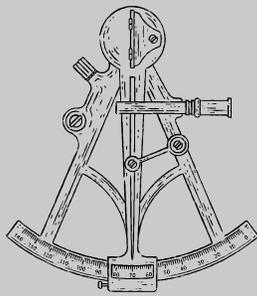
¹⁴¹ *See Johnson*, *supra* note 112, at 262.

¹⁴² Since World War II, Japan released a series of statement "apologizing" for its wartime atrocities to the Allied Powers during World War II. However, the apologies have been interpreted by the international community as insincere and dodging responsibility. David Tolbert, *Japan's Apology to South Korea Shows What Public Apologies Should (Not) Do*, HUFFINGTON POST (Dec. 6, 2017, 10:59 PM), https://www.huffpost.com/entry/japans-apology-to-south-k_b_9111566?guccounter=1.

enforcement mechanisms in international law. The non-retroactive nature of the Rome Statute and the absence of sexual violence as a grave breach make it impossible for comfort women to bring their cases to the ICC. This is unfortunate given that the Rome Statute explicitly criminalizes acts of sexual violence as crimes against humanity and war crimes. The ambiguity in the language of provisions in the Geneva Conventions and Additional Protocols further impede justice

Better enforcement mechanisms are possible. Clarifying the provisions of the Geneva Conventions and finding ways to use IHL and international criminal law together are some ways to improve enforcement. Additionally, continued efforts towards enacting more treaties drafted with victims at the forefront will also be a significant step forward in improving enforcement. Finally, international law will have meaning when the perpetrators of sexual violence against so-called comfort women are held accountable for their crimes. The ICTR and the ICTY have carved important precedent in holding individual perpetrators accountable. Holding states accountable is much harder, but not impossible, given the possibility of using the ICJ and the U.N. Security Council together.





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The Green Veneer of Renewable Energy in the European Union

Caragh McMaster

Abstract. In 2018, the European Union classified wood as a renewable energy and low-carbon biomass fuel source in its most recent amendment to the Renewable Energy Directive (RED II). While well-intentioned, RED II essentially created an incentive for member states to clear cut forests for fuel while still meeting their renewable energy targets. In March 2019, plaintiffs from six different countries, backed by the Center for Climate Integrity, filed suit challenging the classification of forest biomass as an acceptable renewable fuel source. Grounded in Articles 32 and 57 of the EU Charter on Fundamental Rights, plaintiffs contended this amendment violates their fundamental rights and freedoms. The European General Court denied standing to the six plaintiffs in May 2020 and plaintiffs appealed two months later. We wait for a decision on appeal. But, if individual governments regulate incentives and subsidies for wind and solar energy, while taxing and imposing fees on wood harvest, the effects of RED II potentially could be curtailed without litigation.

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I am thankful for Professor Joseph MacDougald for encouraging his environmental law students to always think critically. I am most grateful for my nephews, Jack and Henry, for inspiring me every day to consider how our behavior affects the next generation's future.

TABLE OF CONTENTS

Introduction	24
I. Background	25
II. Overview of Current Legislation Surrounding EU Renewable Energy	27
III. 2019 Renewable Energy Directive	28
IV. The Scientists' Appeal	29
V. Potential Effects	31
Solutions and Conclusion	35

INTRODUCTION

The European Union (EU) has historically been at the forefront of environmental change.¹ Energy in the EU produced from renewable resources has risen at a rapid rate. In 2004, 8.5% of the EU's grid was powered by renewables.² In just twelve years, the share of renewable energy production grew to 17% in 2016.³ The goal for 2020 was that 20% of energy consumed will come from renewables and at least 27% by 2030.⁴

To reach these goals, the EU classified wood as a renewable energy and low-carbon biomass fuel source in its most recent amendment to the Renewable Energy Directive (RED II) in 2018.⁵ The EU did so despite a heavily publicized outcry from climate change scientists around the world.⁶ The goal of RED II is to reach a higher renewable energy target: to double Europe's 2015 renewable energy levels by 2030.⁷ This goal was set with a 2020 target to be on track for 2030.⁸ At first glance, RED II seems like a gallant goal for the EU, however, its execution could threaten our climate and have irreversible consequences.

The Parliament of the European Union voted to classify wood as a low-carbon fuel to achieve the 2030 goal against the written advice of almost 800 scientists that this policy would accelerate climate change.⁹ Scientists argued that the result could consume quantities of wood equal to all of Europe's wood harvests, greatly increase carbon in the air for decades, and set a dangerous example around the world.¹⁰

For decades, wood process wastes have supplied the bulk of Europe's forest-based bioenergy.¹¹ While burning wood process wastes emits carbon dioxide, the fast decomposition of the wood also does, so it has not been a pressing problem.¹² Now, with the EU's Renewable Energy Directive, wood can be harvested to burn *directly* for

¹ *Share of Renewables in Energy Consumption in the EU Reached 18% in 2016*, EUROSTAT (Jan. 25, 2018), <https://ec.europa.eu/eurostat/documents/2995521/10335438/8-23012020-AP-EN.pdf/292cf2e5-8870-4525-7ad7-188864ba0c29> [hereinafter EUROSTAT]. See also Cornelia Klugman, *The EU, A World Leader in Fighting Climate Change*, European Parliamentary Research Service, (May 2018), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621818/EPRS_BRI\(2018\)621818_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621818/EPRS_BRI(2018)621818_EN.pdf), (“The EU achieved its 2020 Kyoto target of reducing greenhouse gas emissions by 20 % (compared to 1990) ahead of schedule. EU economies grew by 53 % while emissions dropped by 23 % (1990-2016). New EU jobs created in the power and energy efficiency sectors will number 823 000 by 2026 to 2030.”).

² EUROSTAT, *supra* note 1, at 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ John Beddington et al., *Letter from Scientist to the EU Parliament Regarding Forest Biomass*, EURACTIV, <https://www.euractiv.com/wp-content/uploads/sites/2/2018/01/Letter-of-Scientists-on-Use-of-Forest-Biomass-for-Bioenergy-January-12-2018.pdf> (last updated Jan. 11, 2018) [hereinafter *Biomass Letter*].

⁷ Council Directive 2018/2001, art.5, 2018 O.J. (L 328) 83 (EU) [hereinafter Council Directive].

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Timothy D. Searchinger et al., *Europe's Renewable Energy Directive Poised to Harm Global Forests*, NATURE (Sept. 12, 2018), <https://www.nature.com/articles/s41467-018-06175-4>.

¹¹ *Id.*

energy.¹³ Essentially, the Amazon rainforest could be clear cut and burned for fuel and the EU would still consider it a net zero carbon footprint so long as the wood was harvested “sustainably.” The United States Environmental Protection Agency (EPA) had a similar misguided interpretation in April 2018, stating that it would begin to consider the burning of forest biomass as carbon-neutral.¹⁴ This is a dangerous and incorrect way to consider biomass—especially biomass from trees cut directly for energy.

Hopefully, member states will avoid the temptations of this “get renewable quick scheme” and turn to and consider the harmful effects. Member states in Southern Europe have rich opportunities for solar power and member states in Northern Europe have a high potential for wind energy.¹⁵ If individual governments regulate incentives and subsidies for wind and solar energy, while taxing and imposing fees on wood harvest, the effects of RED II could potentially be curtailed.

This paper proceeds in six parts. First, I present a background on climate change science and global responses to it. Second, I provide a brief overview of the current legislation surrounding renewable energy in the EU. Third, I outline the parameters of the EU’s 2018 Renewable Energy Directive. Fourth, I elaborate on the concerns presented in the scientists’ letter to EU Parliament. Fifth, I expand on why this new classification is particularly dangerous. And last, I offer potential solutions to the problem before concluding.

I. Background

The European Union has been involved with international efforts to reduce greenhouse gas (“GHG”) emissions to stall the warming of the planet.¹⁶ GHGs primarily refer to methane, carbon dioxide, and chlorofluorocarbons, as all three trap heat within the atmosphere, causing global warming.¹⁷ The rise in these gasses can be mostly attributed to human activity, including animal agriculture, deforestation, and the burning of fossil fuels.¹⁸ The risks of climate change caused by GHGs include “risks to food and water supplies, health, biodiversity and the built environment.”¹⁹

In response to the aforementioned risks and threats associated with climate change, the United Nations met in 1992 at its “Earth Summit,” resulting in the United Nations Framework Convention on Climate Change (“UNFCCC”).²⁰ As of 2019, there

¹³ *Id.*

¹⁴ Jason Daley, *The EPA Declared That Burning Wood Is Carbon Neutral. It's Actually a Lot More Complicated*, SMITHSONIAN MAG. (Apr. 24, 2018), <https://www.smithsonianmag.com/smart-news/epa-declares-burning-wood-carbon-neutral-180968880/>.

¹⁵ See *infra* Figures 4 and 5.

¹⁶ Klugman, *supra* note 1, at 1.

¹⁷ *Id.*

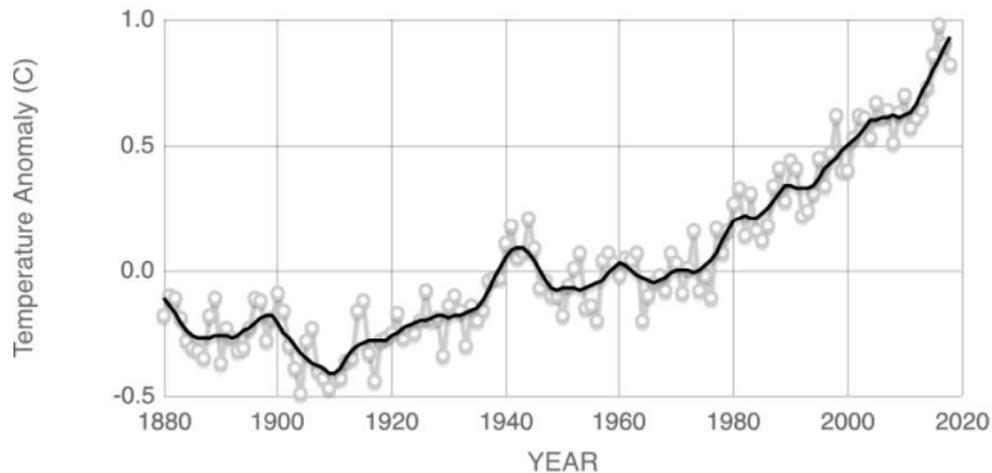
¹⁸ *Id.*

¹⁹ *Id.* at 2 (“There is a [also] clear economic rationale for reducing emissions. For example, if the global temperature is allowed to rise to about 3°C above pre-industrial levels by 2100, the cost of damages could be equivalent to about 4 % of EU gross domestic product (GDP) per year.”).

²⁰ *Climate Change*, UNITED NATIONS, <https://www.un.org/en/sections/issues-depth/climate-change/index.htm> 1 (last visited Oct. 26, 2020).

is nearly universal membership of the UNFCC.²¹ The goals of the UNFCC were further ratified in the 2015 Paris Agreement on Climate Change by 175 world leaders (now 184).²² The most easily measured goal in the agreement is a call for the signees to respond to the effects of climate change so that the global temperature rise stays below 2 degrees Celsius this century, with the ultimate goal of keeping global temperature rise under 1.5 degrees Celsius.²³ Keeping global temperature rise under 1.5 degrees Celsius in the next century is a difficult goal, as from 1980-2012 the average global temperature rise was 0.88 degrees Celsius.²⁴ See Figure 1.²⁵

Figure 1. Global Land-Ocean Temperature Index



Prior to the 2015 Paris Agreement on Climate Change, the Kyoto Protocol was the gold standard of controlling global temperature rise. The Kyoto Protocol of 1992 extended the UNFCC, assigning certain amounts of harmful emissions to parties of the international treaty as “individual targets.”²⁶ The targets of the Kyoto Protocol covered

²¹ *Id.* (The 197 countries that have ratified the Convention are Parties to the Convention. The ultimate aim of the Convention is to prevent “dangerous” human interference with the climate system.”).

²² *Id.*

²³ *Id.*

²⁴ *Id.* (“Oceans have warmed, the amounts of snow and ice have diminished and the sea level has risen. From 1901 to 2010, the global average sea level rose by 19 cm as oceans expanded due to warming and ice melted. The sea ice extent in the Arctic has shrunk in every successive decade since 1979, with 1.07×10^6 km² of ice loss per decade. Given current concentrations and ongoing emissions of greenhouse gases, it is likely that the end of this century that global mean temperature will continue to rise above the pre-industrial level. The world’s oceans will warm and ice melt will continue. Average sea level rise is predicted to be 24–30 cm by 2065 and 40–63 cm by 2100 relative to the reference period of 1986–2005. Most aspects of climate change will persist for many centuries, even if emissions are stopped.”).

²⁵ *Global Temperature*, GLOBAL CLIMATE CHANGE, <https://climate.nasa.gov/vital-signs/global-temperature/> (last updated Oct. 21, 2020).

²⁶ U.N. Framework Convention on Climate Change Conference of Parties, *Adoption of Kyoto Protocol*, U.N. Doc. FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998), <https://unfccc.int/process/the-kyoto-protocol/history-of-the-kyoto-protocol/text-of-the-kyoto-protocol>.

the emissions of: carbon dioxide (CO₂), methane (CH₄), nitrous oxide, hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulphur hexafluoride (SF₆).²⁷

At the 21st Conference of the Parties in Paris, parties to the UNFCCC signed the 2015 Paris Agreement on Climate Change. Essentially, the Paris Agreement intensified and accelerated the Kyoto Protocol, setting stricter regulations and quickening goals to meet the abovementioned global temperature rise goals.²⁸

II. Overview of Current Legislation Surrounding EU Renewable Energy

In 2012, biomass and waste contributed to two-thirds of the EU's renewable energy consumption.²⁹ In addition to RED II, renewable energy—specifically biomass—is regulated in EU member states with:

- (1) the Decision on information about biofuels and bioliquids to be submitted by economic operators to Member States (2011/13/EU);
- (2) the Decision on guidelines for the calculation of land carbon stocks (2010/335/EU);
- (3) the Commission Regulation (EU) No 1307/2014 on defining the criteria and geographic ranges of highly biodiverse grassland; and
- (4) the Directive to reduce indirect land use change for biofuels and bioliquids (EU 2015/1513).

The directives and regulations provide bonuses for “good behavior.” For example, the Decision on information about biofuels and bioliquids to be submitted by economic operators to Member States (2011/13/EU) incentivizes the restoration of degraded land.³⁰ If degraded land is used for the cultivation of biomass rather than land that has not been used for agricultural purposes previously, the greenhouse gas calculation will trigger a bonus for the member state.³¹ While there are rewards for desirable behavior, there are no enforceable consequences for harmful behavior. If an EU member state were to allow for the clear cutting of trees in a natural forest, a parcel that has not previously been used for agricultural purposes, there would effectively be no consequence.

Additionally, these directives and regulations do require member states to document the effects of cutting down trees, specifically the effect on carbon emissions, *unless* the trees are cut down to burn directly for energy. Member states are not required to report or monitor the effects of a single tree so long as every tree is cut for the purposes of fuel. There is nothing to deter countries like Slovenia (64% forested), Estonia (58% forested), and Latvia (56% forested) from harvesting natural forests.³² And, as Slovenia

²⁷ *Id.*

²⁸ U.N. Framework Convention on Climate Change Conference of Parties, Twenty-First Session, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015), https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

²⁹ See Council Directive, *supra* note 7.

³⁰ Commission Decision 2011/13, 2011 O.J. (L 9) 11 (EU).

³¹ *Id.*

³² *Over 40% of the EU Covered with Forests*, EU STAT (Mar. 21, 2018), <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20180321-1?inheritRedirect=true>.

and Latvia struggled to meet their individualized renewable energy target for 2020, it would even be economically responsible to seize the opportunity to turn one of their largest resources into a profitable good while meeting their EU member state requirements. Therefore, RED II encourages a new market of clear cutting and wood burning.

III. 2019 Renewable Energy Directive

RED II outlines a comprehensive policy for the “production and promotion” of energy from the EU’s renewable sources in order to comply with the 2015 Paris Agreement on Climate Change.³³

Directives like this one are principally how the EU responds to goals in the Paris Agreement. The goal is outlined in the text of the directive:

[the] goal...pursued by this Directive [is the] increased use of energy from renewable sources or “renewable energy” [and] constitutes an important part of the package of measures needed to reduce greenhouse gas emissions [to] comply with the Union's commitment under the 2015 Paris Agreement on Climate Change following the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (the ‘Paris Agreement’), and with the Union 2030 energy and climate framework, including the Union's binding target to cut emissions by at least 40 % below 1990 levels by 2030. The Union's binding renewable energy target for 2030 and Member States' contributions to that target, including their baseline shares in relation to their national overall targets for 2020, are among the elements which have an overarching importance for the Union's energy and environmental policy.³⁴

RED II requires the countries in the EU to cumulatively fulfill at least 20% of all energy needs with renewables by 2020.³⁵ This will be achieved through nations meeting individual national targets that together affect the EU’s average results.³⁶ Additionally, all EU countries by 2020 must have at least 10% of their transport fuels to originate from renewable sources as well.³⁷

The Directive stipulates renewable energy targets for each country while weighing its current percentage of supplied renewable energy and the potential for growth.³⁸ These targets range from a low of 10% to a high of 49%. See Figure 2.³⁹

³³ Council Directive, *supra* note 7, at 83.

³⁴ *Id.* at 2 (justifying “The increased use of energy from renewable sources also has a fundamental part to play in promoting the security of energy supply, sustainable energy at affordable prices, technological development and innovation as well as technological and industrial leadership while providing environmental, social and health benefits as well as major opportunities for employment and regional development, especially in rural and isolated areas, in regions or territories with low population density or undergoing partial de-industrialisation.”).

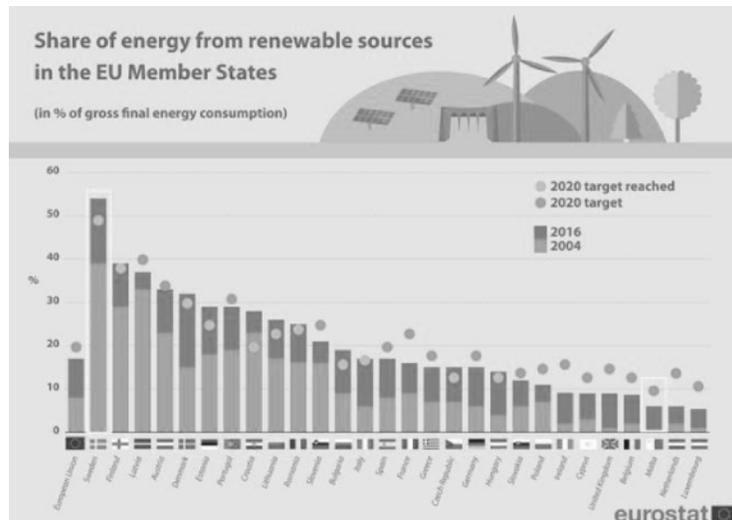
³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Council Directive, *supra* note 7, at 83.

³⁹ Klugman, *supra* note 1.

Figure 2. Share of Energy from Renewable Sources in the EU Member States

For example, Malta has the lowest percentage of renewable energy production, and its target was that by 2020, 10% of its energy would be produced by renewables.⁴⁰ By comparison, Sweden has the highest percentage of renewable energy production, and its target is that 50% of its energy will come from renewables. Sweden has already exceeded its goal.⁴¹ Each country's individual target seems reasonable and in reach, especially if the country is "highly developed," like Sweden.

The most recent amendment to the RED II is cause for concern, though. The amendment classifies wood and other biomass as an acceptable "renewable" fuel source. However, as outlined below, not all biomass is created equal.

IV. The Scientists' Appeal

The abovementioned letter written by over 800 scientists around the world is a harsh, but fair criticism of the potentially dangerous effects of the amended classification in the RED II. The letter begins by applauding the EU for its admirable effort to expand renewable energy among the member states, while pleading for Parliament to heed its warning.⁴² For decades, the scientists explain, wood wastes and forest residues (limited in scope) have fueled electricity and heating as beneficial byproducts.⁴³ Power plants that burn wood chips emit one and a half times the amount of carbon as those using coal, and three times as much as those using natural gas.⁴⁴

⁴⁰ Albert Galea, *Malta with Lowest Renewable Electricity Generation in the EU – Eurostat*, THE MALTA INDEP. (Sep. 29, 2018), <https://www.independent.com.mt/articles/2018-09-27/local-news/Malta-with-lowest-renewable-electricity-generation-in-the-EU-Eurostat-6736196935>.

⁴¹ Alex Gray, *Sweden to Reach Its 2030 Renewable Energy Target This Year*, WORLD ECON F. (Jul. 5, 2018), <https://www.weforum.org/agenda/2018/07/sweden-to-reach-its-2030-renewable-energy-target-this-year/>.

⁴² John Beddington et al., *supra* note 6, at 1.

⁴³ *Id.*

⁴⁴ *Id.*

While RED II emphasizes the similarities between wood waste (already commonly used in the EU as a biomass) and trees, the scientists highlight the incomparable difference:

[f]or decades, European producers of paper and timber products have generated electricity and heat as beneficial by-products using wood wastes and limited forest residues. Since most of these waste materials would decompose and release carbon dioxide within a few years, using them to displace fossil fuels can reduce net carbon dioxide emissions to the atmosphere in a few years as well. By contrast, cutting down trees for bioenergy releases carbon that would otherwise stay locked up in forests, and diverting wood otherwise used for wood products will cause more cutting elsewhere to replace them.⁴⁵

Even when the forests are given time to regrow, using wood will increase carbon in the world's atmosphere for centuries; increase is unavoidable even if the forest management is considered "sustainable."⁴⁶ Such "sustainable" reforestation will take decades and the large carbon debt will affect the climate immediately.⁴⁷ Timing is crucial, yet RED II ignores it.⁴⁸ The effects of the classification will cause "more rapid melting of glaciers and thawing of permafrost, and more packing of heat and acidity into the world's oceans" in the next few years—the threat is imminent.⁴⁹ We need to be "buying time," the letter reads, and this approach to renewable energy is essentially "selling time."⁵⁰

The letter further appeals to the EU's history of setting a good example to other countries, specifically Indonesia and Brazil in preserving their forests.⁵¹ However, if the message is to "cut your forests so long as someone burns them for energy," how can the EU influence other countries to preserve their forests?⁵² Even if the directive causes an additional 3% of energy fueled by wood, countries would double their commercial cutting.⁵³ As a warning, the letter notes that by 1850, wood bioenergy had caused the near deforestation of most of Western Europe. This is particularly troubling as the European population has not only risen but also consumes far more energy today than in the late nineteenth century.⁵⁴ "The directive gives an incentive to burn trees but countries could decide to do the right thing," Renewable Energy Directive oppositionist Searchinger optimistically wrote—"[t]hat's the question . . . the risk is high, and so is the amount of forest at stake."⁵⁵

⁴⁵ *Id.*

⁴⁶ *Id.* Further, the damage from wood harvested would be worse than coal or natural gas.

⁴⁷ John Beddington et al., *supra* note 6, at 1.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* (describing that the adverse implications not just for carbon but for global forests and biodiversity are also large. More than 100% of Europe's annual harvest of wood would be needed to supply just one third of the expanded renewable energy directive. Because demand for wood and paper will remain, the result will be increased degradation of forests around the world).

⁵¹ John Beddington et al., *supra* note 6, at 1-2.

⁵² *Id.* at 1.

⁵³ *Id.* at 2.

⁵⁴ *Id.*

⁵⁵ Lee Bell, *Scientists Slam EU's Renewable Energy Directive for Promoting Wood as a 'Renewable Fuel'*, V3 (Sept. 13, 2018), <https://www.v3.co.uk/v3-uk/news/3062647/scientists-slam-eus-renewable-energy-directive-for-promoting-wood-as-a-renewable-fuel>.

V. Potential Effects

RED II provides vague language to the EU member states on how the forest biomass should be harvested “sustainably;” however, there is no enforceable consequence if a country does not follow the stipulations. The directive reads that, to safeguard the forests, despite an expanding demand for forest biomass, the harvesting should be done in a sustainable manner.⁵⁶ The referenced “sustainable manner” is labeled such that special attention is given to areas explicitly designated to biodiversity, landscapes and specific natural elements, and biodiversity resources.⁵⁷ Additionally, member states are asked to track carbon stocks and have woody raw material coming from only forests “that are harvested in accordance with the principles of sustainable forest management developed under international forest processes.”⁵⁸ Harvesters shall also take the suitable steps to minimize any risk of using unsustainable forest biomass for bioenergy.⁵⁹ While this is asked of harvesters, these “sustainable steps” are not clearly defined in the text, leaving expansive room for potentially dangerous discretion.

Looking to India, the world’s fourth-largest emitter of carbon dioxide and second-largest emitter of black carbon, as a cautionary tale.⁶⁰ *The Los Angeles Times* reports,

[b]y absorbing sunlight and turning it to heat, black carbon melts the Himalayan glaciers and snowfields that hundreds of millions of Indians depend on for irrigation and drinking water. It disrupts the South Asian monsoon . . . It is a major ingredient of the household air pollution from burning wood and dung for cooking that kills more than 1 million Indians each year. Meanwhile, black carbon and other fine particles in outdoor air pollution kill more than 620,000 Indians annually, and cause \$18 billion in economic losses from damage to agriculture and health.⁶¹

Black carbon from biomass emissions is not only a concern for the world’s economy, but also the world’s health. According to World Health Organization Data, New Delhi has suffered from the worst air quality of any major city in the world.⁶² New Delhi recently experienced twelve times the United States government-recommended levels.⁶³ Additionally,

⁵⁶ Council Directive 2018/2001, art.5, 2018 O.J. (L 328) 83, 76 (EU) [hereinafter Council Directive].

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Robbie Andrew, *Why India's CO2 Emissions Grew Strongly in 2017*, CARBON BRIEF (Mar. 28, 2018), <https://www.carbonbrief.org/guest-post-why-indias-co2-emissions-grew-strongly-in-2017>; Archita Rana, *Black Carbon Aerosol in India: A Comprehensive Review of Current Status and Future Prospects*, 218 ATMOSPHERIC RES. 207, 207 (2019).

⁶¹ Jonathan Mingle, *Op-Ed: The Carbon That's Killing India, and How California Can Help*, L.A. TIMES (Jan. 5, 2015), <https://www.latimes.com/opinion/op-ed/la-oe-0126-mingle-u-s--india-climate-black-carbon20150126-story.html>.

⁶² *Delhi Air Pollution Surges to Emergency Levels*, THE GUARDIAN (Jan. 3, 2019), <https://www.theguardian.com/world/2019/jan/03/delhi-air-pollution-surges-to-emergency-levels>.

⁶³ *Id.*

[a]ir pollution in India kills an estimated 1.5 million people every year, and a recent study in the journal *GeoHealth* found that nearly half of these deaths occur in the Indo Gangetic Plain, the northernmost part of the country that includes New Delhi. Crop residue, such as roots and stems, is often burned to help prepare the field for seeding the next season. Burning this agricultural waste, however, also releases black carbon, a type of fine particulate matter formed from incomplete combustion. These particles are then funneled by air currents from rural farms to New Delhi, traveling from as far as 125 miles.⁶⁴

The concern should not only be about RED II's effects on our planet's atmosphere, but also on our general public health.

There are four things to consider when looking to the potential effects of saluting biomass as a carbon-neutral energy source. First, biomass is only sustainable on long-term measures.⁶⁵ Technically, forest biomass is carbon-neutral but only in the long term.⁶⁶ The idea is that when a tree is burned, another will be planted in its place to reabsorb the carbon created from the burning of the first tree. But it takes decades for a tree to absorb the carbon released from that burned tree while the carbon released is already impacting climate change.⁶⁷ Second, a natural forest absorbs carbon at a much higher rate than plantation forests.⁶⁸ It could take sixty more years for a tree in a managed plantation to capture the same amount of carbon as tree in a natural forest.⁶⁹ Nevertheless, there is not even a stipulation in RED II that requires countries to plant trees in place of those harvested for fuel. As long as the tree is cut for fuel, no accounting need be done. Unless trees are being planted at a rate at least twice that of the amount harvested in a carefully managed environment or natural forest, forest biomass will never be carbon neutral. Third, carbon will not only be released from stored carbon in the trees' wood but also in the soil.⁷⁰ Sami Yassa, senior scientist at the Natural Resources Defense Council, reports that soils have the potential to store twice the carbon as the tree that it holds.⁷¹ When a tree is removed, the soil has an expedited microbial breakdown from the exposure, releasing stored carbon at a faster rate.⁷² Finally, regarding forest biomass as carbon-neutral can and *has* led to increased clearcutting,

⁶⁴ Emma Johnson, *Burning Crops Are a Top Source of Air Pollution in India, Study Finds*, E360 DIG. (Mar. 1, 2019), <https://e360.yale.edu/digest/burning-crops-are-a-top-source-of-air-pollution-in-india-study-finds>.

Jason Daley, *The EPA Declared That Burning Wood Is Carbon Neutral. It's Actually a Lot More Complicated*, SMITHSONIAN MAG. (Apr. 24, 2018), <https://www.smithsonianmag.com/smart-news/epa-declares-burning-wood-carbon-neutral-180968880/>

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ William Schlesinger, *Wood pellets: Renewable, But Not Carbon Neutral*, SCI. DAILY (MAR. 22, 2018), <http://www.sciencedaily.com/releases/2018/03/180322140915.htm>.

⁶⁸ *Id.*

⁶⁹ Jason Daley, *supra* note 65.

⁷⁰ *Id.*

⁷¹ *Id.*

even in ecologically protected areas.⁷³ Writing for the Yale School of Forestry and Environmental studies, Fred Pearce argues,

[s]ince 2009, the 28 nations of the European Union have embarked on a dramatic switch to generating power from renewable energy. While most of the good-news headlines have been about the rise of wind and solar, much of the new “green” power has actually come from burning wood in converted coal power stations... Wood burning is turning into a major loophole in controlling carbon emissions.⁷⁴

European and US scientists estimate that using wood for energy will result in 10–15% rise in greenhouse gas emissions for the EU’s energy use by 2050.⁷⁵ Study lead author Tim Searchinger, a research scholar at Princeton University’s Woodrow Wilson School of Public and International Affairs states, “[t]his could occur by turning a five percent decrease in emissions required under the directive using solar energy or wind energy into a five-to-ten increase by using wood.”⁷⁶ Furthermore, he explains, efforts to save trees with the use of recycled paper is undermined, “[a]s the prices companies are required to pay for emitting carbon dioxide increase over time, the incorrect accounting of forest biomass Europe has adopted will make it more profitable to cut down trees to burn.”⁷⁷

It is unlikely that Sweden, producing more than 50% of its energy from renewables, will take advantage of this new classification.⁷⁸ In fact, wind turbine power accounts for the majority of Sweden’s renewable energy production and the country met its target for 2020, so the country is in no rush to increase energy produced from renewables and have time to invest in non-biomass technologies.⁷⁹ The concern lies in if smaller and less-advanced countries like Malta will take advantage. In Malta, only 6% of the electricity generated comes from renewable sources—this is the lowest of all the EU member states. See Figure 3.⁸⁰

⁷² Fred Pearce, *Carbon Loophole: Why Is Wood Burning Counted as Green Energy?*, YALE ENV’T. 360 (Dec. 19, 2017), <https://e360.yale.edu/features/carbon-loophole-why-is-wood-burning-counted-as-green-energy>.

⁷³ *Id.*

⁷⁴ B. Rose Kelly, *Europe’s Policy to Treat Wood as Low-Carbon Fuel Poised to Harm Global Forests*, PRINCETON U. (Sept. 12, 2018), <https://www.princeton.edu/news/2018/09/12/europes-policy-treat-wood-low-carbon-fuel-poised-harm-global-forests>.

⁷⁵ *Id.*

⁷⁶ *Id.*
⁷⁷ Alex Gray, *Sweden to Reach Its 2030 Renewable Energy Target This Year*, WORLD ECON. F. (July 5, 2018), <https://www.weforum.org/agenda/2018/07/sweden-to-reach-its-2030-renewable-energy-target-this-year/>.

⁷⁸ *Id.*

⁷⁹ Cornelia Klugman, *The EU, A World Leader in Fighting Climate Change*, European Parliamentary Research Service, (May 2018), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621818/EPRS_BRI\(2018\)621818_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621818/EPRS_BRI(2018)621818_EN.pdf).

Figure 3. Share of Energy from Renewable Sources

Share of energy from renewable sources
(in % of gross final energy consumption)

	2004	2013	2014	2015	2016	2020 target
EU	8.5	15.2	16.1	16.7	17.0	20
Belgium	1.9	7.5	8.0	7.9	8.7	13
Bulgaria	9.4	19.0	18.0	18.2	18.8	16
Czech Republic	6.8	13.8	15.0	15.0	14.9	13
Denmark	14.9	27.4	29.6	31.0	32.2	30
Germany	5.8	12.4	13.8	14.6	14.8	18
Estonia	18.4	25.6	26.3	28.6	28.8	25
Ireland	2.4	7.7	8.7	9.2	9.5	16
Greece*	6.9	15.0	15.3	15.4	15.2	18
Spain	8.4	15.3	16.1	16.2	17.3	20
France	9.5	14.1	14.7	15.1	16.0	23
Croatia	23.5	28.0	27.8	29.0	28.3	20
Italy	6.3	16.7	17.1	17.5	17.4	17
Cyprus	3.1	8.1	8.9	9.4	9.3	13
Latvia	32.8	37.1	38.7	37.6	37.2	40
Lithuania	17.2	22.7	23.6	25.8	25.6	23
Luxembourg	0.9	3.5	4.5	5.0	5.4	11
Hungary	4.4	16.2	14.6	14.4	14.2	13
Malta	0.1	3.7	4.7	5.0	6.0	10
Netherlands	2.0	4.8	5.5	5.8	6.0	14
Austria	22.5	32.4	33.0	32.8	33.5	34
Poland	6.9	11.4	11.5	11.7	11.3	15
Portugal	19.2	25.7	27.0	28.0	28.5	31
Romania	16.3	23.9	24.8	24.8	25.0	24
Slovenia	16.1	22.4	21.5	21.9	21.3	25
Slovakia	6.4	10.1	11.7	12.9	12.0	14
Finland	29.2	36.7	38.7	39.2	38.7	38
Sweden	38.7	52.0	52.5	53.8	53.8	49
United Kingdom	1.1	5.7	7.0	8.5	9.3	15
Iceland	58.9	71.6	70.4	70.2	72.6	64
Norway	58.1	65.9	68.6	68.4	69.4	67.5
Albania	27.8	33.2	31.5	34.4	37.1	38
Montenegro	:	43.7	44.1	43.1	41.5	33
The former Yugoslav Republic of Macedonia	15.7	18.5	19.6	19.5	18.2	28

: Data not available

- not applicable

* 2016 data for Greece estimated by Eurostat

With the delta between their current renewable production and 2020 target at 4%, Malta has a lot of pressure to increase renewable energy production, and quickly. Aside from concerns surrounding less-developed countries with a large gap in renewables to fill in one year, there is potential for heavily forested countries like Slovenia and Estonia to take advantage of this new classification. Slovenia is 64% forested, Estonia 58% forested, and Latvia 56% forested; burning wood for energy would be cheap and above all an easy way to meet RED II.⁸¹ This is where the worry lies. Will countries like Malta, Estonia, Slovenia, and Latvia fold to pressures for quick renewable production in the short term that will harm the climate in the long term?

SOLUTIONS AND CONCLUSION

The scientists who penned the letter suggested that the only solution is to restrict forest biomass eligible under the directive to residues and wastes.⁸² While the current directive is finalized EU law, RED II gives member states the freedom to choose how it is implemented.⁸³ The hope is that member states will “do the right thing” for the globe and invest in wind and solar renewable energies instead of trees as biofuel. Governments could ensure environmental protection by imposing fees on the practice of tree harvesting or increase the price of wood biomass so that it falls outside of member states’ budget. In practice, a member state could impose a fee on harvesting wood, which would ultimately raise its cost. Subsequently, wood would no longer be the accessible and inexpensive renewable resource that attracts governments. At the very least, forest biomass investments would become equally as expensive as wind or solar energy, with member states electing for wind or solar energy over wood bioenergy. And while this switch would require strong incentives for the member states, more environmentally cautious countries might provide tax incentives to businesses for sourcing their energy from wind and solar renewables. Europe has a relatively high suitability for solar energy and an underinvestment in those areas. See Figure 4.⁸⁴

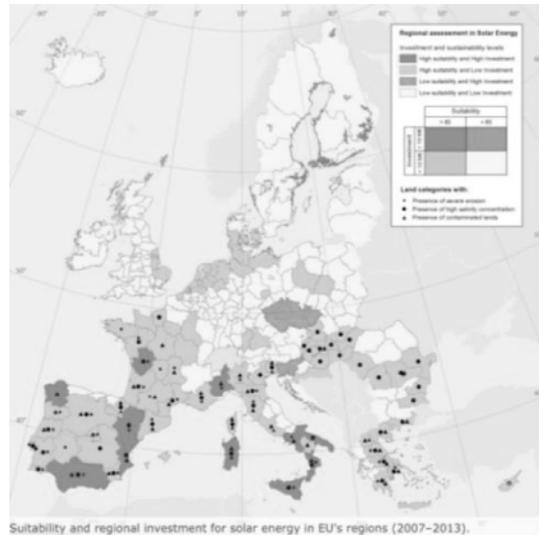
⁸⁰ Jason Daley, *supra* note 65.

⁸² Council Directive, *supra* note 56.

⁸³ *Id.*

⁸⁴ *Wind Power and Photovoltaic Potential*, ESPON (Feb. 28, 2011), <https://www.espon.eu/topics-policy/publications/maps-month/wind-power-and-photovoltaic-potential> (Data on the photovoltaic potential in the regions was provided by the Joint Research Centre’s Sunbird data base. The data refers to the yearly total of estimated solar electricity generation (for horizontal, vertical, optimally inclined planes) in kilowatt hour (kWh) within the built environment. These types of installations will be the first to become competitive at end-use level with electricity obtained from the central grid, with estimates from the International Energy Agency (IEA 2010) pointing to 2020 as break-even point in the regions with the highest potential).

Figure 4. Potential for Solar Energy



The same member states that lack investment potential for solar energy are also those rich in wind potential. See Figure 5.⁸⁵

Figure 5. Potential for Wind Energy



The same is true for the reverse (see Figure 3). If the member states individually commit to fees on wood harvests, this could greatly check the problem with RED II. Ultimately, it is up to individual countries to “do the right thing.”

⁸⁵ *Id.*

While there are many opportunities for member states to ignore the new classification—and it is likely that most will—other states, like Germany, are setting a “good example” for the others. Germany has a national feed-in tariff and subsidies that incentivize construction in an environmentally friendly manner.⁸⁶ Despite Germany having relatively low photovoltaic potential, it is still looking to solar energy with the most installed capacity for solar in the EU.⁸⁷ Subsidies are also given to buildings that construct their heating system with renewable energy.⁸⁸ A great addition to these incentives and subsidies would be to restrict the renewable criteria to all renewables except forest biomass. Furthermore, it is in the countries’ best interest to restrain the use of forest biomass as a fuel source for the public health concerns that biomass causes.

In March 2019, plaintiffs from six different countries backed by the Center for Climate Integrity filed suit challenging the EU’s classification of forest biomass as an acceptable renewable fuel source in RED II.⁸⁹ The suit is grounded in Article 32 and 57 of the EU Charter on Fundamental Rights. Plaintiffs contend that the renewable biomass label violates their fundamental rights and freedoms as “[e]ach has suffered, and will continue to suffer, direct harms from the consequences of the Directive’s biomass energy policy . . . [and] these infringements are neither necessary for, nor genuinely meet, the important environmental protection objectives of the EU. . .”⁹⁰ The plaintiffs claiming to suffer from adverse effects of biomass energy production that come from Estonia, Ireland, France, Romania, Slovakia, and the United States. Their complaint reads,

[the Renewable Energy Directive amendment], will accelerate widespread forest devastation and significantly increase greenhouse gas emissions by not counting CO2 emissions from burning wood fuels. Wood-fired power plants emit more CO2 per unit of energy generated than coal plants, but RED II counts these emissions as zero. The treatment of forest biomass as low or zero-carbon renewable energy in both RED I and RED II has and will continue to increase harvesting pressure on forests in Europe and North America to meet the growing demand for woody biomass fuel in the EU.⁹¹

Essentially, the plaintiffs are seeking an injunction for the reclassification of forest biomass as non-renewable. The plaintiffs filed this “precedent-setting” case in the European General Court in Luxembourg in March 2019.⁹² And, had the European General Court in Luxembourg heard the case, it would have been the first-time standing was granted to an NGO challenging an EU law or regulation.⁹³

Rosaly Byrd & Laurèn DeMates, *Renewable Energy 101 and the Importance of Incentives*, THE SUSTAINABILITY CO-OP, (Oct. 13, 2013), <https://thesustainabilitycooperative.net/2013/10/13/all-about-renewables/>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ EU Biomass Legal Case Press Release, *EU Biomass Legal Case*, <http://eubiomasscase.org/the-case/> (last visited Mar. 4, 2019).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

The European General Court in Luxembourg unfortunately denied the standing to the six plaintiffs in May 2020.⁹⁴ The plaintiffs appealed two months later in July.⁹⁵ The appeal combats the issue of standing, Y0reading:

[t]he Order held that the Applicants lacked standing to bring the Action, within the meaning of the fourth paragraph of Article 263 TFEU, because the Directive was not of individual concern to them. That conclusion was wrong in law because... [t]he Applicants are individuals and environmental NGOs from across the EU and the USA who have fundamental and important interests in the protection of forests and biodiversity and the prevention of catastrophic climate change. They support and welcome many of the steps taken by the EU to transition towards renewable energy production. These provisions will cause irreparable damage to forest ecosystems across the EU, the USA and elsewhere. They will contribute significantly to climate change through increased CO2 emissions.⁹⁶

The appeal further warns that a decision denying standing to the plaintiffs “undermine[s] otherwise positive aspects of the Directive that make the EU the global leader in renewable energy production.”⁹⁷ As mentioned earlier, the EU has historically been at the forefront of climate advocacy, activism, and pro-climate policies. RED II has been and will continue to be a shadow on that legacy unless the indication of forest as biomass is removed.

Hopefully, RED II can be settled with an injunction-like annulment of the forest biomass classification from the directive. If the courts cannot provide an adequate and equitable remedy, the hope is that member states will avoid the temptations of this “get renewable quick” scheme, and consider the harmful effects on both the environment and public health. In the effort of encouraging alternative opportunities for renewable energy with subsidies, member states in Southern Europe can tap into their rich resources for solar power while member states in Northern Europe can access their high potential for wind energy. It seems that this may be a realistic hope after all, as some EU countries are parties to the lawsuit—and they are against RED II’s classification of forest as renewable biomass also. The general sentiment in the EU is one of disapproval of the classification. But, when large companies have an opportunity to save money and receive subsidies for going “renewable,” disapproval will likely not be the feeling of the common citizen. However, if *individual* governments regulate incentives and subsidies for wind

⁹⁴ Case C-141/19, *Sabo v. Parliament and Council*, 2020 EUR-Lex 179 (May 6, 2020).

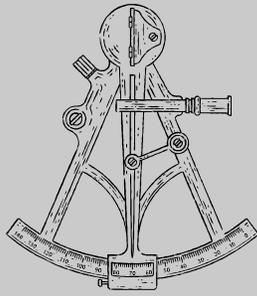
⁹⁵ *Id.*

⁹⁶ Application to Appeal Order of Inadmissibility to the General Court (Fourth Chamber) of 2 July 2020. Peter Sabo and Others v European Parliament and Council of the European Union. Case T-141/19, ECLI identifier: ECLI:EU:T:2020:179, <http://eubiRomasscase.org/wp-content/uploads/2020/07/Application-to-appeal-Order-of-Inadmissibility-02-07-2020.pdf>; *See also*, EU BIOMASS LEGAL CASE, <http://eubiromasscase.org/2020/07/05/biomass-case-relaunched-appeal-goes-to-higher-court-supported-by-paper-tiger-report-deconstructing-red-ii-biomass-protections/> for updates on the case.

⁹⁷ Application to Appeal Order of Inadmissibility to the General Court (Fourth Chamber) of 2 July 2020. Peter Sabo and Others v European Parliament and Council of the European Union. Case T-141/19, ECLI identifier: ECLI:EU:T:2020:179, <http://eubiromasscase.org/wp-content/uploads/2020/07/Application-to-appeal-Order-of-Inadmissibility-02-07-2020.pdf>.

and solar energy while also taxing and imposing fees on wood harvest, the effects of RED II may be curbed without litigation. In the meantime, we wait for a decision on appeal.





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Developing an International Code of Conduct for Private Military Support Contractors

Mary Mikhaeel

Abstract. Private military support contractors provide a large portion of support services from construction to maintenance—but they operate in a legal vacuum. This article fills the gap left by the legal and academic discourse by identifying issues that private military support contractors face, excavating human rights deficiencies that go unnoticed, and providing a detailed structure for an international code of conduct to govern private military support contractors and provide them with guidance on human rights.

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TABLE OF CONTENTS

Introduction	44
I. Gaps in Legal and Policy Discourse with Respect to the Application of International Legal Obligations and Best Practices to Private Military Support Contractors	47
A. Defining Private Military Support Contractors	48
B. Human Rights and Private Military Contractors: Gaps in Policy and Scholarly Discourse Surrounding PMSCs	50
1. Policy and Scholarly Debate Defining Support Contractors and Identifying Their Role in Military Operations	50
2. Policy and Scholarly Debate Focusing on the International Humanitarian Law and Human Rights Law Violations of Contractors.....	50
3. Providing Recommendations for Defining Obligations and Creating Accountability for Military Contractors	51
4. Policy and Scholarly Debate Addressing Gaps in Legal Accountability	51
C. Gaps in Legal Mechanisms Relating to Private Military Contractors.....	53
1. Montreux Document.....	53
2. International Code of Conduct.....	58
3. ANSI/PSC.1	60
4. Best Practices for Businesses.....	61
5. FAR Part 22.17 on Human Trafficking	62
6. The Department of Defense’s Bill of Rights.....	64
III. Human Rights Violations by Military Support Contractors	65
A. Human Trafficking	66
B. Forced Labor	67
C. Just and Favorable Working Conditions	68
D. Poor and Dangerous Living Conditions	69
E. Freedom of Movement	69
IV. Modeling an International Code of Conduct for Private Military Support Contractors	70
A. Procedural Elements from the ICoC.....	71
B. Substantive Elements from the ICoC	72
C. Integrating Relevant Human Rights Provisions	73
D. Attributes From Other International Legal Regimes.....	73
E. Blueprinting a Code.....	75
Conclusion	75

INTRODUCTION

In Doha, Qatar, lies a United States (“U.S.”) air force base called Al Udeid Air Base, built and run by dozens of unseen and poorly treated contractor workers.¹ Since its construction in 1996, Al Udeid has served as an integral part of many of the U.S. military operations, including recently housing over 11,000 anti-ISIL coalition forces.² However, this important military asset is not functioning solely at the hands of the U.S. military.³ Behind nearly every U.S. military operation lies an “invisible army”⁴ of cooks, maintenance workers, construction workers, laundry service people, hair stylists, sanitation workers, and more—hired and managed by private military contractors that keep the everyday operations of the U.S.’s complex military regimes alive.⁵

The U.S. Government has awarded over \$100 million to private military contractors to perform a slew of vital day-to-day operations on Al Udeid Air Base.⁶ Contractors hire workers to perform various functions such as cooking, cleaning, laundry, and construction. These workers are commonly referred to as support contractors, or logistics contractors.⁷ Contractors also handle and load powerful military weapons and operate complicated defense and combat systems.⁸

Al Udeid is not an anomaly in how military bases are run.⁹ While combat and war were once solely government-controlled functions, there is a continuing practice by the U.S. and other countries of contracting out important roles like military security and logistics to private companies.¹⁰ Today, non-uniformed contract workers perform a large number of the

¹ Karen DeYoung & Dan Lamothe, *Qatar to Upgrade Air Base Used by U.S. to Fight Terrorism*, WASH. POST (July 24, 2018, 12:01 AM), https://www.washingtonpost.com/world/national-security/qatar-to-upgrade-air-base-used-by-us-to-fight-terrorism/2018/07/23/19e04c84-8eb7-11e8b769e3fff17f0689_story.html?utm_term=.d6f195b59985.

² *US ‘Mystified’ Over Gulf States’ Position Towards Qatar*, AL JAZEERA (June 21, 2017), <https://www.aljazeera.com/news/2017/6/21/us-mystified-over-gulf-states-position-towards-qatar>.

³ DynCorp Int’l, *DynCorp International Awarded Two AFCAP IV Task Orders*, (July 28, 2016), <http://www.dyn-intl.com/media-center/press-releases/dyncorp-international-awarded-two-afcap-iv-task-orders/>.

⁴ The term “invisible army” can be found in Sarah Stillman’s article. See Sarah Stillman, *The Invisible Army*, NEW YORKER (May 30, 2011), <https://www.newyorker.com/magazine/2011/06/06/the-invisible-army>.

⁵ See Nick Schwellenbach & David Isenberg, *Documents Reveal Details of Alleged Labor Trafficking by KBR Subcontractor*, PROJECT ON GOV’T OVERSIGHT (June 14, 2011), <https://www.pogo.org/investigation/2011/06/documents-reveal-details-of-alleged-labor-trafficking-by-kbr-subcontractor/>.

⁶ See e.g. *Contract No. W912ER21C0005*; U.S. Department of Defense, Inspector General *Defense Logistics Agency Fuel Contract for Al Udeid Air Base, Qatar*, Sept. 5, 2017; available at: <https://media.defense.gov/2017/D ec/19/2001858705/-1/-1/1/DODIG-2017-116.PDF>.

⁷ Peter W. Singer, *Outsourcing War*, 84 FOREIGN AFF. 119, 122–23 (2005).

⁸ *Id.*

⁹ *Id.*

¹⁰ P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security*, 26 INTL SECURITY 186, 197, 202 (2001-2002); CHRISTOPHER KINSEY, PRIVATE CONTRACTORS AND THE RECONSTRUCTION OF IRAQ: TRANSFORMING MILITARY LOGISTICS 3, 6 (James Gow & Rachel Kerr eds., 2009); DAVID ISENBERG, PRIVATE MILITARY CONTRACTS AND U.S. GRAND STRATEGY 7, 11 (2009); MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40835, THE DEPARTMENT OF DEFENSE’S USE OF PRIVATE SECURITY CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND, ANALYSIS, AND OPTIONS FOR CONGRESS 1 (2011); COMM’N ON WARTIME CONTRACTING IN IRAQ AND AFG., TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 23, 56, 57 (2011), <https://oversight.house.gov/sites/democrats.oversight.h>

U.S. military's functions.¹¹ In fact, every major U.S. military operation since the Cold War has incorporated a large number of private military contractors.¹² These contractors are vital to military operations in combat and non-combat zones alike.¹³

Contractors are also prevalent in non-combat zones because many of the logistics functions that contractors perform are largely done outside the scope of an ongoing armed conflict. Much of the work provided by contractors—from intelligence to construction, training, technical assistance, and maintenance—are performed in non-combat zones.¹⁴ Contractors play an even greater role in military operations in non-combat zones because the U.S. Congress has generally accepted the legality of using contractors in non-combat zones and for non-conflict purposes.¹⁵ The amount of time and money private military and security companies (“PMSC”) spend in non-combat zones is significant. In Iraq alone, contractors employed by the United States government have spent several years and tens of billions of dollars on reconstruction projects.¹⁶ Projects like these almost exclusively occur in foreign countries and outside of conflict zones.¹⁷

The U.S. is not alone when it comes to engaging logistics contractors in its military functions. Europe, China, Japan, and the United Arab Emirates all frequently engage in private military support contracting.¹⁸ The Emirati Armed Forces, for example, rely heavily on military contractors, and much of the focus is on logistics and maintenance contractors. These contractors are vital to keeping the Emirati army functioning smoothly.¹⁹ Similarly, the United Kingdom has largely privatized its military support functions.²⁰

Just as states' operation of military functions have evolved, so has the legal regime governing the human rights obligations of private military contractors.²¹ In an attempt to define states' obligations in governing private military contractors, the international community formulated the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security

ouse.gov/files/migrated/CWC_FinalReport-lowres%5B1%5D.pdf [hereinafter TRANSFORMING WARTIME CONTRACTING]; José L. Gómez del Prado, *A United Nations Instrument to Regulate and Monitor Private Military and Security Contractors*, 1 NOTRE DAME J. OF INT'L & COMP. L. 1, 1 (2011); Laura A. Dickinson, *Regulating the Privatized Security Industry: The Promise of Public/Private Governance*, 63 EMORY L.J. 417, 417 (2013).

¹¹ Gómez del Prado, *supra* note 10, at 2.

¹² Singer, *supra* note 7, at 188.

¹³ See generally Fabien Mathieu & Nick Dearden, *Corporate Mercenaries: The Threat of Private Military & Security Companies*, 34 REV. OF AFR'N. POL. ECON. 744 (2007).

¹⁴ *Id.* at 745.

¹⁵ JENNIFER K. ELSEA, MOSHE SCHWARTZ & KENNON H. NAKAMURA, CONG. RESEARCH SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 1 (2008).

¹⁶ *Id.* at 4 n.15.

¹⁷ Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AJIL 119, 141 (2005).

¹⁸ Rudolf O. Large et al., *Procurement of Logistics Services and Sustainable Development in Europe: Fields of Activity and Empirical Results*, 19 J. PURCHASING & SUPPLY MGMT. 122 (2013). Although countries around the world use private military support contractors, this paper will largely focus on U.S. support contractors as the United States contracts more military support contractors than any other country in the world.

¹⁹ Josh Wood, *Outsourcing War: How Foreigners and Mercenaries Power UAE's Military*, MIDDLE EAST EYE (July 13, 2018), <https://www.middleeasteye.net/news/outsourcing-war-how-foreigners-and-mercenaries-power-uaes-military>.

²⁰ See ELKE KRAHMANN, STATES, CITIZENS AND THE PRIVATIZATION OF SECURITY 84 (2010).

²¹ SCHWARTZ, *supra* note 9, at 18–19 (2011).

Companies During Armed Conflict (“Montreux Document” or ‘Montreux’), a set of guidelines that apply to both military security and support contractors to ensure that they abide by human rights norms in their practice.²²

Although the Montreux Document has provided an important foundation in guiding private military contractors’ actions, it was intended primarily to clarify states’ obligations under international humanitarian law in times of conflict.²³ Montreux does not lay out obligations for the military support contractors themselves, nor does it articulate that these best practices should extend beyond times of armed conflict.²⁴ Instead, the intention of drafting Montreux was that states, private contractors, and the international community would build a more robust legal paradigm based on these principles.²⁵ Further, Montreux is heavily focused on international humanitarian law. Although there is some focus on human rights law, Montreux does not extensively elaborate on how human rights law should be respected by support contractors.

Out of Montreux, a very specific initiative for security contractors called the International Code of Conduct for Private Military Security Contractors (“ICoC”) emerged. The ICoC, enforced by the International Code of Conduct Association (“ICoCA”) and through the ASIS/ANSI PSC.1 (PSC.1), is an auditable management system for quality of private security company operations.²⁶ These mechanisms further identified the obligations of private military security contractors and created a robust enforcement mechanism.²⁷ However, while this growth in the use of private contractors has propelled a global movement to define the legal obligations of private military *security* contractors (contractors who provide combat-like services such as security, translation, and interrogation), a similar discourse and regulatory framework has been largely lacking in regards to military logistics (or “support”) contractors: that is, contractors who find themselves in and out of combat zones, but are not performing military or security functions. Even though private military support contractors have played an equally large role in military operations and are also susceptible to committing human rights and international humanitarian law violations, they have largely been ignored in the movement to regulate the human rights practices of private military contractors. Therefore, the potential human rights violations of military support

²¹ INT’L COMM. OF THE RED CROSS, 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 16 (2009), https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/20192511-montreux-document_EN.pdf [hereinafter MONTREUX DOCUMENT].

²³ *Id.* at 5.

²⁴ *Id.*

²⁵ *See id.*

²⁶ Int’l Code of Conduct Ass’n, *International Code of Conduct for Private Security Service Providers* (2010), http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf [hereinafter ICoC]; ASIS Int’l, *ANSI/ASIS PSC.1-2012, Management System for Quality of Private Security Company Operations—Requirements with Guidance* (2012), https://www.acq.osd.mil/log/PS/.psc.html/7_Management_System_for_Quality.pdf [hereinafter *ASIS/PSC.1*].

²⁷ *ASIS/PSC.1*, *supra* note 26.

contractors, from human trafficking to upholding unfair labor practices,²⁸ remains unnoticed.²⁹

Although some work has been done to address these issues, two major gaps still remain in the current legal framework.³⁰ First, much of the literature and legal work has focused on international humanitarian law, leaving a significant gap in addressing human rights law.³¹ Second, current enforcement mechanisms largely focus on security contractors and not on support contractors.³² Therefore, the scope of this paper will focus on human rights law (as opposed to humanitarian law) and will address support contractors. This article will address the gaps in the current legal framework, discuss why these gaps must be filled, and propose an international code of conduct for support contractors to fill these gaps.

This article proceeds as follows. Part II of this article discusses how the academic, policy, and legal discourse regarding private military contractors' obligations under international humanitarian law and human rights law has largely focused on security contractors and has insufficiently addressed support contractors and human rights law. Part III demonstrates the need for a robust legal mechanism for private military support contractors by giving examples of potential human rights violations that have occurred. Part IV proposes a structure and elements for an International Code of Conduct for private military support contractors to address the current legal gaps. Part V concludes by illustrating how a code of conduct for military support contractors will address the wrongdoings contractors currently commit.

I. Gaps in Legal and Policy Discourse with Respect to the Application of International Legal Obligations and Best Practices to Private Military Support Contractors.

A legal and policy framework identifying private military contractors, the legal and policy issues surrounding them, and possible solutions has emerged in recent years.³³ However, this legal and policy discourse does not adequately cover two large gaps in legal governance: (1) the discourse does not sufficiently focus on support contractors and (2) the discourse does not sufficiently address how human rights law does and should apply to private military contractors.

²⁸ See Sarah Stillman, *The Invisible Army: For Foreign Workers on U.S. Bases in Iraq and Afghanistan, War can be Hell*, NEW YORKER (May 30, 2011), <https://www.newyorker.com/magazine/2011/06/06/the-invisible-army>.

²⁹ JENNIFER K. ELSEA, CONG. RESEARCH SERV., R40991, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: LEGAL ISSUES 21 (2010).

³⁰ See e.g., Alexander Faire, *Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law*, INT'L COMM. OF THE RED CROSS [ICRC] (2008), <https://www.icrc.org/en/doc/assets/files/other/pmc-article-a-faire.pdf>.

³¹ See e.g., TRANSFORMING WARTIME CONTRACTING, *supra* note 10.

³² Cf. Singer, *supra* note 7, at 187.

³³ See Deborah Avant, *The Privatization of Security and Change in the Control of Force*, 5 INT'L STUD. PERSP. 153, 157 (2004); Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383, 384–88 (2006); Benjamin Perrin, *Promoting Compliance of Private Security and Military Companies with International Humanitarian Law*, 88 INT'L. REV. OF THE RED CROSS 613, 623–24 (2006); SCHWARTZ, *supra* note 10, at 5; LINDSEY CAMERON & VINCENT CHETAIL, *PRIVATIZING WAR: PRIVATE MILITARY AND SECURITY COMPANIES UNDER PUBLIC INTERNATIONAL LAW* 7–9 (2013).

The legal and policy discourse does not adequately address support contractors. Regulations focus heavily on military security contractors, but this group only makes up 5–10% of all employed military contractors.³⁴ The remaining 85–90% consists of military consulting and support contractors.³⁵ While violations by private military security firms are exposed to the public more often, military support firms often also commit violations—yet little attention is paid to the violations PMCs commit and support contractors' legal status in and out of combat is still largely uncertain.³⁶

Nor has legal and policy discourse sufficiently developed in addressing how human rights law does and should apply to private military support contractors. Since these support contractors are not providing traditional military functions and because they often work outside of combat zones, international humanitarian law does not adequately govern them.³⁷ International human rights law provides an adequate framework for addressing many of the issues support contractors face, yet the legal and policy discourse of how human rights applies to support contractors is insufficient. There must be a proper framework for legally binding private military support contractors to international human rights law.

This next section will define support contractors, distinguish them from security contractors, and explain why the difference is important. It will then identify the inadequacies in policy and legal discourse in identifying and addressing issues surrounding support contractors and explain how there has not been a focus on how human rights law applies to support contractors.

A. Defining Private Military Support Contractors

Defining private military support contractors is important in order to understand their obligations under human rights law.³⁸ As discussed below, international legal frameworks trigger different obligations for combatants versus non-combatants and state actors versus non-state actors. The role that private military contractors play has blurred those lines. Yet, defining their roles is important as these precise definitions indicate which legal regimes will be triggered. This is particularly important for military support contractors, as literature is largely lacking in identifying what constitutes a military support contractor.³⁹ Further understanding their prevalence and importance in military affairs indicates the need to identify their legal obligations.

Under the Montreux Document, PMSCs are independent companies contracted by governments to provide military services, security services, or logistic support in connection

³⁴ SCHWARTZ, *supra* note 10, at 2.

³⁵ *Id.*

³⁶ Presidential Message on The International Telecommunication with Annexes and the Final Protocol to the Convention Which Were Signed at Montreux on November 12, 1965, Doc. 65-118 (July 11, 1966); ELSEA, SCHWARTZ & NAKAMURA, *supra* note 14, at 14–21.

³⁷ See discussion *infra* Part II.C.1.ii.

³⁸ Many scholars have defined private military and security contractors. These terms will be used in this paper, but the basis for defining private military and security contractors is beyond the scope of this paper.

³⁹ *Contra* ISENBERG, *supra* note 10, at 11–12; ; Singer, *supra* note 7, at 186, 202. See Singer, *supra* note 7, at 186. For the purposes of this paper, private military and security contractors will be defined as it is in the Montreux Document. Where the Montreux Document is silent, this paper will use the definitions provided by the Commission on Wartime Contracting.

with U.S. warfare.⁴⁰ Peter Singer defines contractors by categorizing them into subsections.⁴¹ First, private security contractors (“PSCs”) are firms that offer direct military services and often engage in security or combat.⁴² Second, management and accountability firms provide advice and training to U.S. military personnel.⁴³ Lastly, military support firms, “provide nonlethal aid and assistance, such as weapons maintenance, technical support, explosive ordnance disposal, and intelligence collection and analysis” and participate in supply chain management of military activities.⁴⁴ This last classification of firms is the focus of this article.

Private military support contractors are not involved in the direct planning or execution of military activities.⁴⁵ They cover a variety of activities from fixing trucks, managing facilities, and performing building maintenance to constructing buildings and providing technical assistance—and much more both in and outside of war zones—like the military support contractors in Al-Udeid.⁴⁶ However, in order to perform these duties, these contractors hire third-country nationals (“TCNs”) to do the majority of the work.⁴⁷

Military support contractors have played a major role in U.S. military operations since 1985, when the Army established the Logistics Civil Augmentation Program (“LOGCAP”).⁴⁸ Two-thirds of all the money spent on private military contractors are for support and services contracts.⁴⁹ Between 2002 and 2011, \$46.5 billion of government funding was used in awarding military support contracts in Iraq and Afghanistan alone.⁵⁰ In total, the U.S. has contracted out over \$385 billion dollars of services to military support firms.⁵¹ For operations in Iraq and Afghanistan alone, the U.S. has employed over 240,000 private contractors per year since 2001. A significant portion of these are logistics contractors.⁵² LOGCAP allows for logistics engineering and construction work to be

⁴⁰ See MONTREUX DOCUMENT, *supra* note 22, at 9.

⁴¹ TRANSFORMING WARTIME CONTRACTING, *supra* note 10, at Foreword ; ISENBERG, *supra* note 10, at 11–12.

⁴² DAVID ISENBERG, SHADOW FORCE: PRIVATE SECURITY CONTRACTORS IN IRAQ 25 (2009).

⁴³ *Id.*

⁴⁴ *Id.* Since Singer and Isenberg’s classifications differ from the Commission on Wartime Contracting’s usage, Singer and Isenberg’s works will be used to supplement the material published by the Commission on Wartime Contracting when it is not inconsistent.

⁴⁵ Singer, *supra* note 7, at 202.

⁴⁶ See TRANSFORMING WARTIME CONTRACTING, *supra* note 10, at 210.

⁴⁷ *Id.* at 203, 206.

⁴⁸ See Theodore T. Richard, *Logistics Civil Augmentation Program (LOGCAP) Legal Reviews*, ARMY LAW. 48, 49 (Geo. Wash. School of Law Legal Studies Research Paper No. 2012-48, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2040943. One such example is Kellogg Brown and Root’s (KBR) contract under LOGCAP. They have provided over \$50 billion in services, including maintenance equipment to the U.S. military. In total, the United States has contracted out over \$385 billion dollars of services to military support firms. David Vine, *The \$385 Billion Military-Industrial Boondoggle You’ve Never Heard Of*, NATION, (May 14, 2013), <https://www.thenation.com/article/385-billion-military-industrial-boondoggle-youve-never-heard/>; see also STEVEN G. WOODS, U.S. ARMY WAR COLLEGE, *THE LOGISTICS CIVIL AUGMENTATION PROGRAM: WHAT IS THE STATUS TODAY?* 3 (2004).

⁴⁹ TRANSFORMING WARTIME CONTRACTING, *supra* note 10, at 23, 56. (“Compared to the scope of contracting in reconstruction or logistics programs, contracted security providers are relatively small in number.”).

⁵⁰ *Id.* at 23.

⁵¹ Vine, *supra* note 48.

⁵² Lillian Tan, AMNESTY INT’L., *If You Can’t Quit Them, Then Regulate Military Contractors*, (July 3, 2009), <https://www.amnestyusa.org/if-you-cant-quit-them-then-regulate-military-contractors/>.

outsourced to private contractors.⁵³ The large role these contractors play in military functions makes it essential to define their human rights obligations.

B. Human Rights and Private Military Contractors: Gaps in Policy and Scholarly Discourse Surrounding PMSCs

There is robust literature focused on regulating private military contractors. This literature came in four waves. Each wave focused largely on security contractors within the framework of humanitarian law and did not sufficiently address human rights law as it applies to support contractors. The first wave defined private military contractors and identified the increasing role they played in military operations. The second wave addressed how contractors were likely committing human rights and humanitarian law violations. The third wave proposed ideas for defining obligations and providing legal accountability for PMSCs. The fourth wave addressed the gaps in accountability left in the legal paradigm.

1. Policy and Scholarly Debate Defining Support Contractors and Identifying their Role in Military Operations

In the early 2000's, as governments became increasingly dependent on their utilization of private military contractors, scholars responded by defining, classifying, and identifying the role of such contractors in the existing international legal regime.⁵⁴ While many scholars argued over the classifications of different types of military contractors, definitions of support contractors were excluded from the conversation.⁵⁵ Peter Singer was a leader in the effort of defining and classifying military contractors by publishing a body of literature explaining and categorizing private military contractors and highlighting gaps in the international legal framework regulating these contractors.⁵⁶ Others, like Deborah Avant, expanded on Singer's work by further classifying these workers.⁵⁷ Laura Dickinson's publications created a repertoire of work on the language defining private military security contracts, proposed changes, and identified legal issues in the international and domestic classifications of PSCs.⁵⁸

2. Policy and Scholarly Debate Focusing on the International Humanitarian Law and Human Rights Law Violations of Contractors

As the prevalence of private military contractors grew, literature began to focus on possible violations of international humanitarian law (and to a lesser degree, human rights law) and the legal gaps in accountability of these violations. Scholars began to examine private military contractors' actions and the inadequacies in defining their legal obligations and holding them accountable for violating those legal obligations. Deborah Avant has significantly contributed to the literature on issues surrounding military security contractors,

⁵³ ISENBERG, *supra* note 10, at 19.

⁵⁴ *See id.* at 12.

⁵⁵ Compare FRED SCHREIER & MARINA CAPARINI, GENEVA CTR. FOR THE DEMOCRATIC CONTROL OF ARMED FORCES, PRIVATISING SECURITY: LAW, PRACTICE AND GOVERNANCE OF PRIVATE MILITARY AND SECURITY COMPANIES, Occasional Paper No. 6 (2005), with Deborah Avant, *The Privatization of Security and Change in the Control of Force*, 5 INT'L STUD. PERSP. 153 (2004).

⁵⁶ Although private military security contractors have been used around the world beginning in the 1990s, Singer's work was the first to highlight their significance in modern warfare. *See* Singer, *supra* note 7, at 188; Peter W. Singer, *Outsourcing War*, 84 FOREIGN AFF. 119, 122–23 (2005).

⁵⁷ *See* Avant, *supra* note 33.

⁵⁸ Dickinson, *supra* note 33, at 403–04.

with her body of work focusing partially on the U.S.'s tendency to hire aggressive security contractors and problems in monitoring security contractors.⁵⁹ Avant's work focuses on issues such as torture and use of force. These issues apply specifically to security contractors. Private military support contractors generally do not commit the same *kinds* of violations that security contractors do.⁶⁰ While most of the violations addressed in these works surround torture, violations of humanitarian law, and the right to life, many of the other human rights violations committed by private military support contractors are not covered in depth.

3. Providing Recommendations for Defining Obligations and Creating Accountability for Military Contractors

After the issues had been identified in the literature, the policy and scholarly discourse turned to recommending ways for providing more accountability for private military contractors.⁶¹ However, much of this work has largely focused on private military security contractors, with limited focus on support contractors. Of note in this area, Laura Dickinson published a body of work identifying numerous potential mechanisms for accountability and oversight, including adding oversight provisions to government contracts, accreditation programs, transparency mechanisms, and mechanisms to expand extraterritorial and civil jurisdiction.⁶² In addition to her published work, Dickinson has often spoken on this issue and increased its awareness to both legal scholars and state leaders.⁶³ However, Dickinson's focus is entirely on security contractors.⁶⁴ Avant's work also provides several compelling solutions on governing private military security contractors, but her work does not extend to the scope of support contractors, leaving a void in the literature on how her solutions can or should apply to non-security contractors. The legal framework as it applies to private military *security* contractors cannot be simply transposed to private military *support* contractors. New efforts are thus required to ensure that a sound legal framework applies exclusively to private military support contractors. There is little in the way of explicitly connecting this analysis to private military support contractors.

4. Policy and Scholarly Debate Addressing Gaps in Legal Accountability

As new mechanisms of accountability and oversight emerged, many scholars began evaluating the effectiveness of these regimes. For example, Rebecca DeWinter-Schmitt, like many of her colleagues, analyzes the effectiveness of Montreux through her work, most of which focuses on voluntary regulation by private military security contractors,⁶⁵ but does not

⁵⁹Much of Avant's work rests on the very principle that not only are private military security contractors poorly governed, but it is precisely this lack of oversight that makes them appealing to governments who see them as tools to circumvent existing standards. See e.g. Perrin, *supra* note 33, at 622.

⁶⁰ Avant, *supra* note 33.

⁶¹ See e.g., Anna Leander, *The Market for Force and Public Security: The Destabilizing Consequences of Private Military Companies*, 42 J. PEACE RES. 605, 611 (2005); Dickinson, *supra* note 32, at 400n.19, 403–23.

⁶² Dickinson, *supra* note 33, at 403–23.

⁶³ E.g., Laura Dickinson, Presentation at Third Plenary Meeting of the Montreux Document Format Western New England College of Law: Outsourcing War and Peace (Nov. 2009); Laura Dickinson, Presentation at Junior International Law Scholars Workshop at Georgetown University Law Center: Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability in International Law (Dec. 2004).

⁶⁴ See generally Dickinson, *supra* note 33.

⁶⁵ The Montreux Document was a powerful tool in reminding states of their already existing obligations to ensure that all private military contractors are respecting the human rights obligations that states have. However,

focus on private military support contractors. Most notably, her book *Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Document Legal Obligations and Good Practices*, reviews states' responses to Montreux in the years following its implementation. However, while Montreux covers both military and support contractors, DeWinter-Schmitt's compilation focuses on states' practices with regard to security contractors.⁶⁶

While these works, and many others, provide applicable solutions to problems with respect to private military contractors, they do so primarily in the context of *security* contractors, and the focus is largely on international humanitarian law, not human rights law.⁶⁷ This is perhaps because security contractors were engaged in high profile violations such as the Nisour Square massacre and torture scandals.⁶⁸ However, security contractors only make up a fraction of private military contractors.⁶⁹ This body of work did not fully address the problems that support contractors face, nor did it propose solutions.

Academic work on military support contractors focuses heavily on human trafficking,⁷⁰ although the focus is on how this human rights violation pertains to all private military contractors.⁷¹ These works on human trafficking touch on how these issues are prevalent with military support contractors, but they do not address the wide range of other human rights issues military support contractors face.⁷²

The current body of academic literature does not adequately address the human rights obligations of private military support contractors nor does it present solutions on how to keep private military support contractors from potentially committing human rights violations. This leaves what their obligations are under international law open for question and allows for potential human rights violations to go unaddressed. In response, this paper seeks to address issues largely left uncovered by both the legal frameworks and academic literature surrounding private military contractors.

the Montreux Document receives several criticisms for not being an effective tool in ensuring states actually take action. In addition, the International Code of Conduct, ISO 18788 and PSC.1, discussed extensively below, do not cover support contractors.

⁶⁶ MONTREUX FIVE YEARS ON: AN ANALYSIS OF STATE EFFORTS TO IMPLEMENT MONTREUX DOCUMENT LEGAL OBLIGATIONS AND GOOD PRACTICES (Rebecca DeWinter-Schmitt ed., 2013). Further, some scholars argue that the military should not be engaging in outsourcing at all. See Alon Harel, *Outsourcing Violence?*, 5 LAW & ETHICS OF HUM. RTS. 395 (2011).

⁶⁷ For example, consider Jeremy Scahill's body of work on Blackwater, most notably his book, BLACKWATER, which details the company's role throughout the world as private military security and criticizes their power. See also CAMERON & CHETAIL, *supra* note 33 (detailing how public international law applies to private military security contractors).

⁶⁸ Marie-Louise Tougas, *Some Comments and Observations on the Montreux Document*, 12 Y.B. INT'L HUMANITARIAN L. 321, 341 n.122 (2009); Charles Tiefer, *No More Nisour Squares: Legal Control of Private Security Contractors in Iraq and After*, 88 OR. L. REV 745, 746.

⁶⁹ CHRISTOPHER KINSEY, PRIVATE CONTRACTORS AND THE RECONSTRUCTION OF IRAQ: TRANSFORMING MILITARY LOGISTICS I (James Gow & Rachel Kerr eds., 2009).

⁷⁰ Michelle Lillie, *Third Country Nationals Trafficked by Military Contractors*, HUMAN TRAFFICKING SEARCH (2013), <http://humantraffickingsearch.org/third-country-nationals-trafficked-by-military-contractors/>.

⁷¹ Brittany Warren, Note, "If You Have a Zero-Tolerance Policy, Why Aren't You Doing Anything?": Using the Uniform Code of Military Justice to Combat Human Trafficking Abroad, 80 GEO. WASH. L. REV. 1255, 1262-63 (2012); see also *id.*; Stillman, *supra* note 28.

⁷² Lillie, *supra* note 70.

C. Gaps in Legal Mechanisms Relating to Private Military Contractors

A relatively robust international legal regime surrounding private military contractors has emerged. However, this regime is insufficient for two reasons. First, it falls short of adequately covering private military support contractors. Second, it has largely focused on international humanitarian law as opposed to human rights law. As mentioned above, the challenges of applying these legal regimes to private military security contractors has been clarified by existing literature. However, these legal frameworks are equally ambiguous in their application to military support contractors, and the existing literature does not sufficiently address these issues.

1. Montreux Document

After the debacle in Nisour Square, where U.S. private military security contractors killed Iraqi civilians, seventeen countries came together to address the legal challenges private military contractors pose and provide guidelines and solutions on how to regulate their activity.⁷³ While the Montreux Document distinctly points to already existing legal obligations of states⁷⁴ in order to hold private military contractors accountable, it does not directly hold private military contractors themselves accountable.⁷⁵ The Montreux Document emphasizes states already existing legal obligations with respect to private military contractors and then proceeds to set out a list of best practices for states to follow in order to control their private military contractors and ensure they are adhering to international human rights and international humanitarian law standards.⁷⁶ The Montreux Document reminds states of their humanitarian and (to a lesser degree) human rights obligations, which have been crystalized into international law through treaties and customary international law.⁷⁷

(i) Private Military and Security Contractors in the Montreux Document

Although the Montreux Document encompasses all private military contractors, it focuses heavily on security contractors.⁷⁸ The detailed parts of Montreux focus on suggestions that are especially related to security contractors, but not support contractors.⁷⁹ For example, in Montreux's section on criteria for the selection of PMSCs, it calls upon contracting states to choose contractors, 'particularly those who are required to carry weapons as part of their duties' to not have been involved in violent crimes or to have been

⁷³ In 2009, a private military security group contracted by the United States killed 17 civilians in Nisour Square, causing international outcry. Tiefer, *supra* note 68, at 746.

⁷⁴ Since different countries have signed on to different treaties and therefore have different human rights obligations, it follows that countries, under Montreux, are called to follow different best practices based upon their obligations under human rights law.

⁷⁵ See INT'L COMM. OF THE RED CROSS, 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 5 (2009), https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/20192511-montreux-document_EN.pdf [hereinafter MONTREUX DOCUMENT].

⁷⁶ *Id.* at 16.

⁷⁷ Many of these principles are premised in the Universal Declaration of Human Rights, which holds the status of customary international law and is therefore binding on all states. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948).

⁷⁸ MONTREUX DOCUMENT, *supra* note 75.

⁷⁹ *Id.*

dishonorably discharged from the armed forces.⁸⁰ Requirements such as these apply more heavily to security contractors than other types of contractors. These issues with use of force are more problematic with security contractors.⁸¹ The issues surrounding support contractors, however, such as human trafficking, inadequate living conditions, and inadequate wages are not the focus of the Montreux Document.⁸² Focusing on support contractors is important because there is no legal regime that holds them accountable or defines states' and contractors' obligations.⁸³

(ii) International Humanitarian Law in the Montreux Document

The Montreux Document focuses mainly on international humanitarian law ("IHL"), though not exclusively, as there is some focus on human rights law. While the Montreux Document calls upon states and contractors to respect human rights in general terms, the obligations it recalls for states and contractors under IHL are much more developed and contain more specific duties.⁸⁴ For example, Part One of Montreux calls upon states to implement their obligations under international human rights law by adopting relevant legislation and other measures.⁸⁵ By contrast, most of the provisions in Part One invoke IHL obligations in great depth, such as extraditing or prosecuting violators of IHL, providing penal sanctions for violators, and not allowing PMSCs to take any actions that IHL specifically reserves for governments.⁸⁶ A focus on IHL is important because it clearly sets out how states should treat PMSCs under IHL and how those PMSCs should behave. This clarity is useful because much of the work PMSCs do is in the context of armed conflict.⁸⁷

While a focus on IHL is important, it is insufficient in creating an accountability regime for private military support contractors because IHL governs state actors in combat zones in times of war.⁸⁸ Private military support contractors often operate under the auspices of war, so it is important to consider their obligations under IHL.⁸⁹ However, the legal status of private military contractors-private actors performing government actions on behalf of the government- is not explicitly addressed in IHL.⁹⁰ Therefore, questions remain as to whether

⁸⁰ *Id.* at 22.

⁸¹ Amol Mehra, *Bridging Accountability Gaps—The Proliferation of Private Military and Security Companies and Ensuring Accountability for Human Rights Violations*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 323, 325 (2009) (citing Robert Capps, *Crime Without Punishment*, SALON.COM (June 28, 2002), <https://www.salon.com/archive/2002/06/28>).

⁸² See generally MONTREUX DOCUMENT, *supra* note 75.

⁸³ See Joseph C. Hansen, *Rethinking the Regulation of Private Military and Security Companies Under International Humanitarian Law*, 35 FORDHAM INT'L L.J. 698, 699, 709 (2012).

⁸⁴ MONTREUX DOCUMENT, *supra* note 75, at 11–15.

⁸⁵ *Id.* at 11.

⁸⁶ *Id.* at 11–12.

⁸⁷ Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, 19 EUR. J. INT'L L. 989, 989–90 (2008).

⁸⁸ Int'l Comm. Red Cross, *What is International Humanitarian Law?*, (Dec. 31, 2014), <https://www.icrc.org/en/document/what-international-humanitarian-law>.

⁸⁹ *Id.*

⁹⁰ See generally *id.*

they can be classified as combatants.⁹¹ This is particularly true of support contractors, who are not actively engaged in combative functions.⁹²

Arguably, humanitarian law may generally apply to private military contractors as they often find themselves in the middle of combat.⁹³ The Department of Defense, for example, makes it clear in its contracts with military support firms that their functions are limited to “indirect participation in military operations.”⁹⁴ Whether support contractors are considered combatants under IHL, however, is far less obvious than whether security contractors are considered combatants, as support contractors do not perform the core responsibilities generally attributed to armed forces.⁹⁵ Moreover, many academics now agree that private military contractors are considered civilians for the purposes of IHL until they directly participate in hostilities.⁹⁶ Still, after years of debate, their status under IHL is “ambiguous at best.”⁹⁷

As mentioned, the Montreux Document does place some emphasis on how human rights obligations relate to private military contractors.⁹⁸ States that use private military contractors have an obligation to ensure that those contractors are operating in accordance with that state’s international human rights obligations and domestic laws.⁹⁹ These states are also obligated to use domestic legislation and policies to ensure that private military contractors are protecting human rights.¹⁰⁰ Private military contractors are just as obligated as states, under the Montreux Document, to comply with domestic laws.

(iii) International Human Rights Law in the Montreux Document

The international human rights standards referred to in the Montreux Document are primarily incorporated in the International Covenant on Civil and Political Rights (“ICCPR”).¹⁰¹ Under the ICCPR, states are responsible for ensuring that their private military contractors are protecting the human rights to life, security of person, freedom from slavery and servitude, freedom from degrading treatment, freedom of movement, the right to

⁹¹ Won Kidane, *The Status of Private Military Contractors Under International Humanitarian Law*, 38 DENV. J. INT’L L. & POL’Y 361, 364 (2020).

⁹² Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 43, June 8, 1977, 1125 U.N.T.S. 3.

⁹³ Kidane, *supra* note 89, at 364.

⁹⁴ Alice S. Debarre, Article, *U.S.-Hired Private Military and Security Companies in Armed Conflict: Indirect Participation and its Consequences*, 7 HARV. NAT’L SEC. J. 437, 446 (2016) (citing U.S. Dep’t of Def., Instruction 3020.41, Operational Contract Support ¶ 6.1.1 (2011) [hereinafter DODI 3020.41]).

⁹⁵ See Antenor Hallo de Wolf, *Modern Condottieri in Iraq: Privatizing War from the Perspective of International Human Rights Law*, 13 IND. J. GLOBAL LEGAL STUD. 315, 320–21 (2006).

⁹⁶ Hansen, *supra* note 83, at 699.

⁹⁷ *Id.*

⁹⁸ MONTREUX DOCUMENT, *supra* note 75, at 5.

⁹⁹ *Id.* at 11–12.

¹⁰⁰ *Id.* While the Montreux Document also highlights the human rights obligations of the states in which PSCs are operating and the home states out of which the PSCs are based, this paper will concentrate on the human rights obligations of the states using PSCs because this paper’s argument that the ICoCA should develop a standard for military support contractors rests on a premise that the states using private military support contractors will ensure that these standards are met, use auditing mechanisms to guarantee proper oversight based on the standards, and will be incentivized to contract with those contractors meeting the standards.

¹⁰¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

leave any country, and the right to marry.¹⁰² These rights may be implicated in the daily functions of support.¹⁰³

Unlike IHL, which binds private actors, the ICCPR's text does not explicitly bind private contractors. To the contrary, the ICCPR Article 2(1) states: "*Each State Party* to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind."¹⁰⁴ The scope of the ICCPR presents a twofold problem with respect to private military contractors.

First, the ICCPR clearly applies to "[e]ach state party."¹⁰⁵ Each state party includes the state and its official government actors.¹⁰⁶ While militaries undoubtedly act on behalf of their governments, there has been ongoing debate as to whether private military contractors also act on behalf of the states that hire them.¹⁰⁷ According to the International Court of Justice, human rights regimes that apply to state actors, such as the ICCPR, will only apply to private military contractors who are acting as "organs of a state,"¹⁰⁸ a very high standard to meet.¹⁰⁹ Since private military support contractors are often far removed from combat, it is unlikely that they qualify as organs of a state.¹¹⁰ On the other hand, the International Law Commission is of the position that anyone acting under state capacity and exercising government control is an agent of the state and therefore is a state actor.¹¹¹ While there is an increasing amount of literature explaining why private military security contractors should be considered state actors, the support services that logistics contractors perform are arguably not government functions, making it difficult to include them in current definitions of the state actors.¹¹²

A second problem in applying the ICCPR to military support contractors arises from questions on the scope of its application. The ICCPR instructs states to ensure that individuals' rights are not being violated "within its territory."¹¹³ This makes extraterritorial application of the ICCPR difficult.¹¹⁴ The United States, for example, has long held the position that the ICCPR does not bind the United States to respect and protect human rights

¹⁰² *Id.* at art. 6–9, art. 12, art. 23.

¹⁰³ *See id.*

¹⁰⁴ *Id.* (emphasis added).

¹⁰⁵ *Id.* at art. 2.

¹⁰⁶ *See Hoppe, supra* note 87, at 990–91.

¹⁰⁷ *See id.* at 1008–09.

¹⁰⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, ¶¶ 385, 392. An analysis of the test for "organ of the state" is beyond the scope of this paper.

¹⁰⁹ Hoppe, *supra* note 87, at 991 (noting many of the PMC services in Iraq and Afghanistan).

¹¹⁰ *See id.* at 991 n.12.

¹¹¹ *See id.* (referring to the International Law Commission).

¹¹² *See id.*

¹¹³ ICCPR, *supra* note 99, at art. 2.

¹¹⁴ Extraterritorial application refers to the notion that a state is violating human rights in the territory of another state, not in the territory of their own state. Hugh King, *The Extraterritorial Human Rights Obligations of States*, 9 HUMAN RIGHTS L. REV. 521, 521–22 (2009).

extraterritorially.¹¹⁵ The Human Rights Committee calls upon states to apply the language of the ICCPR extraterritorially, as such an application is more in line with the object and purpose of the ICCPR.¹¹⁶ However, many countries, like the United States, have pushed back against this expanded meaning of Article 2(1) and claim that they are only obligated to respect the rights laid out in the ICCPR within their territory.¹¹⁷ Another point of contention is whether human rights law applies to non-state actors. Ultimately, as long as the debate continues as to the scope of the ICCPR, the ICCPR will be insufficient in holding PMCs accountable.

For the reasons discussed above, the Montreux Document is insufficient in filling the gaps left by other legal regimes and must be supplemented by domestic law for it take effect. First, Montreux is not legally binding, but rather calls upon states to recall already existing obligations. In fact, Part Two of the Montreux Document clearly states that since the document is not legally binding, its intention is not to be exhaustive, but rather to push states to implement their own statutory regime and codify the principles outlined in Montreux.¹¹⁸

Second, Montreux alone is insufficient because it neglects some economic, social, and cultural rights. Although Montreux calls on states to respect and ensure *all* human rights obligations, the specific examples Montreux gives largely allude to civil and political rights.¹¹⁹ However, civil and political rights are not exhaustive of all of the human rights being implicated in the wrongdoings of military support contractors. Private military support contractors also threaten to violate rights stipulated in the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) such as the right to adequate living conditions, labor rights, the right to family life, the right to health, and the right to a fair wage.¹²⁰ Although some states—notably the U.S.—are not parties to the ICESCR, it is nevertheless important to address these rights because many states, the U.S. included, have signed the ICESCR but many of the rights laid out in the covenant are commonly violated by military support contractors.

The Montreux Document did not sufficiently address support contractors or how human rights obligations should apply to them. Individual state implementation of the principles in the Montreux Document to support contractors has been, at best, inconsistent. States have had problems ensuring accountability, determining which services should be

¹¹⁵ Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Give It Up*

6 (2014), <http://digitalcommons.law.scu.edu/facpubs/848>.

¹¹⁶ King, *supra* note 114 at 523; Vienna Convention on the Law of Treaties, art. 31, Jan. 27, 1980, 1155 U.N.T.S. 331 (explaining that treaties should be interpreted in light of the object and purpose of the treaty).

¹¹⁷ Aldo S. Zilli, *Approaching the Extraterritoriality Debate: The Human Rights Committee, the U.S. and the ICCPR*, 9 SANTA CLARA J. INT'L L. 399, 401 (2011) (citing U.S. Dep't of State, Second and Third Periodic Report of the United States of America to the U.N. Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, P 129, delivered to the Human Rights Committee, Oct. 21, 2005).

¹¹⁸ Marie-Louise Tougas, *Some Comments and Observations on the Montreux Document*, 12 Y.B. INT'L HUMANITARIAN L. 321, 340 (2009).

¹¹⁹ INT'L COMM. OF THE RED CROSS, 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 5 (2009), https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/20192511-montreux-document_EN.pdf [hereinafter MONTREUX DOCUMENT].

¹²⁰ International Covenant on Economic, Social and Cultural Rights, art. 7–8, art. 10–12, (Dec. 16, 1966), 993 U.N.T.S. 6.

outsourced, and monitoring contractors.¹²¹ While the Montreux Document is a good place for states to start creating statutory guidelines for private military support contractors, states must go beyond what the Montreux Document provides in order to sufficiently cover military support activities.

The Montreux Document largely focuses on principles of IHL; however, the application of IHL to support contractors is beyond the scope of this article for two reasons. First, since IHL favors a presumption of civilian status, and even private military security contractors who are involved in combat are largely viewed in the current legal literature as civilians, it is unlikely that support contractors would be considered combatants under IHL and, therefore, IHL would not apply to them.¹²² Second, even if IHL does apply to military support contractors during times of war, their human rights obligations still stand in both conflict and non-conflict zones; therefore, the application of human rights law is broader and more encompassing.¹²³ Possible violations of IHL are beyond the scope of this paper.

2. International Code of Conduct

The Montreux Document does not provide a specific mechanism for accountability. Its purpose is to remind states and contractors of their already existing legal obligations, but it does not provide any further mode of accountability.¹²⁴ While the Montreux Document broadly states the obligations countries have, it falls short of stipulating mechanisms to ensure those obligations are met.¹²⁵ The lack of specificity in Montreux leaves both states and contractors alike with a structural vacuum. An additional mechanism was needed to give specific guidelines to private military security contractors. This need was met through the formation of the International Code of Conduct for Private Military Security Contractors (“ICoC”).¹²⁶

The ICoC is a joint effort formed by a coalition composed of the U.S., Switzerland, the United Kingdom, private military security industry leaders, and human rights groups.¹²⁷ The ICoC sets forth specific standards for private military security contractors to meet, in the spirit of the Montreux Document.¹²⁸ This group also agreed to create the International Code of Conduct Association (“ICOCA”) to complement the ICoC and oversee its implementation and enforce its provisions.¹²⁹ While many hail the successes of the ICoC,

¹²¹ See Laura A. Dickinson, *Regulating the Privatized Security Industry: The Promise of Public/Private Governance*, 63 EMORY L.J. 417, 419–20 (2013) (citing *About the ICoC Association*, INT’L CODE OF CONDUCT FOR PRIV. SEC. SERV. PROVIDERS, http://www.icoc-ppsp.org/ICoC_Association.html (last visited Dec. 13, 2013)).

¹²² However, there are arguments saying that IHL should apply to military support contractors as well as any action taken for the ultimate purpose of ultimately engaging in war. See Debarre, *supra* note 94, at 450.

¹²³ Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT’L L. 119, 141 (2005).

¹²⁴ Other attempts have been made to create compliance for private military security contracts, such as codes created by the International Peace Association. Lauren Groth, Article, *Transforming Accountability: A Proposal for Reconsidering How Human Rights Obligations are Applied to Private Military Security Firms*, 35 HASTINGS INT’L & COMP. L. REV. 29, 62 (2012).

¹²⁵ MONTREUX DOCUMENT, *supra* note 119.

¹²⁶ Dickinson, *supra* note 121, at 419.

¹²⁷ *Id.* at 420.

¹²⁸ *Id.* at 420 (citing *About the ICoC Association*, INT’L CODE OF CONDUCT FOR PRIV. SEC. SERV. PROVIDERS, http://www.icoc-ppsp.org/ICoC_Association.html (last visited Dec 13, 2013)).

¹²⁹ *Id.* at 419.

many skeptics wonder if the ICoC will fail as its predecessors did.¹³⁰ Critics of the ICoC doubt its effectiveness and potency as it rests on underdeveloped principles of international law that indirectly regulate private parties.¹³¹

Companies sign on to the ICoC to signify their agreement to adhere to the principles of the ICoC and take on the obligations it stipulates.¹³² Notably, this means that companies that sign on to the ICoC must implement internal procedures to ensure that the standards in the ICoC are consistently met.¹³³ ICOCA has authority to make sure that members properly implement the ICoC's provisions and ensures that accountability is realized by requiring certification, auditing, monitoring, and reporting.¹³⁴ In addition, companies are required to state how their internal procedures lead to the adherence of the human rights and humanitarian law principles set out in by the ICoC.¹³⁵ This includes, for example, adding the ICoC's principles into company policies and establishing vetting and training programs for employees to make sure they employees are properly trained and capable of dealing with weapons.¹³⁶ ICOCA may also make visits to the companies or the areas in which they are operating to assess their compliance with human rights and IHL.¹³⁷ In order to ensure that these mechanisms work, ICOCA discusses ways for member companies to improve their adherence to the ICoC and also hears complaints regarding how members have allegedly violated principles of the ICoC.¹³⁸ When companies fail to comply, ICOCA may "request a specific company to take corrective action" or otherwise be suspended from, sanctioned by, or removed from ICOCA.¹³⁹ Therefore, the ICoC is more than just a pledge.¹⁴⁰ Rather, it requires companies to make tangible changes and subjects them to ICOCA's auditing in order to ensure results.¹⁴¹

In addition to its effectiveness as a set of international guidelines, the ICoC had positive unintended consequences. Trade associations began requiring a commitment to ICoC principles as a requirement for membership.¹⁴² Further, several states that engage in the largest amount of hiring of private military security contractors mandate that their contractors adhere to the ICoC before they bid for contracts.¹⁴³ Companies are thereby incentivized to

¹³⁰ Laurence Juma, *Privatisation, Human Rights and Security: Reflections on the Draft International Convention on Regulation, Oversight and Monitoring of Private Military and Security Companies*, 15 LAW, DEMOCRACY & DEV. 182, 183–84 (2011).

¹³¹ Groth, *supra* note 124, at 61 n.141.

¹³² Dickinson, *supra* note 121, at 420–21 (citing *About the ICoC Association*, INT'L CODE OF CONDUCT FOR PRIV. SECURITY SERV. PROVIDERS, http://www.icoc-pp.org/ICoC_Association.html (last visited Dec. 13, 2013)).

¹³³ *Id.* at 420–21.

¹³⁴ UNIV. OF DENVER, *Private Security Monitor*, http://psm.du.edu/international_regulation/global_standards_codes_of_conduct/icoc.html (last visited May 2, 2020).

¹³⁵ Dickinson, *supra* note 121, at 422–23.

¹³⁶ *Id.*

¹³⁷ *Id.* at 427–28.

¹³⁸ Dickinson, *supra* note 121, at 428–29; Ian Ralby, *Accountability for Armed Contractors*, 2 FLETCHER SECURITY REV. 1, 3 (2015).

¹³⁹ Dickinson, *supra* note 121, at 428.

¹⁴⁰ *Id.* at 427

¹⁴¹ *Id.*

¹⁴² Ralby, *supra* note 138, at 3.

¹⁴³ *Id.* at 6.

adhere to the ICoC because it is good for business prospects.¹⁴⁴ Governments and other contractors likely want to work with contractors who have signed on to the ICoC because doing so gives them legitimacy. A similar trend can be seen with the ICoC for security contractors.¹⁴⁵ Membership to ICOCA has become a requirement for procurement and membership into several trade organizations.¹⁴⁶ A corollary code of conduct for support contractors may produce the same results.

The ICoC was created to further develop the Montreux Document. However, the ICoC's major flaw is that it only does so for private military security contractors, excluding a great number of other private military contractors who also violate human rights law and IHL.¹⁴⁷ Therefore, a legal gap persists in the Montreux Document's basic principles that define the obligations states have for non-security private military support contractors. A similar international code of conduct that covers private military support contractors is necessary to define their obligations, as well as provide transparency by creating similar obligations in signing on to the code. An international code of conduct for private military support contractors is particularly important because most of their violations fall under human rights law,¹⁴⁸ and it would directly bind support contractors to human rights laws in a way that human rights itself does not.

3. ANSI/PSC.1

In addition to the ICoC, another avenue of regulation has been the establishment of business management standards. Shortly after the adoption of the ICoC, the U.S. Department of Defense developed and funded ASIS/ANSI PSC.1.¹⁴⁹ The Department of Defense awarded a contract to the American Society of Industrial Security (ASIS) to develop auditing standards that met the requirements set forth in the ICoC.¹⁵⁰ In response, ASIS combined a group of experts from 26 countries to create a comprehensive and detailed auditing standard using the rules of the American National Standards Institute (ANSI).¹⁵¹ The standard, known as ASIS/ANSI PSC.1 (PSC.1), goes further than the ICoC by specifying standards for auditing procedures.¹⁵² PSC.1 provides standards for auditing management systems to ensure

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 3.

¹⁴⁷ BUS. & HUMAN RIGHTS RES. CTR., *International Code of Conduct for Private Security Service Providers (ICoC)-a Process Aimed at Companies*, <https://www.business-humanrights.org/en/conflict-peace/specialinitiatives/initiatives-on-private-military-security-companies/international-code-of-conduct-for-private-security-service-providers-icoc-a-process-aimed-at> (last visited May 2, 2020).

¹⁴⁸ See discussion *supra* Section II.C.1.ii.

¹⁴⁹ Office of the Assistant Sec'y of Def. for Sustainment, *Private Security Companies-Standards*, https://www.acq.osd.mil/log/ps/psc_Standards.html (last visited May 2, 2020).

ASIS International has also been responsible for creating a corresponding international auditing standard known as ISO 18788. See generally ASIS INT'L., *MANAGEMENT SYSTEM FOR QUALITY OF PRIVATE SECURITY COMPANY OPERATIONS-REQUIREMENTS WITH GUIDANCE, ASIS PSC.1-2012* (2017), https://www.acq.osd.mil/log/ps/.psc.html/ANSI-ASIS_PSC.1-2012_R2017.pdf.

¹⁵⁰ REBECCA DEWINTER-SCHMITT, *INTERNATIONAL SOFT LAW INITIATIVES: THE OPPORTUNITIES AND LIMITATIONS OF THE MONTREUX DOCUMENT, ICoC, AND SECURITY OPERATIONS MANAGEMENT SYSTEM STANDARDS, IN PUBLIC INTERNATIONAL LAW AND HUMAN RIGHTS VIOLATIONS BY PRIVATE MILITARY AND SECURITY COMPANIES 121* (Helena Torroja ed., 2017).

¹⁵¹ *Id.* at 117.

¹⁵² Ralby, *supra* note 138, at 4.

that companies being audited using the standard are observing good human rights practices and are following IHL.¹⁵³ Since the time that the Department of Defense funded the standard, it has been adopted by several other states, including the United Kingdom, Australia, Canada, and the Czech Republic.¹⁵⁴ Its effects have been widespread.¹⁵⁵ Today, over “72 companies working in 23 different countries and every inhabited continent are either certified to the standards or nearing certification” of ANSI PSC.1.¹⁵⁶

In 2015, ICOCA recognized PSC.1 as the first acceptable management system auditing standard to properly measure adherence to the ICoC.¹⁵⁷ Since then, PSC.1 has been widely used and accepted.¹⁵⁸ One reason for this success is that the auditing system is familiar to businesses because they are subject to similar systems in their ordinary course of business.¹⁵⁹

PSC.1 works by first requiring management to create policies that demonstrate a commitment to human rights.¹⁶⁰ Additionally, they must create a grievance mechanism through which violations can be voiced.¹⁶¹ Companies then vet and select personnel only after considering their prior human rights conduct.¹⁶² Subsequently, employees are trained on how to respect human rights.¹⁶³ If any human rights violations do happen, the companies must adequately record and mitigate them.¹⁶⁴ Both the Department of Defense and the British Foreign Commonwealth Offices have required that private military security contractors implement the ANSI PSC.1 management standard. However, PSC.1 does not entirely address the issue at hand, because it is intended for private security contractors and not *support* contractors.¹⁶⁵ Only security contractors are required to comply with the standard in order to contract with the federal government.¹⁶⁶ In some ways, PSC.1 overlaps with the ICoC.¹⁶⁷ Despite efforts to harmonize the two standards, there are gaps in the consistency between them.

4. Best Practices for Businesses

Additionally, PMSCs should adhere to the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,

¹⁵³ DeWinter-Schmitt, *supra* note 150, at 121.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 117.

¹⁵⁸ Ralby, *supra* note 138, at 4.

¹⁵⁹ *Id.*

¹⁶⁰ DeWinter-Schmitt, *supra* note 150, at 121.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See generally Office of the Assistant Sec’y of Def. for Sustainment, *supra* note 149.

¹⁶⁶ *Id.*

¹⁶⁷ Int’l Code of Conduct Ass’n [ICoCA], *Analysis of ANSI/ASIS PSC.1-2012 Against the ICOCA Certification Assessment Framework* (2012), <https://icoca.ch/sites/default/files/uploads/Annex%20A%20PSC.1%20Certification%20Assessment%20Framework.pdf>.

and by extension the U.N. Guiding Principles on Business and Human Rights.¹⁶⁸ States can voluntarily opt into these standards. Although non-binding, the U.N. Guiding Principles set forth principles that businesses should follow. As mentioned above, states are obligated to ensure that all private military contractors are protecting human rights. In addition to that framework, there is an emerging and developing paradigm that obligates all transnational corporations, which includes all private military contractors, to protect human rights, independent of the responsibilities states hold. While helpful and necessary, the U.N. Guiding Principles on Business and Human Rights are not specific enough to bind or guide private military contractors. The U.N. Guiding Principles state broad and generalized best practices such as avoiding “causing or contributing to adverse human rights impacts.”¹⁶⁹ These standards, while helpful, must be supplemented by more specific, better practices for support contractors.

5. FAR Part 22.17 on Human Trafficking

Additionally, the United States has attempted to build a robust legal system to combat human trafficking among military contractors.¹⁷⁰ In 1999, a group of private police employed by DynCorp, on contract with the U.S. government, were investigated for participating in a sex trafficking scandal.¹⁷¹ In response, the Federal Acquisition Regulation Council (“FAR Council”) created Federal Acquisition Regulation (“FAR”) 22.17, which, in an effort to combat trafficking, allows the government to terminate a contract or penalize a contractor if it engages in human trafficking.¹⁷² Also somewhat notable is FAR 22.15, which prohibits procurement officials from purchasing goods made with child labor.

One of the most notable efforts in combating human trafficking came in 2012, when President Obama issued an executive order requiring the FAR Council to regulate business practices to ensure that federal contractors are not participating in human trafficking.¹⁷³ The FAR Council adopted mandates into the FAR, including requiring certain contractors and subcontractors to form compliance plans.¹⁷⁴ The executive order also

¹⁶⁸ Rep. of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, transmitted by the Chairperson of the Working Group Established Pursuant to Resolution 2005/2 (2005) Concerning The Right of Peoples to Self-Determination and its Application to Peoples under Colonial or Alien Domination or Foreign Occupation, ¶ 28, U.N. Doc. E/CN.4/2006/11/Add.1 (Mar. 3, 2006). Although the Working Group referred to the draft norms, the norms were never adopted. In response, the sub-commission that created the norms appointed John Ruggie to create the U.N. Guiding Principles on Business and Human Rights, which effectively replaced the draft norms. While the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination calls on PMCs to follow the Draft Norms, many of the principles in the Draft Norms have been adopted by the United Nations in the form of the U.N. Guiding Principles.

¹⁶⁹ U.N. Office of the High Comm’r, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. HR/PUB/11/04 ¶13 (2011).

¹⁷⁰ See generally 48 C.F.R. § 22.1703 (2019).

¹⁷¹ Amol Mehra, *Bridging Accountability Gaps—The Proliferation of Private Military and Security Companies and Ensuring Accountability for Human Rights Violations*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 323, 325 (2009) (citing Robert Capps, *Crime Without Punishment*, SALON.COM (June 28, 2002)).

¹⁷² John G. Bradbury, *Human Trafficking and Government Contractor Liability: Is FAR 22.17 a Step in the Right Direction?*, 37 PUB. CONT. L.J. 907, 908 (2008) (citing FAR § 22.1703 (2019)); P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT’L L. 521, 522 (2004).

¹⁷³ Exec. Order No. 13,627, 3 C.F.R. 309 (2012).

¹⁷⁴ *Id.*

attempted to fill in enforcement gaps since the original FAR regulation was lacking in enforcement mechanisms.¹⁷⁵

However, the FAR regulations are only applicable to U.S. government contracts and have been domestically criticized for not providing enough protection against human trafficking.¹⁷⁶ By failing to define ambiguous terms, the FAR leaves room for loopholes.¹⁷⁷ For example, the FAR is ambiguous on who is an employee under the FAR.¹⁷⁸ Further, it covers human trafficking, but does not mention the many other ways in which military support contractors violate human rights, such as failing to meet living and health standards, safety measures, and labor rights.¹⁷⁹

Human trafficking has a very specific, two-part definition under the U.N. Convention Against Transnational Organized Crime,¹⁸⁰ in which the violation of human trafficking ends after the “recruitment, transportation, transfer, harboring, or receipt” of trafficked persons.¹⁸¹ Private military contractors’ violations continue, however, after the trafficking is complete. Additionally, many people employed by these contractors are nationals of the state in which the contract is being performed, not third country nationals. Consequently, even if all trafficking were stopped, violations would still occur where domestic workers were not trafficked, but their rights were nevertheless violated.¹⁸² Often, support contractors that do not fit within the very narrow definition of trafficking often go unnoticed and unaddressed, leaving both a legal and scholarly void on best practices on how to avoid human rights violations committed by support contractors. Although the United States has recognized that the mere transportation of individuals is not where the violations stop, there has been a reluctance to take further action.¹⁸³

While President Obama’s executive order provided much needed change, it still falls short of properly protecting human rights from military support contractor abuse.¹⁸⁴ For example, it proposed that contracts valued at \$500,000 or more are subject to the provision, but not those that are valued less, creating a major loophole.¹⁸⁵ Additionally, the executive

¹⁷⁵ Sariana García-Ocasio, *How Tolerant Is Zero Tolerance? The Loopholes in Anti-Trafficking Federal Contract Regulations*, 44 PUB. CONT. L.J. 551, 558–60 (2015).

¹⁷⁶ See, e.g., Bradbury, *supra* note 172, at 908.

¹⁷⁷ *Id.* at 919.

¹⁷⁸ 48 C.F.R. § 22.1702 (2019).

¹⁷⁹ Cf. Bradbury, *supra* note 172, at 916.

¹⁸⁰ See G.A. Res. 55/25, annex, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime art. 3(Nov. 15, 2000). The U.N. Convention Against Transnational Organized Crime covers individuals. Therefore, trafficking does not pose the same questions about state action that other human rights violations do.

¹⁸¹ See *id.*

¹⁸² See HEIDI M. PETERS ET AL., CONG. RESEARCH SERV., R44116, DEPARTMENT OF DEFENSE CONTRACTOR AND TROOP LEVELS IN IRAQ AND AFGHANISTAN: 2007-2017 4 (2017). (According to the Department of Defense, 23% of contract employees in Iraq and Afghanistan by the Department of Defense have been third-country nationals, and 41% have been local/host-country nationals.)

¹⁸³ Nick Schwellenbach & David Isenberg, *Documents Reveal Details of Alleged Labor Trafficking by KBR Subcontractor*, PROJECT ON GOV’T OVERSIGHT (June 14, 2011), <https://www.pogo.org/investigation/2011/06/documents-reveal-details-of-alleged-labor-trafficking-by-kbr-subcontractor/> (“At the heart of this phenomenon are the myriad of forms of enslavement— not the activities involved in international transportation.”).

¹⁸⁴ García-Ocasio, *supra* note 175, at 558.

¹⁸⁵ *Id.* at 562 (citing Certification Regarding Trafficking in Persons Compliance Plan, 80 Fed. Reg. 4967 (Jan. 29, 2015) (to be codified in FAR pts. 1, 2, 9, 12, 22, 42, and 52)).

order is silent on the obligations of subcontractors. Another major problem with the regulations set forth in the executive order is that there is no enforcement mechanism.¹⁸⁶ Rather, it relies on companies to self-enforce in an area that is already very difficult to monitor. Lastly, the regulation shields general contractors from liability if their subcontracts are the ones committing the violations.¹⁸⁷ This framework incentivizes general contractors to turn a blind eye to what their subcontractors are doing.¹⁸⁸ Attempts by the United States to curb human trafficking through FAR have proven insufficient to ensure that private military support contractors respect human rights. While adopting FAR principles internationally provides a good first step, it only begins to address the problem.

6. The Department of Defense's Bill of Rights

Another effort has been the Department of Defense's creation of a "bill of rights" for military support contractors that would require them to respect certain rights.¹⁸⁹ The proposed "bill" would require contractors to make sure employees are aware of all their rights before working for military contractors.¹⁹⁰ It would also require that these contractors provide adequate lunch breaks, wages, living standards, and safety standards.¹⁹¹

The Department of Defense initiative to include a mandatory bill of rights for government contracting firms, coupled with Obama's efforts, are steps in the right direction, but do not go far enough. The Department of Defense's efforts to stop forced labor with FAR 22.1—which prohibits federal procurement officials from purchasing goods made with child labor, does not encompass adult forced labor and only applies to goods, ignoring the fundamental problem of forced labor of services.¹⁹² The gaps in these domestic regulations would likely be remedied if an international coalition was formed. An international coalition would provide diverse viewpoints, leaving less gaps in regulation, and would be more likely to apply to contractors globally.

Military support firms carry out contracts that are worth billions of dollars on behalf of the U.S., making them a large and integral part of the country's overall military operations.¹⁹³ In fact, military support firms now take part in "every major U.S. military deployment."¹⁹⁴ Consequently, their dominant impact on human rights in U.S. military zones must be monitored and regulated. However, the government contracts awarded to these companies do not contain provisions requiring them to obey international human rights norms recognized by the United States.¹⁹⁵ These private contractors are ultimately businesses concerned with fulfilling their contractual duties and do not face the same moral admonition

¹⁸⁶ *Id.* at 563.

¹⁸⁷ *Id.* at 565.

¹⁸⁸ García-Ocasio, *supra* note 175, at 572.

¹⁸⁹ Darryl Li, *Offshoring the Army: Migrant Workers and the U.S. Military*, 62 UCLA L. REV. 124, 160 (2015).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 160–61.

¹⁹² See Samir Goswami, *We Still Don't Punish Contractors for Slavery on U.S. Bases*, LEXISNEXIS (Dec. 13, 2012), <https://www.lexisnexis.com/legalnewsroom/international-law/b/international-law-blog/posts/we-still-don-t-punish-contractors-for-slavery-on-u-s-bases>.

¹⁹³ David Vine, *The \$385 Billion Military-Industrial Boondoggle You've Never Heard Of*, NATION (May 14, 2013), <https://www.thenation.com/article/385-billion-military-industrial-boondoggle-youve-never-heard/>.

¹⁹⁴ Peter W. Singer, *The Private Military Industry and Iraq: What Have We Learned and Where to Next?*, GENEVA CTR. FOR THE DEMOCRATIC CONTROL OF ARMED FORCES [DCAF] 3 (2004).

¹⁹⁵ Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383, 403–04 (2006).

associated with human rights violations committed directly by a state.¹⁹⁶ Moreover, the relative ease by which employees can work for these firms makes it more likely that these companies hire individuals who will not respect human rights.¹⁹⁷ Recruiting, screening, and background checks of individuals is completely left to private entities, with no standards or controls in place.¹⁹⁸ Therefore, these contractors concern themselves with the job at hand, as this is what they are told to do, and have no incentives to perform these tasks in a manner compliant with human rights norms.¹⁹⁹

Ultimately, this disincentive creates a vacuum in legal governance.²⁰⁰ Rather than in a traditional model, where the duty to respect human rights falls squarely on the shoulders of state actors, contracting out work to private companies allows the government to dilute its human rights responsibilities by putting the onus on private contractors.²⁰¹ Thus, it becomes unclear who must be held accountable for these violations.²⁰² Creating a paradigm in which neither the state nor private military contractors are held adequately responsible for these violations.²⁰³ The Working Group On The Use Of Mercenaries As A Means Of Violating Human Rights And Impeding The Exercise Of The Right Of Peoples To Self-Determination, (“Working Group”) has noted the existence of this vacuum and has called upon states to put effective regulations in place to address the issue.²⁰⁴

These international mechanisms have attempted to define best practices for PMSCs and to hold them accountable, but with varying degrees of success. None of them adequately address human rights obligations of military support contractors. Such a gap in legal governance is problematic because military support contractors’ actions often implicate human rights violations

II. Human Rights Violations by Military Support Contractors

Finding the appropriate legal framework for defining the human rights obligations of private military contractors has been difficult. Attempts to do so for private military support contractors in particular have been lacking. However, defining the human rights obligations of private military support contractors is imperative as they often commit human rights violations, and those violations often go unnoticed and unremedied.²⁰⁵ Private contracting firms provide important services to the military; but they commit human rights violations while fulfilling their tasks.²⁰⁶ For example, KBR subcontracted with a

¹⁹⁶ P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security* 26 INT’L SECURITY 186, 214 (2001–2002).

¹⁹⁷ P.W. Singer, *Outsourcing War*, 84 FOREIGN AFF. 119, 124 (2005).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Singer, *supra* note 197, at 215.

²⁰¹ *Id.*

²⁰² *Id.* at 127.

²⁰³ *Id.*

²⁰⁴ Mehra, *supra* note 171, at 330.

²⁰⁵ Consider, for example, the U.N. Working Group on Mercenaries’ annual reports on human rights violations by private military security contractors. However, the U.N. does not have a similar reporting system for support contractors and the reports from the U.N. Working Group on Mercenaries do not address the violations committed by support contractors.

²⁰⁶ Mehra, *supra* note 171, at 327.

Jordanian job brokerage company who employed a group of Nepalis under false pretenses that they would work at a luxury hotel in Jordan.²⁰⁷ Instead, they were forced to pay a recruitment fee, their passports were taken away, and they were taken to Iraq in an unprotected convoy that was attacked along the way and they were beheaded.²⁰⁸ Additionally, the company that was responsible for building the U.S. Embassy in Baghdad is being investigated for labor violations.²⁰⁹ The company had allegedly told hired employees that they were being sent to Dubai for work, but fraudulently sent the workers to Iraq to work on the embassy under false pretenses.²¹⁰ This example highlights only one of many incidents that present potential human rights violations.

A. Human Trafficking²¹¹

One of the main human rights violations that military support contractors may commit is human trafficking.²¹² Human trafficking includes the “recruitment, transportation, transfer, harboring, or receipt of persons by improper means (such as force, abduction, fraud, or coercion) for an improper purpose including forced labor or sexual exploitation.”²¹³ While human trafficking is often categorized on its own and is addressed in the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (UN Protocol on Trafficking), it implicates many human rights found in the ICCPR and ICESCR including the right to an adequate standard of living, the right to be free from slavery and servitude, the right to marry and more.²¹⁴ The UN Protocol on Trafficking obligates state parties who have signed on to the protocol.²¹⁵

In order to perform their duties, support contractors hire third country nationals to do most of the work.²¹⁶ Often, these workers are lured in by promises of jobs with good pay

²⁰⁷ Li, *supra* note 189, at 142 (citing First Amended Complaint ¶64, Adhikari et al. v. Daoud & Partners, No. 4:09-cv-01237 (S.D. Tex. Dec. 22, 2008)).

²⁰⁸ *Id.*

²⁰⁹ Yochi J. Dreazen, *U.S. Investigates Firm Building Embassy in Iraq*, WALL ST. J. (June 7, 2007), <https://www.wsj.com/articles/SB118118318284127413>.

²¹⁰ *Id.*

²¹¹ Human trafficking may encompass sexual assault, but whether human rights law adequately prohibits sexual assault is very unclear. However, sexual assault is a prevalent issue that needs to be addressed. Angela Snell, Note, *The Absence of Justice: Private Military Contractors, Sexual Assault, and the U.S. Government's Policy of Indifference*, U. ILL. L. REV. 1125, 1126 (2011); DEP'T OF DEF., OFFICE OF THE INSPECTOR GEN., Rep. No. D-2-1-052, EFFORTS TO PREVENT SEXUAL ASSAULT/HARASSMENT INVOLVING DOD CONTRACTORS DURING CONTINGENCY OPERATIONS (2010). Therefore, a code of conduct for support contractors must contain regulations on preventing sexual assault.

²¹² Michelle Lillie, *Third Country Nationals Trafficked by Military Contractors*, HUMAN TRAFFICKING SEARCH (2013), <http://humantraffickingsearch.org/third-country-nationals-trafficked-by-military-contractors/>.

²¹³ G.A. Res. 55/25, annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, art. 3 (Nov. 15, 2000).

²¹⁴ See U.N. Human Rights Office of the High Comm'r, *Human Rights and Human Trafficking*, Fact Sheet No. 36, (June 2014), for more information on the relationship between human trafficking and human rights.

²¹⁵ G.A. 55/25, annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, art. 3 (Nov. 15, 2000). This raises issues as to whether private parties can be held to the standards laid out in the protocol. See discussion *supra* Part II.C.1.

²¹⁶ COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 203 (2011), https://oversight.house.gov/sites/democrat.s.oversight.house.gov/files/migrated/CWC_FinalReport-lowres%5B1%5D.pdf.

but find themselves working hard jobs with low pay.²¹⁷ Human trafficking is prevalent in the realm of private military contracting because third country nationals are often trafficked from their home countries to support U.S. military missions.²¹⁸ Human trafficking can occur in and out of conflict zones.²¹⁹

Many incidents of contractors taking away the passports of third country nationals and not permitting them to leave military bases have been reported.²²⁰ Further, companies awarded military support contracts often subcontract work to foreign organizations that traffic third country nationals.²²¹ These workers are then brought to military bases to perform tasks from construction work, cooking, cleaning, or working at beauty shops.²²² For example, Kuwait-based subcontractor General Trading and Contracting Company has been reported to take third country nationals from their home countries under the false pretenses of going to work in Dubai.²²³ When the contractors later find out that they are instead being redirected to Afghanistan or Iraq, their passports are taken away and they are told that should they not choose to go on, they will have to find their own way home, an almost impossible task for these workers whose passports have been taken away and who have no money, many who have taken out loans simply to pay General Trading's high alleged "transportation costs" to work in Dubai.²²⁴ If, and only if, they choose to go on to Iraq are the workers given food and water.²²⁵ However, since trafficking is very narrow in its definition, a more capacious framework must be used to implicate support contractors' actions.²²⁶ Many of the atrocities that occur during this process fall outside the very narrow definition of human trafficking.

B. Forced Labor

Another major violation that private military support contractors commit that often goes unnoticed is forced labor. Forced labor is defined in Article 8 of the ICCPR.²²⁷ Article 8 protects against forced labor, slavery and servitude and states that no one shall be held in slavery or servitude and no one shall be required to perform forced or compulsory labor.²²⁸

A study cited by Human Trafficking Search reports that the majority of U.S. contractors' military needs come from "countries like Fiji, the Philippines, Nepal, Ukraine

²¹⁷ *Id.* at 94.

²¹⁸ Lillie, *supra* note 209.

²¹⁹ U.N. Office on Drugs and Crime (UNODC), *Countering Trafficking in Persons in Conflict Situations*, at 46–47 (2018).

²²⁰ Nick Schwellenbach, *War Contracting Commission Cites Center Article on Trafficking*, CTR. FOR PUB. INTEGRITY, <https://www.publicintegrity.org/2010/07/28/2599/war-contracting-commission-cites-center-article-trafficking> (last updated May 19, 2014).

²²¹ Lillie, *supra* note 212.

²²² *Id.*

²²³ Schwellenbach, *supra* note 220.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Schwellenbach & Isenberg, *supra* note 183. ("At the heart of this phenomenon are the myriad of forms of enslavement—not the activities involved in international transportation.")

²²⁷ International Covenant on Civil and Political Rights art. 8(3)(c), Dec. 16, 1966, 999 U.N.T.S. 175.

²²⁸ *Id.* at 171; *but see* discussion *supra* Part II.C.1. (discussing state action issues with respect to human rights). Forced labor implicates a number of other rights found in the ICCPR and ICESCR including violating workers' rights, freedom from slavery, free choice of employment, just and favorable working conditions, and just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity. These rights will be taken, in turn, in the following sections.

and Bulgaria” and that workers are often promised lucrative jobs, but instead find themselves in poor working conditions, working twelve hour days, seven days a week with little to no pay.²²⁹ More specifically, in Iraq and Afghanistan, foreign military contractors in some situations were forced to work every day for 12 hours a day.²³⁰ At times, activists and academics group forced labor and human trafficking together, but forced labor does not fall under the scope of human trafficking violations as human trafficking violations stop once the transportation of persons ceases.²³¹

C. Just and Favorable Working Conditions

Many third country nationals who work for support contractors or subcontractors are subject to unjust or unfavorable working conditions, in violation of Article 7 of the ICESCR. Article 7 defines just and favorable working conditions by calling for fair wages, equal remuneration for work in order to make a decent living for themselves and their families, for safe and healthy working conditions, for rest leisure and reasonable limitation of working hours, and periodic holidays with pay.²³²

However, workers are not being provided with the entitlements included in Article 7. For example, government contracting giant KBR was once reported to have left migrant workers for three months without ever compensating them for their work.²³³ Some cases report workers going up to a year without pay because they are told they need to recoup for the expenses it took to transport the workers in the first place.²³⁴ Therefore, workers are often unable to afford their basic needs, support their families, or send their children to school as promised.²³⁵

Furthermore, workers are often subject to work in dangerous conditions. In some cases where support contractor employees were working in war zones, they were not given protective helmets or body armor.²³⁶ Many support contract laborers were killed.²³⁷ In fact, the work is so dangerous that , since 2010, more support contractors than armed service members were killed in combat zones.²³⁸

²²⁹ Lillie, *supra* note 212.

²³⁰ *Id.*

²³¹ *Id.*

²³² International Covenant on Economic, Social and Cultural Rights art. 7, Dec. 16, 1966, 993 U.N.T.S. 6.

²³³ Schwellenbach & Isenberg, *supra* note 183.

²³⁴ Samuel Black & Anjali Kamat, *After 12 Years of War, Labor Abuses Rampant on US Bases in Afghanistan*, AL JAZEERA AM. (Mar. 7, 2014, 12:00 AM), <http://america.aljazeera.com/articles/2014/3/7/after-12-years-ofwarlaborabusesrampantonusbasesinafghanistan.html>.

²³⁵ Nick Schwellenbach & David Isenberg, *Documents Reveal Details of Alleged Labor Trafficking by KBR Subcontractor*, PROJECT ON GOV'T OVERSIGHT (June 14, 2011), <https://www.pogo.org/investigation/2011/06/documents-reveal-details-of-alleged-labor-trafficking-by-kbr-subcontractor/>.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Lillie, *supra* note 212; MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40835, THE DEPARTMENT OF DEFENSE'S USE OF PRIVATE SECURITY CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND, ANALYSIS, AND OPTIONS FOR CONGRESS 9 (2011).

D. Poor and Dangerous Living Conditions

In addition to the poor working conditions that laborers face at the hands of government contractors, laborers are forced to live in unlivable conditions.²³⁹ This violates the human right to a standard of living adequate for the health and wellbeing of self and family, the right to be free from hunger, and the right to clothing and housing—all stated in Article 11 of ICESCR as well as numerous other human rights agreements.²⁴⁰

There have been reports of third country nationals taken to Iraq and Afghanistan for work and yet being forced to live in shipping containers.²⁴¹ KBR was once reported to house its workers in windowless warehouses.²⁴² Laborers are often crowded into small quarters and forced to live in unsanitary conditions.²⁴³ Others were left in makeshift camps until their employers were ready to put them to work.²⁴⁴ Often, just going to the bathroom requires walking long distances from remote and dark sleeping quarters, in unsafe conditions with no security or safety measures provided.²⁴⁵ A 2006 study by the Department of Defense reported that subcontractors were living in substandard living conditions.²⁴⁶ In some cases, workers were living in makeshift tents they had been constructed out of trash.²⁴⁷ One KBR inspection report revealed dismal living conditions including no soap, lack of trash removal, cramped bunk beds in small living quarters, no space to own or keep personal belongings, no food service operations, and one shower for more than eleven people to share.²⁴⁸

E. Freedom of Movement

Often, once workers find out they are going to war zones, rather than the luxury hotels they were promised they would be working at, they beg to go back home.²⁴⁹ This implicates ICCPR Article 12 which states that everyone shall have the freedom of movement, to choose a place of residence, to leave any country, and not to be arbitrarily deprived of

²³⁹ Lillie, *supra* note 212 (“The workers are often forced to work for years in dangerous and unsanitary conditions.”).

²⁴⁰ See International Covenant on Economic, Social and Cultural Rights art. 11 Dec. 16, 1966, 993 U.N.T.S. 7; *but see discussion supra* Part II.C.1. on state action issues.

²⁴¹ Amol Mehra, *Bridging Accountability Gaps—The Proliferation of Private Military and Security Companies and Ensuring Accountability for Human Rights Violations*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 323, 330 (2009).

²⁴² Schwellenbach & Isenberg, *supra* note 235.

²⁴³ Lillie, *supra* note 209.

²⁴⁴ Schwellenbach & Isenberg, *supra* note 235; *see also* Embassy of Baghdad, *Subject KBR Subcontractors Suspected of Top Violations*, <http://www.documentcloud.org/documents/204321-u-s-embassy-baghdad-cable> (last visited July 30, 2020).

²⁴⁵ Steven P. Cullen, *Out of Reach: Improving the System to Deter and Address Criminal Acts Committed by Contractor Employees Accompanying Armed Forces Overseas*, 38 PUB. CONT. L.J. 509, 517 n.41 (2009).

²⁴⁶ Brittany Warren, “If You Have a Zero-Tolerance Policy, Why Aren’t You Doing Anything?”: *Using the Uniform Code of Military Justice to Combat Human Trafficking Abroad*, 80 GEO. WASH. L. REV. 1255, 1258 n.20 (2012). (“In 2006, DOD conducted an investigation into the living conditions of subcontractors, which uncovered widespread abuses, including illegal confiscation of workers’ passports, deceptive hiring practices, excessive recruiting fees, and substandard worker living conditions.”) (internal quotations omitted).

²⁴⁷ Schwellenbach & Isenberg, *supra* note 235.

²⁴⁸ Embassy of Baghdad, *Subject KBR Subcontractors Suspected of Top Violations*, <http://www.documentcloud.org/documents/204321-u-s-embassy-baghdad-cable> (last visited July 30, 2020).

²⁴⁹ Amy Kathryn Brown, *Baghdad Bound: Forced Labor of Third-Country Nationals in Iraq*, 60 RUTGERS L. REV. 737, 748–49 (2008).

entering one's own country.²⁵⁰ Instead of being allowed to return home, these laborers are forced to continue working for the government contractor on the projects they were brought to third countries to do, often on military bases.²⁵¹ They are then often informed that they have accrued several costs in the process and will need to work without pay in order to pay back their debt to the company.²⁵²

When the work is done, third country nationals are left abandoned in the foreign country with no way of returning home.²⁵³ Their passports are taken away and they are left to fend for themselves in an unfamiliar place.²⁵⁴ In doing so, private military contractors violate the human rights of freedom of movement and residence; the right of an individual to leave any country; and the right to return to one's home country.²⁵⁵ These incidences are not sporadic, isolated events.²⁵⁶ To the contrary, such abuse became so prevalent that the International Organization for Migration established a mission tasked with remedying the problem.²⁵⁷ Although perhaps colloquially such abuse is considered trafficking, it is not considered human trafficking under the legal definition of human trafficking set by the United Nations because these events happened after the TCNs were transported from their homes.²⁵⁸

All the above incidents exemplify human rights violations. However, private military support contractors do not fall squarely within any of the above-referenced legal regimes and therefore, defining their obligations and holding them accountable is a challenge. There needs to be a legal regime that defines human rights obligations and addresses the human rights violations of military support contractors.

III. Modeling an International Code of Conduct for Private Military Support Contractors

There is vast potential for private military support contractors to commit human rights violations. However, the existing legal framework does not address this potential—or its actuality. Therefore, an international code of conduct for private military support contractors is necessary in order to close the legal gaps that the current legal regime leaves open. Without properly defining support contractors' human rights obligations, contractors are likely to continually engage in human rights violations. A successful code will largely be modeled after the ICoC' as well as successful parts of other various legal enforcement mechanisms.²⁵⁹ An international code of conduct will be successful by (1) borrowing procedural elements from the ICoC, (2) modeling itself after substantive elements of the

²⁵⁰ International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 8.

²⁵¹ *Id.*

²⁵² Schwellenbach & Isenberg, *supra* note 232.

²⁵³ *Id.*

²⁵⁴ Warren, *supra* note 246, at 1258 n.20.

²⁵⁵ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 13(Dec. 10, 1948).

²⁵⁶ Lillie, *supra* note 212.

²⁵⁷ *Id.*

²⁵⁸ See G.A. Res. 55/25, annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, art. 3 (Nov. 15, 2000).

²⁵⁹ See Anna Leander, *Whitelisting and the Rule of Law: Legal Technologies and Governance in Contemporary Commercial Security*, in *THE RULE OF LAW IN GLOBAL GOVERNANCE*, 205, 220 (2016). While there are debates regarding the ICoC's effectiveness, it provides a good mechanism to begin defining rights.

ICoC, (3) integrating relevant human rights provisions found in various international treaties into the code, and (4) adopting successful attributes of other international legal regimes explained earlier in this article.

A. Procedural Elements from the ICoC

An international code of conduct for support contractors should largely parallel the ICoC partly because the structure and procedure of the ICoC can easily be applied to a code for support contractors. Both leave open questions about state action versus private party action, the role of government contractors in governmental functions, their responsibility to respect human rights, and the challenges in policing their actions inside and outside of conflict zones. Therefore, applying ICoC structure and procedure to a code of conduct for private military contractors provides significant advantages.

One large advantage of using the ICoC as a structural model is that the infrastructure to create the code already exists. An international code of conduct for private military support contractors can be housed under ICOCA and can provide meaningful change in stopping the human rights violations military support contractors commit. There are some questions regarding the sufficiency of ICoCA's resources,²⁶⁰ however, regulations for private military support contractors likely would not be a burden because membership fees from companies signing on to the code for private military support contractors will fund ICOCA (in the same way that membership fees of members to the ICOC fund ICOCA.) Members will be incentivized to pay the fee because signing on to the principles assures governments and the public alike that the company can be trusted to protect human rights. This, in turn, will garner more business and win more contracts.

Using ICoCA's already existing infrastructure will allow the code to benefit from the public's familiarity with it. Part of the reason that the ICOC has been so effective is that different actors, like government representatives, human rights organizations, and industry leaders came together with different interests to set common goals.²⁶¹ There are over 700 industry signatories to the ICOC and several states and trade organizations have required compliance with it, too.²⁶² Likewise, an international code of conduct for military support contractors will be effective if it has the support of and input from government and industry actors.

The international code of conduct for military support contractors (Support Contractor Code) should include a reporting system closely modeled after the ICoC's complaint mechanism. Companies' conduct would be regularly assessed to ensure that they are abiding by the principles of the code. A reporting system is particularly important in a code of conduct for support contractors because creating a level of transparency is a vital step in ensuring that these violations stop. This can be evidenced by the U.S.'s attempts to ensure that military support contractors do not engage in human trafficking. These efforts only began once a few trafficking incidents became highly publicized.²⁶³ A complaint

²⁶⁰ *Id.*

²⁶¹ See Laura A. Dickinson, *Regulating the Privatized Security Industry: The Promise of Public/Private Governance*, 63 EMORY L.J. 417, 419 n.12 (2013).

²⁶² *Id.* at 441.

²⁶³ See, e.g., Sarah Stillman, *The Invisible Army*, NEW YORKER (May 30, 2011), <https://www.newyorker.com/magazine/2011/06/06/the-invisible-army>.

procedure would monitor adherence to the code in between assessments.²⁶⁴ The complaint mechanism should mandate that companies implement the code into their internal procedures, require vetting and training, and subject them to periodic auditing. This is particularly important for military support contractors' observance of human rights because, all too often, their violations go unnoticed.²⁶⁵ Failure to comply with these would result in potential removal from ICoCA.²⁶⁶

Expounding on ICoCA's reputation and adopting its mechanisms will catalyze how receptive states are to an international code of conduct for military support contractors because ICoCA already has an established reputation and many governments look favorably upon membership.²⁶⁷ Its success also shows that ICoCA is able to undertake and effectively monitor an international code of conduct because it has already done so.²⁶⁸ This will facilitate the same tangible changes that the ICoC has prompted.²⁶⁹ The code should consist of a set of principles and guidelines that signatories can sign on to in order to pledge their compliance to the Code. Additionally, ICoCA extends to subcontractors.²⁷⁰ A similar extension Support Contractor Code is especially necessary because violations often occur when support contractors work with subcontractors who traffic and exploit workers.²⁷¹

B. Substantive Elements from the ICoC

In addition to taking procedural cues from the ICoC, the Support Contractor Code could take many of the substantive provisions from the ICoC. The Support Contractor Code can mimic the ICoC Conduct by requiring contractors to adhere to principles of international human rights law.²⁷² For example, all the ICoC members are required to follow provisions of human rights law that prohibit companies and their employees from "engaging in sexual exploitation and abuse, gender-based violence, human trafficking, slavery, forced labor, child labor, and discrimination" as well as provisions protecting human dignity.²⁷³

The ICoC also requires a certain level of training for contractors and their employees in order to make sure that violations do not occur.²⁷⁴ Similar training mandates are needed for military support contracts so they can recognize signs of human rights violations. Since these provisions have so far been successful in encouraging private military

²⁶⁴ See Reema Shah, Comment, *Beating Blackwater: Using Domestic Legislation to Enforce the International Code of Conduct for Private Military Companies*, 123 YALE L.J. 2559, 2564 (2014) (citing *Articles of Association*, INT'L CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS ASS'N 2-3, <http://www.icoca.ch/assets/icoc-aoa-english2.pdf> (last visited Feb. 13, 2014)).

²⁶⁵ JENNIFER K. ELSEA, CONG. RESEARCH. SERV., R40991, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: LEGAL ISSUES, at Summary (2010).

²⁶⁶ See Dickinson, *supra* note 261, at 428.

²⁶⁷ Ian Ralby, *Accountability for Armed Contractors*, 2 FLETCHER SECURITY REV., 15, 16 (2015) (discussing ICoCA membership).

²⁶⁸ *Id.*

²⁶⁹ See Dickinson, *supra* note 261, at 449–50 (discussing the general effects of the ICoC).

²⁷⁰ *Id.* at 423.

²⁷¹ Michelle Lillie, *Third Country Nationals Trafficked by Military Contractors*, HUMAN TRAFFICKING SEARCH (2013), <http://humantraffickingsearch.org/third-country-nationals-trafficked-by-military-contractors/>.

²⁷² See Dickinson, *supra* note 261, at 422.

²⁷³ *Id.* at 422.

²⁷⁴ Int'l Code of Conduct Ass'n., *International Code of Conduct for Private Security Service Providers*, (Nov. 9, 2010), <http://www.news.admin.ch/NSBSubscriber/message/attachments/21143.pdf>.

security contractors accountable to adhere to these laws,²⁷⁵ implementing them into a corollary Support Contractors Code would be effective in preventing human rights violations from occurring.

C. Integrating Relevant Human Rights Provisions

The Support Contractor Code must also include several provisions not in the ICoC. As indicated earlier in this article, private military support contractors cannot simply sign on to the ICoC because the human rights implicated in support contractors' line of work are vastly different than the ones security contractors face. Therefore, the Support Contractor Code must incorporate rights identified in the ICESCR and ICCPR in order to make support contractors directly responsible for protecting these rights. The Support Contractor Code should specifically obligate contractors to adhere to certain provisions in the ICESCR and ICCPR. Particularly, it is important that the code obligates contractors to protect against human trafficking, and not engage with companies who participate in trafficking. It is important that contractors do their due diligence with respect to their subcontractors to ensure that they are not trafficking. Another important feature of the code should be to publish wage and living standards for workers. These standards should ensure that contractors are transparent with the workers they hire on the nature of the work they will be performing and the location of the jobs. Furthermore, these obligations should ensure safety standards, proper equipment, and training in making sure that workers are safe. Finally, contractors must be responsible for ensuring the safe return of their employees to their home countries once the contract is over and must allow contractors to return to their homes freely. These substantive rights can be incorporated into an international code of conduct for private military support contractors by utilizing successful concepts in already existing similar voluntary codes and legal obligations. In addition to incorporating specific provisions of the ICESCR and ICCPR into the Support Contractor Code, the code should incorporate the ICESCR and ICCPR by reference, calling upon support contractors to respect and protect *all* the rights indicated in these treaties.

D. Attributes From Other International Legal Regimes

Several other legal mechanisms address international human rights law and humanitarian law as it pertains to PMSCs, or businesses in general. Many attributes of these legal regimes should be integrated into a code for support contractors.

The Montreux Document's principles should be included in the Support Contractor Code. Using the Montreux Document, the Code will expand on Montreux's principles. While Part Two of the Montreux Document concentrates on private military security contractors,²⁷⁶ many of the same principles apply to support contractors as well. Part Two, Section A of the Montreux describes factors that states should consider before employing PSCs.²⁷⁷ The Support Contractor Code should adopt the same. For example, Montreux calls on contracting

²⁷⁵ See generally Dickinson, *supra* note 261.

²⁷⁶ INT'L COMM. OF THE RED CROSS, 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 16 (2009), https://www.icrc.org/en/doc/assets/files/other/icrc_002_0996.pdf [hereinafter MONTREUX DOCUMENT].

²⁷⁷ *Id.* at 16, 17–18.

States to select contractors who have publicly disclosed their contracting regulations, practices and processes.²⁷⁸ The Support Contractor Code should incorporate this requirement.

Further, Part B of the Montreux Document mentions guidelines for territorial states to follow that are largely applicable to military support contractors, such as ensuring that subcontractors are notified about their duty to respect human rights.²⁷⁹ Lastly, Part C, which pertains to PMCs' home states, provides guidelines such as ensuring that contractors provide employees adequate training on international human rights law.²⁸⁰ These examples show how seamlessly the principles of Montreux can be translated into guidelines for private military support contractors to follow in the form of a code of conduct.

The Support Contractor Code should require that businesses sign on to and adhere to the U.N. Guiding Principles on Business and Human Rights (Guiding Principles). Since the Guiding Principles apply to all business entities, and not just military contractors, they are far more general than the Montreux Document. However, the responsibilities businesses are given when they sign on to the Guiding Principles provide the groundwork in ensuring that they do not violate human rights.

Additionally, the Support Contractor Code should have an auditing and compliance mechanism that mimics the structure of ANSI PSC.1. While there was originally some criticism of the International Code of Conduct because no domestic mechanisms existed to support it,²⁸¹ the creation and rather speedy adoption of ANSI PSC.1 is promising because it suggests that countries have taken the ICoC seriously and are likely to do the same with an international code of conduct for private military support contractors.²⁸² An auditing mechanism such as ANSI/PSC.1 will help ensure that contractors actually follow through with the Support Contractor Code's requirements. In fact, the Department of Defense's current development of a bill of rights for military support contractors follows a similar path to the U.S.'s support and creation of PSC.1, showing that developing an enforceable auditable standard mechanism comparable to PSC.1 for military support contractors in the near future is realistic. Similar to how the Department of Defense contracted out the development of a standard to ASIS,²⁸³ the Department of Defense can contract out work to create an auditable standard for military support contractors based on the bill of rights that the Department of Defense has created. The U.S. should feel incentivized to take the lead in this project because of the large amount of private military support contractors it employs.²⁸⁴

The U.S. Department of Defense's auditing system has strong attributes that the Support Contractor Code can adopt. For example, President Obama's Executive Order, *Strengthening the Protections Against Trafficking of Persons in Federal Contracts*, provides that contractors must submit a plan to the contracting officer, as well as any subcontractors,

²⁷⁸ MONTREUX DOCUMENT, *supra* note 276, at 17.

²⁷⁹ MONTREUX DOCUMENT, *supra* note 276, at 21–22.

²⁸⁰ *Id.* at 26.

²⁸¹ *See* Shah, *supra* note 264.

²⁸² Consider that over 700 companies, a large number of states, and many nongovernmental organizations have shown support for the ICoC. *Id.* at 2563.

²⁸³ Ralby, *supra* note 267, at 17.

²⁸⁴ Victoria L. Starks, *The U.S. Government's Recent Initiatives to Prevent Contractors from Engaging in Trafficking in Persons: Analysis of Federal Acquisition Regulation Subpart 22.17*, 37 PUB. CONT. L.J. 879, 881 (2008).

on how they will comply with human rights standards.²⁸⁵ Further, the Executive Order's call for sanctions on contractors who violate the prohibitions against human trafficking serves as a strong deterrence mechanism.²⁸⁶ The Executive Order's requirement of employee training to recognize patterns of human trafficking also ensures that trafficking does not continue to go unnoticed.²⁸⁷ These initiatives would serve a vital purpose in the Support Contractor Code. The Department of Defense Inspector General also found that language required by FAR 22.17 about combating human trafficking was missing from a large number of Department of Defense contracts.²⁸⁸ In response, the Department developed a requirement in which the contract operators' representatives' methods of monitoring human trafficking must be described in the contract.²⁸⁹ Learning from these errors and incorporating these revisions in the Support Contractor Code will help create an effective mechanism to ensure that support contractors adhere to human rights principles and laws.

E. Blueprinting a Code

In sum, a Support Contractor Code would be housed under ICoCA and adopt the procedural and structural mechanisms of the ICoC. Also, many of the substantive provisions of the ICoC can be transposed into the Code. However, since these provisions alone are inadequate, the Support Contractor Code should also require adherence to certain human rights principles like protection against forced labor and sexual abuses as well as the other human rights principles mentioned in Part C. Furthermore, this article discusses important attributes of other legal mechanisms that are missing from ICoC in Part D. Incorporating these into the code will create a robust legal framework for support contractors to follow — ultimately creating a system by which support contractors can operate while respecting and protecting human rights.

CONCLUSION

The Nisour Massacre brought the possible human rights and humanitarian law violations to the attention of international and domestic legal policy makers, leading to the creation of the Montreux Document.²⁹⁰ Montreux inspired real change, but an entire group of victims, those employed and exploited by military support contractors, have been forgotten in the attempts to create enforceable mechanisms based on its principles.²⁹¹ In 2011, *The New Yorker*, published an article featuring the story of two Fijian women taken from their country to be hair stylists to the elite society of the United Arab Emirates, only to end up being forced into labor on a U.S. military base in Iraq where they were given inadequate

²⁸⁵ Sariana García-Ocasio, *How Tolerant Is Zero Tolerance: The Loopholes in Anti-Trafficking Federal Contract Regulations*, 44 PUB. CONT. L.J. 551, 560 (2015).

(citing Final TIP Rule, 80 Fed. Reg. at 4992 (explaining that compliance plans must be turned into the Contracting Officer "upon request")).

²⁸⁶ See Laura L. Shoaps, *Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act*, 17 LEWIS & CLARK L. REV. 931, 965 (2013) (citing Exec. Order No. 13,627, 77 Fed. Reg. 60,029 (Sept. 25, 2012)).

²⁸⁷ See *id.* (citing Exec. Order No. 13627, 77 Fed. Reg. 60,029 (Sept. 25, 2012)).

²⁸⁸ *Half of CENTCOM Contracts Lack Human Trafficking Clause, DOD IG Finds*, 53 NO. 5 GOV'T CONTRACTOR ¶ 36 (2011).

²⁸⁹ *Id.*

²⁹⁰ See Mehra, *supra* note 241, at 327.

²⁹¹ See ELSEA, *supra* note 265, at 10.

housing and food.²⁹² This story is all too common; yet little has been done to ensure that these rights are protected.²⁹³

However, there is hope. The implementation of the ICoC is a success story of how the international community can come together to protect human rights being violated by private military contractors.²⁹⁴ More so, the development of PSC.1 shows a willingness to take specific actions to create domestically adopted systems to ensure that the code is followed.²⁹⁵ Its rapid success suggests that a similar system of governance for private military support contractors can protect the rights of those the ICoC has neglected. The story of those two Fijian women would be vastly different had there been some level of international oversight to make sure they were not exploited.

²⁹² Stillman, *supra* note 263.

²⁹³ *See id.*

²⁹⁴ *See generally* Dickinson, *supra* note 258.

²⁹⁵ *See* Office of the Assistant Sec'y of Def. for Sustainment, *Private Security Companies-Standards*, <https://www.acq.osd.mil/log/ps/pscStandards.html> (last visited May 2, 2020).



