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STATUS OF PMSC PERSONNEL IN THE LAWS OF WAR:
THE QUESTION OF DIRECT PARTICIPATION IN HOSTILITIES

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Abstract

The legal status of private military and security company personnel under the law of international armed conflicts determines the rights and the privileges afforded by the law and the legal consequences deriving from the conduct of those persons. In order to verify whether they may be considered combatants or civilians, it is important to analyze their relationship with the hiring State as well as the function they perform. The issue of 'direct participation in hostilities' arises in this context: the article focuses on the most controversial activities carried out by private contractors. Since a precise definition does not exist, it looks into the different approaches and explains why a narrow interpretation of the term is preferable. Finally, this article argues that the notion contributes to establish specific limits on the State practice of hiring military companies.

Keywords

Law – Regulation – Human Rights – Security – Accountability

***Status of PMSC Personnel in the Laws of War:
The Question of Direct Participation in Hostilities***

MIRKO SOSSAI*

1. Introduction

The employment of private military and security companies (PMSCs) in present war-scenarios is unprecedented in both its size and scope.¹ The performed activities include protecting military personnel and assets, training and advising armed forces, maintaining weapons systems, interrogating detainees and sometimes even fighting. Various commentators have already dealt with the legal status of private contractors' personnel under international humanitarian law. Thus far, the main conclusions reached can be summarized as follows.

First, an all-encompassing notion of such companies does not exist under the law of armed conflict: the distinction between military and security companies is not useful for the determination of their nature and status. Secondly, there is no vacuum in the law. Existing international humanitarian law provides a binding legal framework and contains the criteria for individuating the status of the contractors' staff.

The article will focus on the legal challenges posed by the employment of private companies in the context of an international armed conflict. Therefore, the fundamental principle of distinction between combatants and civilians is unavoidable. The primary status of persons affected by such a conflict is crucial as it determines the rights and the privileges afforded by the law and the legal consequences deriving from the conduct of those persons.²

There seems to be little doubt that private contractors' employees can fall into several categories, once certain criteria are satisfied: in particular, commentators have discussed whether they could fall within the categories of combatants, according to the indirect definition under Article 4 A of the 1949 Third Geneva Convention; whether they could be members of the armed forces within the meaning of Article 43 of the 1977 Additional Protocol I; whether they can be mercenaries according to Article 47 of Additional Protocol I; finally, whether they could be considered civilians, and possibly "civilians accompanying the armed forces" according to Article 4 A (4) of the Third Geneva Convention.

Therefore, their legal status depends on both the function they perform and their relationship with the hiring State. In this context, the discussion of the controversial notion of direct participation in hostilities is crucial. In any case, the first issue to be considered is the qualification of the connection with the hiring State.

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¹ See *inter al.* A. Alexandra, D.-P. Baker and M. Caparini (eds.), *Private Military and Security Companies: Ethics, Policies and Civil-Military Relations* (2008).

² Ipsen, 'Combatants and non-Combatants', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (2008), 79.

Finally, having considered their primary status, the article will be able to address the following fundamental aspects: whether PMSC employees are entitled to bear arms and directly participate in hostilities; whether they may become military objectives; and their legal status upon capture.

2. The Nature of the Relationship between the Contractor and the Hiring State

There is general agreement that a number of activities that were previously performed by regular military forces are now being outsourced to private contractors.³ Though most of them carry out functions that are unrelated to the conduct of hostilities, concern has been expressed about their possible involvement in combat operations on behalf of a Party to a conflict. The first problematic aspect is whether they should be considered as legitimate combatants under international humanitarian law: traditionally only members of the armed forces (regular or irregular combatants belonging to a Party to the conflict) enjoy the “combatant privilege” in war. There is no doubt that the increasing relevance of private sector poses a challenge to the paradigm of international humanitarian law as a state-centric system based on the State monopoly of the use of force.⁴

One cannot exclude *a priori* that contractors’ personnel may fall within the category of mercenaries. Episodes of violence and abuses committed by private firms shocked public opinion so much that several commentators have claimed that they should be banned under the existing norms on mercenaries. The essential character of the latter, according to Article 47 of Additional Protocol I, is that they are “motivated to take part in the hostilities essentially by the desire for private gain and, in fact, [are] promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party”. However, the definitions in this provision and by two other international instruments⁵ are all very narrow as they include a number of cumulative conditions. In recent years, those standards seem to have been met by firms like Sandline and Executive Outcomes which entered into contracts with several countries of Africa, including Sierra Leone and Angola, as well as with Papua New Guinea.⁶ The main question is whether a definition developed in the 1970s having the decolonization scenario in mind should be applied to the phenomenon of the outsourcing of military functions. Suffice it here to mention the requirement of being ‘neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict’ in Article 47: its application would bring to the absurd situation of certain employees of a private firm being considered mercenaries and others not.

³ Singer, *Can’t Win With ‘Em, Can’t Go To War Without ‘Em: Private Military Contractors and Counterinsurgency*, Policy Paper, Number 4, September 2007.

⁴ Cockayne, ‘The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law’, 88 *IRRC* (2006) 459.

⁵ Organization of African Unity Convention for the Elimination of Mercenarism in Africa, 3 July 1977, OAU Doc CM/817 (XXIX) Annex 11 Rev; UN International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, 4 December 1989, UN Doc A/44/43 (1989). Article 47 (2) of Additional Protocol I reads as follows: “A mercenary is any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces”.

⁶ For an analysis of these events, see P. W. Singer, *Corporate Warriors* (2003) at 9. See also, Cameron, ‘Private Military Companies: their Status under International Humanitarian Law and its Impact on their Regulation’, 88 *IRRC* (2006) 573, at 581. In this author’s view, some individuals working for military companies in Iraq may fall within the category of mercenaries under Article 47 of Protocol I and the mercenary conventions.

Contrary to the two conventions on mercenarism, international humanitarian law does not provide for the criminalization of mercenary activity: under Article 47 (1) the only consequence of being a mercenary is the loss of the right to be a combatant or a prisoner of war.

A. *Can Private Contractors Be Legitimate Combatants?*

Much debate has been devoted to the definition of membership in the armed forces, specifically whether they could include the PMSC employees in certain cases. However, it seems that the underlying crucial question relates to the legitimacy of outsourcing of activities which are inherently governmental and military in nature. In this respect, one might wonder whether international humanitarian law sets specific limits to the State practice of hiring military companies.

The first step is to investigate whether the law of international armed conflicts assigns certain tasks to the regular armed forces of the State, so that they cannot be carried out by private firms. This is the case of the appointment of the commander responsible for a prisoner of war camp: Article 39 of the Third Geneva Convention provides that every camp “shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power”. In the same way, Article 99 of the Fourth Geneva Convention states that, “Every place of internment shall be put under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power”.

In addition, does the corollary of the fundamental principle of distinction, according to which only combatants can lawfully directly participate in hostilities, define again a criterion to determine what functions private companies may perform and what degree of control the State should exercise?

It goes without saying that the discussion on the combatant status is limited to the situation of private contractors hired by States. In this regard, international humanitarian law identifies various categories of persons who can be combatants. The discussion among certain experts,⁷ focused essentially on the category of *de facto* combatant status, identified by Article 4 A (2), “members of other militias and members of other volunteer corps belonging to a Party to the conflict”, and on the key rule contained in Article 43 of Additional Protocol I, which provides the definition of the members of armed forces. The 1977 Additional Protocol I, which innovates the previous discipline introduced by the Third Geneva Convention, represents a complicating factor as a significant number of States have not ratified it, even though the recent ICRC study considered Article 43 as evidence of customary law.⁸ That is the reason why the relevant provisions of both instruments need to be taken into account.

The category identified by Article 4 A (2) comprises the members of irregular forces. Independent militias which are not formally incorporated into the State armed forces⁹ are combatants, if they belong to a Party to the conflict and fulfil the well-known four conditions, already set out in the 1907 Hague Regulations:¹⁰ that of being commanded by a person responsible for his/her subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war. It has been argued that the prerequisite of independence can hardly be satisfied by private contractors hired by a State since they act on its

⁷ The University Centre for International Humanitarian Law, *Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions*, August 2005; Summary Report, *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, co-organized by the International Committee of the Red Cross and the TMC Asser Institute, October 2005 (ICRC, 2005 Summary Report).

⁸ See J. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law* (2005), vol. I, at 14: Rule 4.

⁹ For a discussion on the relevance of Article 4 A (1) of the Third Geneva Convention cf. Gillard, ‘Business Goes to War: Private Military/Security Companies and International Humanitarian Law’, 88 *IRRC* (2006) 525, at 533.

¹⁰ See Article 1 of the Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (1907 Hague Regulations).

behalf:¹¹ however, that reading of the requirement of ‘independence’ is untenable, because the term applies to the militias and volunteer groups that are not *de jure* incorporated into the armed forces of the State.¹² In another author’s view, it is inappropriate to rely on that provision, as it was drafted having the partisan movements in mind.¹³

The majority of the commentators share the view that private companies, only in peculiar scenarios, could meet the four standards.¹⁴ As for the first condition, the most important companies are often hierarchically organized and provide some form of supervision analogous to command.¹⁵

The second and the third conditions are intended to eliminate any risk of confusion with the civilian population: in particular, the requisite of having a fixed distinct emblem does not require to wear a uniform. This seems to be satisfied by the PMSC staff who carry arms openly and wear military clothes: it is reported that in Iraq they have sometimes been confused by the civilian population with members of the regular armed forces. There is no unified policy among the contractors. Generally, the US Department of Defense does not allow the contractors’ staff to wear military or uniforms resembling military attire. However, certain contractor personnel may be authorized “to wear standard uniform items for operational reasons¹⁶”.

The fourth condition requires the general respect of the laws and customs of war by individual employees and by the whole company. This standard has been recognized as less problematic: a general and systematic disregard for international humanitarian law has not been observed. It is also noteworthy that the US Department of Defense published a directive on 9 May 2006, which includes the contractors employed by the Pentagon in the Law of War Program: “[t]he law of war obligations of the United States are observed and enforced by the DoD Components and DoD contractors¹⁷”.

The broader and more flexible criteria individuated by Article 43 of Additional Protocol I might offer a viable solution to include the PMSC staff within the category of the “members of the armed forces”. This provision introduces a fundamental change, as it covers both regular and irregular forces. The object is to establish a common denominator applicable to all, supplementing the specific rules of Article 4 of the Third Geneva Convention,¹⁸ with a view to take into account “the new forces which have appeared on the modern battlefield in the course of the last few decades”. The definition under Article 43 is based on the following elements: a) acting on behalf of a Party to the conflict; b) being organized; c) being under a command responsible to that Party for the conduct of its subordinates.

The most controversial aspect is therefore how to qualify the connection between the Party to the conflict and the private contractor: the opinions expressed by the various experts could be grouped around two main positions with regard to the content of the crucial notions of “belonging to a Party of the conflict” and of “under a command responsible”.

¹¹ Schmitt, ‘Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees’, 5 *Chi. J. Int’l L.* (2005) 511.

¹² Boldt, ‘Outsourcing War – Private Military Companies and International Humanitarian Law’, 47 *German YIL* (2004) 502, at 526.

¹³ Cameron, *supra* note 6, at 586.

¹⁴ Cf. Gillard, *supra* note 9, at 535; Doswald-Beck, ‘Private Military Companies under International Humanitarian Law’, in S. Chesterman and C. Lehnardt (eds.), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (2007), 118.

¹⁵ Cf. Schmitt, ‘Humanitarian Law’, *supra* note 11, at 529.

¹⁶ As will be clarified below, the reason is that the Pentagon considers as civilians accompanying the armed forces and therefore not directly participating in hostilities.

¹⁷ US Department of Defense Directive, 2311.01 E, 9 May 2006.

¹⁸ De Preux, ‘Article 43’, in Y. Sandoz *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 506.

According to the first approach, what is required is the formal incorporation by the State, in order to put the private contractors within the military chain of command and control. Therefore, membership in an armed force remains primarily regulated by domestic legislation. It has been argued that contractors' employees do not become members of the armed forces of a State, simply by performing certain activities and even though the State does not consider them as such.¹⁹ This seems to be confirmed by Article 43 (3), on the incorporation of paramilitary or armed law enforcement agencies, which provides an obligation of notification to the other Parties to the conflict. In the view of Schmitt, the provision introduces a constitutive requirement, so that unincorporated agencies are civilian in nature for the purposes of humanitarian law.²⁰

On the contrary, it has been argued that if private contractors were entitled by a State to directly participate in hostilities on its behalf, they should be included within the members of the armed forces. Therefore, the second position adopts a functional approach: decisive are the requirements of international law that provide the fulfilment of certain conditions *de facto*.²¹ In this regard, the category identified by Article 43 covers all groups which have a certain qualified factual link to the regular armed forces.²²

Against the background of these considerations, the first observation relates to the comprehensiveness of the definition provided by Article 43 which overcomes the distinction between regular and irregular armed forces: it follows that formal incorporation is not an unavoidable requirement. Nevertheless the functional approach needs further analysis and clarification, on the basis of the recent practice.

B. The 'Command Responsible' Requirement

First of all, it is worth recalling that the question of the "combatant privilege" concerns an organized unit of private contractor employees hired by the State for the provision of services which may amount to "taking a direct part in hostilities". In this respect, it is noteworthy that the US Department of Defense excludes that private companies staff could be legitimate combatants since it considers them as civilians who accompany the armed forces, within the meaning of Article 4 A (4) of the Third Geneva Convention²³ and therefore not directly participating in hostilities. The instructions published in October 2005, which apply to "contingency contractor personnel who deploy with or otherwise provide support in a theatre of operations to U.S. Armed Forces deployed outside the United States conducting contingency operations or other military operations", offers a list of outsourced services: "providing communications support, transporting munitions and other supplies, performing maintenance functions for military equipment, providing security services [...] and providing logistic services such as billeting, messing, etc."²⁴ Whether these activities amount to indirect participation in hostilities will be evaluated in the next paragraph.

¹⁹ ICRC, Summary Report 2005, *supra* note 7, at 77.

²⁰ Schmitt, 'Humanitarian Law', *supra* note 11, at 525.

²¹ ICRC, Summary Report 2005, *supra* note 7, at 75.

²² Doswald-Beck, *supra* note 14, at 121, quoting M. Bothe, K. J. Partsch and W. A. Solf, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982) at 234.

²³ Article 4 A (4) reads as follows: "Person who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model".

²⁴ Department of Defense Instruction, 'Contractor Personnel Authorized to Accompany the U.S. Armed Forces', 3020.41, 3 October 2005, at 7.

In any case, assuming that a State intends to mandate private companies to participate directly in the hostilities, it should make the effort to satisfy the criteria established by international humanitarian law, in order to confer combatant status on the employees. As argued in the previous paragraph, formal incorporation is not decisive according to the definition included in Article 43 of Additional Protocol I. Under the functional approach, the problem of what the “command responsible” condition entails lies at the heart of the analysis. This requirement, in conjunction with the existence of “an internal disciplinary system”, pursues *inter alia* the aim of enforcing “compliance with the rules of international law applicable in armed conflict”.

On the one hand, it seems that the mere conclusion of the contract between the State and the private firm would not be sufficient to meet the condition, even though the document would contain clauses on the respect for the laws of war and the contractor would be required to submit reports to a governmental officer.²⁵ On the other hand, the formulation of Article 43 does not call for the existence of a military chain of command: the notion is flexible and it leaves open the possibility of a different kind of command, for instance consisting of private individuals.

In other words, the ‘command responsible’ condition requires a certain degree of oversight by the Party to the conflict. An accepted standard should meet the requirement provided by Article 43 of an internal disciplinary system, “which covers the field of military disciplinary law as well as that of military penal law²⁶”. What the hiring State has to do is to establish appropriate supervision and control which includes the exercise of criminal jurisdiction over the contractor personnel.

There is no doubt that the first step would be to define rigorously the tasks in the contract and include specific provisions on the respect the law of international armed conflicts, the violation of which should trigger consequences like contract suspension or termination, possible fines and exclusion from future contracts. The contract should provide for appropriate training programs in international human rights and humanitarian law.²⁷ Even though the US consider the contractors as civilians accompanying the armed forces, the recent practice deserves particular attention, as it represents the unavoidable test case:²⁸ while in the early stages of the Iraqi operations the Department of Defense almost lacked regulation about the presence and use of contractors, now a substantial number of documents have been published.²⁹ It is important to investigate how they cover the new functions of the private firms and whether they set a certain trend with regard to the relationship with the armed forces. In this respect, a 2006 Department of Defense directive requires “contractors to institute and implement effective programs to prevent violations of the law of war by their employees and subcontractors, including law of war training and dissemination³⁰”. However, implementation has been regarded as insufficient.³¹

²⁵ *Contra* Hoppe, ‘Passing the Buck: State Responsibility for Private Military Companies’, 19 *EJIL* (2008) 989 at 1009.

²⁶ De Preux, *supra* note 18, at 513.

²⁷ The Parties to a conflict are required to “give orders and instructions to ensure observance” (cf. Article 80 (2) of Additional Protocol I) of international humanitarian law.

²⁸ Various examples in this article will be taken from the Iraqi scenario since 2003, as they offer essential elements for the evaluation of the relationship between the State and the private companies. As a matter of law, the *occupatio bellica* following the end of major hostilities still constitutes a situation of international armed conflict. On the application of the occupation law in Iraq, according to the principle of effectiveness, see *inter al.* Roberts, ‘The End of Occupation: Iraq 2004’, 54 *ICLQ* (2005) 27; Carcano, ‘End of the Occupation in 2004? The Status of the Multinational Force in Iraq after the Transfer of Sovereignty to the Interim Iraqi Government’, 11 *Journal of Conflict and Security Law* (2006) 58; more recently, on the application of international humanitarian law in Iraq, see Al Hassani, ‘International Humanitarian Law and its Implementation in Iraq’, 90 *IRRC* (2008) 51.

²⁹ Isenberg, ‘A Government in Search of Cover’, in S. Chesterman and C. Lehnardt (eds.), *supra* note 14, at 89.

³⁰ US Department of Defense Directive, 2311.01 E, 9 May 2006.

³¹ Dickinson, ‘Testimony Before the United States Senate Committee on Homeland Security and Governmental Affairs’, 27 February 2008, at 8; Summary of Meeting, *Princeton Problem Solving Workshop Series: A new Legal Framework*

In addition, under Protocol I, being “responsible to a Party of the conflict” entails that the organized group has to answer to the Party for its own actions. In the context of the use of private contractors in armed conflicts, it means not only that the contractor must report to the hiring State but that the latter must establish a supervision mechanism. Specific indications are unlikely to be found in the commentary to the Protocol: however, one might infer that the command of the regular armed forces should ensure a certain degree of control and coordination of the activities performed by private contractors.

It is useful to refer to the Iraqi scenario again. The problem of the lack of control over the private military and security companies emerged dramatically in the aftermath of the incident in the Nisoor Square on 16 September 2007, when Blackwater personnel, running an armed convoy through Baghdad, killed 17 civilians.³² It was even reported that in some cases contractors were actually supervising governmental personnel, instead of the other way around.³³ On October 2007 the panel of experts appointed by the US Secretary of State published a report on personal protective services in Iraq, which recommended a series of measures to improve coordination, oversight and accountability.³⁴ The panel stressed the importance of increasing the number of governmental personnel who can accompany the contractors performing ‘Personal Protective Service’ movements. A Memorandum of Agreement between the Departments of State and Defense was then signed on 5 December 2007: the document represents a significant step towards the enhancement of procedures, since it states that US government private contractors running a convoy in Iraq “will coordinate their movements” with either Coalition military or US Embassy operations centres in Baghdad.³⁵

The last aspect is the issue of criminal jurisdiction over the contractor personnel. The US practice shows that the trend moves towards the exercise of military jurisdiction over the employees of private firms. On 17 October 2006, the Uniform Code of Military Justice (UCMJ) was amended to extend jurisdiction over persons “serving with or accompanying an armed force in the field” also during ‘contingency operations’:³⁶ courts-martial are authorized to try them for offences prohibited by the UCMJ. Among the few documents on the implementation of the amendment, the Memorandum, issued by the Deputy Secretary of Defense, on 25 September 2007 defines the measures available to military commanders as follows:

Commanders have UCMJ authority to disarm apprehend and detain DoD contractors suspected of having committed a felony offense in violation of the RUF [Rules for Use of Force], or outside the scope of their authorized mission, and to conduct the basic UCMJ pre-trial process and trial procedures currently applicable to the courts-martial of military service members. Commanders also have available to them contract and administrative remedies, and other remedies, including discipline and other possible criminal prosecution.³⁷

(Contd.) _____
for Military Contractors, at 6, available at
http://lapa.princeton.edu/conferences/military07/MilCon_Workshop_Summary.pdf.

³² Memorandum to Members of the Committee on Oversight and Government Reform, ‘Additional Information about Blackwater USA’, 1 October 2007, at 6.

³³ Dickinson, *supra* note 31, referred to the incident in Najaf in 2004, when “Blackwater guards charged with defending a Coalition Provisional Authority site fought alongside a marine who appears to have asked the Blackwater guards for advice about whether or not to fire into a menacing crowd”.

³⁴ Kennedy *et al.*, ‘Report of the Secretary of State’s Panel on Personal Protective Services in Iraq’, 23 October 2007.

³⁵ Memorandum of Agreement between the Department of Defense and the Department of State on USG Private Security Contractors, 5 December 2007.

³⁶ Under US law, ‘Contingency operations’ are those “designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force”.

³⁷ Deputy Secretary of Defense, ‘Management of DoD Contractors and Contractor Personnel Accompanying US Armed Forces in Contingency Operations Outside the United States’, 25 September 2007, available at <http://www.afsc.army.mil/gc/battle2.asp>.

To conclude, when a State hires an organized private unit for coercive services, the existence of the factual link required for ‘membership in the armed forces’ within the meaning of Article 43 (1) is not unlikely.

The scenario appears to be more problematic when private companies are not contracted by the State directly, but subcontracted. In Iraq, for example, more than 20,000 individuals perform protective security functions for private firms under US government contracts.³⁸ The question whether they act on behalf of a Party to the conflict should be answered in the affirmative if the security services constitute an integral element of the prime contract performance.³⁹

3. Private Contractors Taking a Direct Part in Hostilities

This paragraph focuses on the specific conduct of contractors’ personnel. There is no agreed definition of what constitutes “direct participation in hostilities”. This controversial notion is used both in Article 43 (2) and in Article 51 (3) of Additional Protocol I: to define the combatant privilege in the former, to express the loss of the civilians’ right to protection from attack in the latter. The loss of immunity for civilian participating in hostilities is repeated also in Additional Protocol II on the law of non-international armed conflicts.

The issue of ‘direct participation’ has been tackled by an expert working group instituted in 2003 by the International Committee of the Red Cross and the TMC Asser Institute. Three reports have been published and the expected outcome is the drafting of interpretative guidelines. The initial purpose of formulating an abstract definition of general application has been abandoned, since doubts were expressed as to whether such a definition “could actually cover the vast variety of conceivable situations and whether it could sufficiently reflect the complexity of the legal issues at stake⁴⁰”. The approach adopted by the working group has been to focus on the constitutive elements of the notion.

A. The Debate on the Constitutive Elements of the Notion

The 2005 summary report of the third ICRC/TMC Asser meeting shows the emerging agreement among the experts around three cumulative constitutive elements: the notion of “hostilities”; the “nexus” requirement and the “causal proximity” requirement. A further criterion, based on the ascertainment of the “hostile intent”, was rejected.⁴¹

For the definition of the term “hostilities”, one should start from the description of ‘hostile acts’ as “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces⁴²”. The Commentary then refers to the fact that the expression ‘hostilities’ may cover also “preparations for combat and return from combat” and “situations in which [a person] undertakes hostile acts without using a weapon”.

As for the typology of harm, the commentary seems to imply that only military objectives must be affected. However, this interpretation is too restrictive in the present war-scenarios, where the parties pursue their goals by illegally attacking also civilian objects. Thus, the judgment on targeted killings handed down by the Israeli High Court of Justice on December 2006 has rightly recognized that “acts

³⁸ See *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*, RL32419, July 2007, at 6.

³⁹ Schmitt, ‘Humanitarian Law’, *supra* note 11, at 528.

⁴⁰ ICRC, Summary Report 2005, *supra* note 7, at 5.

⁴¹ ICRC, Summary Report 2005, *supra* note 7, at 36.

⁴² Y. Sandoz *et al.* (eds.), *supra* note 18, at 618, para. 1942. See *The Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, judgment of 17 December 2004, para. 51; IACiHR, *Third Report on human rights in Colombia*, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, para. 53.

which by nature and objective are intended to cause damage to civilians should be added to that definition⁴³”. One of the formulations proposed within the working group covers “all acts that adversely affect or aim to adversely affect the enemy’s pursuance of its military objective or goal”; similarly, a second one focuses on the notion of “military activities against the enemy in an armed conflict”. That the definitions cover all hostile acts both in offence and in defence⁴⁴ is undisputed. Less clear is still the qualification of the term ‘harm’: it should not be interpreted too broadly, to individuate every interference with the enemy’s strategic goals. It definitely includes the infliction of death, injury or destruction on persons or objects, as well as the establishment and exercise of control over military personnel, objects and territory.⁴⁵ Furthermore, the reference to the ‘enemy’ is of crucial importance when evaluating protective security services in a situation of occupation, where it is not self-evident who the adversary is.

The second element seems to be less problematic. Its function is to explain that “an act qualifying as ‘direct participation in hostilities’ must have a ‘nexus’ to a situation of armed conflict⁴⁶”. In particular the required nexus is one between the act and the war itself. It is not necessary to prove a connection with a Party to an armed conflict: therefore, even non-state contractors can take a direct part in hostilities.⁴⁷

The third element – the existence of a causal correlation between the activity and the harm for the adversary – is definitely more controversial. As is well known, the qualification of the term ‘directness’ lies at the core of the debate on the notion of ‘direct participation’. Two main theoretical positions were distinguished by the Israeli Supreme Court: a narrow interpretation which prioritizes the protection of innocent civilians;⁴⁸ and a wider approach, in favour of finding participation in grey areas, aimed at encouraging the civilians “to remain as distant from the conflict as possible⁴⁹”.

In this respect, the ICRC commentary appears to favour a restrictive interpretation, as it affirms in the context of Article 43 of Additional Protocol I: “[d]irect participation in hostilities implies a *direct causal* relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place⁵⁰”.

On the contrary, even though there is no explicit endorsement, the exemplification provided by the targeted killing judgment suggests that President Barak favoured a broad interpretation of the notion of direct participation: “a person who collects intelligence on the army, whether on issues regarding the hostilities [...], or beyond those issues [...]; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the

⁴³ *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, judgment of 13 December 2006, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.htm, para. 33.

⁴⁴ See Article 49 of Additional Protocol I.

⁴⁵ The interpretation of the term ‘harm’ becomes problematic when evaluating the effects of electronic warfare. See M. Schmitt and B. T. O’Donnell (eds.), *Computer Network Attack and International Law* (2002).

⁴⁶ ICRC, Summary Report 2005, *supra* note 7, at 24.

⁴⁷ Cfr. G. Mettraux, *International Crimes and the ad hoc Tribunals* (2005) at 39, for a discussion on the substance and meaning of the nexus requirement for war crimes in the jurisprudence of the *ad hoc* International Criminal Tribunals. On private military personnel perpetrating war crimes, see Lehnardt, ‘Individual Liability of Private Military Personnel under International Criminal Law’, 19 *EJIL* (2008) 1015, at 1020.

⁴⁸ Cassese, *Expert Opinion on Whether Israel’s Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law*, para. 12 *et seq.*, at para. 18, available at <http://www.stoptorture.org.il>.

⁴⁹ Schmitt, ‘Direct Participation in Hostilities and 21st Century Armed Conflict’, in H. Fischer (ed.), *Crisis Management and Humanitarian Protection, Festschrift für Dieter Fleck* (2004), 505.

⁵⁰ De Preux, *supra* note 18, at 516, para. 1679.

battlefield as it may⁵¹”. It is noteworthy that the Israeli Supreme Court interpreted the term ‘directness’ not in terms of the causal correlation between the activity and the harm – as provided by the commentary – but rather in terms of the function performed by the individuals: “All those persons are performing the function of combatants. The function determines the directness of the part taken in the hostilities⁵²”. Such an alternative approach seems to follow the model proposed by Watkin, based on a broad understanding of *combatancy* as ‘a group activity’.⁵³ However, this solution is questionable as it seems to lead to the assumption that all the activities performed by the members of the States’ armed forces amount to direct participation in hostilities. In this way, one might confuse the issue of combatant status with the qualification of certain activities: the fact that the development of international humanitarian law has almost abandoned the original division of the armed forces between combatants and non-combatants simply means that the members of the armed forces are entitled to directly participate in hostilities, but the commentary makes clear that “in any army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons⁵⁴”. It goes without saying that such a functional approach does not consider the situation of unorganized or sporadic participation in hostilities⁵⁵.

Therefore, the term ‘directness’ implies the element of a causal correlation between the activity and the harm to the adversary. In considering the spectrum of possibilities, direct participation is uncontested when a person uses weapons and other means to commit acts of violence in the course of military operations. On the other hand, a mere contribution to the general war effort does not fall within that category: working in a munitions factory, transport of food or humanitarian supplies, building infrastructures are certainly all unproblematic examples.⁵⁶ However, a consistent number of activities already performed by private security companies belong to the so-called grey area, which lies between the extremes.

In particular, one of the most problematic scenarios is when an individual contractor does not materially inflict the harm to the adversary. In complex military operations, one has to assess what kind of contribution an individual makes to the production of the harm. The main question to be addressed is therefore what degree of causation between an individual conduct and the harm is required. Various standards have been proposed: some favoured a ‘direct causation’ approach; others suggested the criterion of ‘but for’ causation; finally a criterion similar to ‘aiding and abetting’ was advanced. Nevertheless, some experts pointed out that the criteria for ‘direct participation in hostilities’ not only has to be sufficiently precise to allow the prosecution of the civilians in question after capture, but also simple and clear enough to remain understandable for the persons actually confronted with an operational situation.⁵⁷

⁵¹ *The Public Committee against Torture in Israel et al.*, judgment, *supra* note 43, para. 35.

⁵² *Ibid.* Cf. Keller and Forowicz, ‘A Tightrope Walk between Legality and Legitimacy: An Analysis of the Israeli Supreme Court’s Judgment on Targeted Killing’, 21 *Leiden Journal of International Law* (2008) 185, at 208.

⁵³ See Watkin, ‘Humans in the Cross-Hairs: Targeting, Assassination and Extra-Legal Killing in Contemporary Armed Conflict’, in D. Wippman and M. Evangelista (eds.), *New Wars, New Laws? Applying the Laws of War in the 21st Century Conflicts* (2005) 137, at 153: for identifying direct participation in hostilities, this author suggests to “apply the basic military staff structure (personnel, intelligence, operations, logistics, civil-military relations, and signals) to a non-state organization”.

⁵⁴ De Preux, *supra* note 18, at 515, para. 1677.

⁵⁵ Keller and Forowicz, *supra* note 52, at 208.

⁵⁶ De Preux, *supra* note 18, at 516: “Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad”. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, in the *Strugar* case, observed that Article 67 (1) (e) of Additional Protocol I draws a distinction between the broader notion of direct participation in hostilities and the commission of “acts harmful to the adverse party”. Cf. *The Prosecutor v. Strugar*, IT-01-42-A, judgment of 17 July 2008, para. 176.

⁵⁷ ICRC, Summary Report 2005, *supra* note 7, at 28.

An accepted standard of causation does not exist in international law:⁵⁸ the common law and civil law traditions offer a variety of approaches. It goes beyond the scope of this paper to analyze the criteria developed in each domestic legal system. In any case, the inescapable point of reference is the theory that appears to remain the predominant one: the causal link requires that a certain conduct should be regarded as an immediate *sine qua non* of the event adversely affecting the enemy. Of course, this does not exclude the existence of other concurrent causes. But, as recognized by an author, “what counts is the immediate impact on the enemy⁵⁹”. Other scholars seem to share this approach. The link between a certain activity and the subsequent harm for the enemy has been convincingly described as “integration into combat operations⁶⁰”: an individual directly participates in hostilities once his activity constitutes an indispensable contribution, within a military operation, to the direct infliction of violence.⁶¹ This means that the notion of direct participation of hostilities comprises also activities which cause harm “only in conjunction with other acts⁶²”.

The above considerations help to evaluate the relevance of geographic proximity in the notion of direct participation and essentially lead to a reconsideration of the validity of the principle according to which the closer an activity occurs to the physical location of fighting, the more likely it will be considered combat.⁶³ It is questionable whether a civilian’s proximity to the theatre of operations is in itself a decisive and qualifying element, absent any immediate link with the caused harm. It goes without saying that the law of international armed conflicts already takes into account such a situation, since it recognizes the category of civilians accompanying the armed forces.

In conclusion, a restrictive interpretation of the notion is preferable as it better reflects the principle of distinction under international humanitarian law. A wider approach, in favour of a presumption of loss of protection in grey areas, leaves an excessive margin of appreciation and does not offer sufficient safeguards. In particular, the ‘functional approach’ to the notion is not satisfactory, because it does not distinguish the issue of combatant status from the qualification of certain activities.

In the next paragraph, the three constitutive elements of the notion will be tested and applied with regard to the most important categories of activities performed by contractors personnel.

B. Protective Security Services: the Defensive Use of Force

The first category comprises the security services performed by private contractors in a situation of an armed conflict. These include tasks such as guarding of military bases, checkpoints, work sites and embassies; personal security of high ranking officials; travel security for individuals; escorts for vehicle convoys moving equipment and supplies; event security; evacuation planning and finally security advice and planning.

⁵⁸ For the difficulties in the context of State Responsibility, as for the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise, UN Doc. A/56/10, 227-228; see Rigaux, ‘International Responsibility and the Principle of Causality’, in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 81.

⁵⁹ Sassoli, ‘Targeting: the Scope and Utility of the Concept of “Military Objectives” for the Protection of Civilians in Contemporary Armed Conflicts’, in *New Wars*, supra note 53, at 201.

⁶⁰ Guillory, ‘Civilianizing the Force: Is the United States Crossing the Rubicon?’, 51 *The Air Force Law Review* (2001) 111, at 134

⁶¹ See also Bartolini, ‘The “Civilianization” of Contemporary Armed Conflicts’, paper presented at the Biennial Conference of the European Society of International Law, Heidelberg, 4-6 September 2008.

⁶² N. Melzer, *Targeted Killing in International Law* (2008) at 342.

⁶³ Cf. Heaton, ‘Civilians at War: Reexamining the Status of Civilians accompanying the Armed Forces’, 57 *The Air Force Law Review* (2005) 155, at 178.

The extensiveness of the US use of private security contractors in Iraq has been recently confirmed by the Office of the Special Inspector General for Iraq Reconstruction (SIGIR), which has identified “310 companies with direct contracts and subcontracts to provide security services to US agencies, contractors supporting the military, or organizations implementing reconstruction programs for these agencies since 2003⁶⁴”. The Congressional Budget Office estimated that total spending for such services ranged between \$6 billion and 10 billion in the period between 2003 and 2007.⁶⁵

In this context, it is noteworthy that the Instruction released by the Department of Defense on 3 October 2005, which applies “to all contractors and subcontractors at all levels, and their employees, authorized to accompany U.S. Armed Forces”, devoted a specific paragraph to the discipline of the use of contractor personnel for security services: it specifies that “[c]ontracts shall be used cautiously in contingency operations where major combat operations are ongoing or imminent. In these situations, contract security services will not be authorized to guard US or coalition military supply routes, military facilities, military personnel, or military property except as specifically authorized by the geographic Combatant Commander⁶⁶”.

Public awareness for this kind of activity is connected to the series of tragic incidents involving private military and security companies in the last years. A recent report by Human Rights First reviews the events which occurred between 2004 and 2005 on the basis of official documents: these sources offer detailed accounts of roadside explosions, small arms attacks, and kidnappings.⁶⁷ On 4 April 2004, Blackwater personnel engaged “in tactical military actions in concert with US troops” to defend the regional Coalition Provisional Authority headquarters in Najaf: a memorandum of the US House Committee on Government Oversight described the battle as follows “the Blackwater became aware from staff for the US Ambassador to Iraq that there was an attack on Najaf and joined the fire fight. Several Blackwater personnel took positions on a rooftop alongside U.S. Army and Spanish forces⁶⁸”. To give one more example, the US Department of Defence contracted the British firm Aegis Defence Services Limited “to provide a comprehensive security management team that provides anti-terrorism support and analysis, close personal protection, movement and escort security, and security program management⁶⁹”.

Security services usually entail the use of weapons. The events described above demonstrate that their legal characterization is problematic when the contractors are required to protect high-level individuals and certain sites: could their actions be qualified as exercise of self-defence or do they amount to a direct participation in hostilities? To answer the questions, two variables have been considered: whether the persons or objects to be protected constitute a military objective and whether the attacker is a common criminal or belong to a Party of the conflict.⁷⁰ Since the law of armed conflicts does not distinguish between offensive and defensive operations, defending military objectives from the enemy amounts to taking a direct part in hostilities. The fact that the contractor personnel was mandated to carry out that task is not determinative.⁷¹ The opposite case would be the provision of security for civilians against common crimes: such a situation amounts to a police operation.

⁶⁴ US Office of the Special Inspector General for Iraq Reconstruction, *Agencies Need Improved Financial Data Reporting for Private Security Contractors*, SIGIR-09-005, 30 October 2008, at 3.

⁶⁵ US Congressional Budget Office Report, *Contractors' Support of US Operations in Iraq*, August 2008, at 15.

⁶⁶ Instruction 3020.41, 3 October 2005, para. 6.4.

⁶⁷ Human Rights First, *Private Security Contractors at War: Ending the Culture of Impunity* (2008), at 59.

⁶⁸ Memorandum, ‘Additional Information about Blackwater USA’, *supra* note 32, at 8.

⁶⁹ Office of the Special Inspector General for Iraq Reconstruction, *Audit Report: Compliance with Contract No. W911SO-C-0003 Awarded to Aegis Defense Services Limited*, Report No 05-005, 20 April 2005, at 1.

⁷⁰ Cf. Schmitt, ‘Humanitarian Law’, *supra* note 11, at 538-539; Doswald-Beck, *supra* note 14, at 129.

⁷¹ In this context, see also *The Prosecutor v. Thomas Lubanga Dylo*, ICC-01/04-01/06, Decision on the confirmation of charges, 29 January 2007, para. 263. Actually, the Chamber analyzed the notion of “active participation in hostilities”

As for the definition of military objectives, buildings and positions where combatants, their material and armaments are located, and military means of transportation and communication fall within the category identified by the Article 52 (2) of Additional Protocol I. Other situations are more problematic. As for the characterization of dual-use facilities, this provision is based on two cumulative criteria: first, the object has to contribute effectively to military action; second, its destruction, capture, or neutralization has to offer a definite military advantage. I will focus here on the specific case of economic installations: after the Iraqi invasion,⁷² many attacks by insurgents against oil pipelines were reported. Erinys was one of the early contractors in Iraq and won an \$80 million contract in the summer of 2003 to provide security for Iraqi oil refineries and pipelines.⁷³ It could be difficult to verify whether the attack against these installations was simply an attempt of loot by criminals or a military operation for diminishing the enemy's access to oil.⁷⁴ Here the element of the nexus to an armed conflict seems to be decisive: an evaluation of both the context in which a person bears arms and the nature of the exchange of fire lead to the correct qualification of the conduct. The same approach should be applied when considering the case of private contractors protecting certain civilian objects.

However, it is important to bear in mind that in the vast majority of the reported incidents involving private contractors in Iraq, the security personnel forces fired first at a vehicle or suspicious individual prior to receiving any fire.⁷⁵ In my view, these events could amount to direct participation, depending on the nature of the operation: the Israeli Court has already clarified that the term 'hostilities' also includes the infliction of harm to the civilian population.

A related question which needs to be answered here is whether the employees of private companies, as civilians, are allowed to carry weapons for self-defence purposes. It has been estimated that about three-quarters of the 7,300 contractor personnel working for the US Department of Defense in Iraq carry weapons.⁷⁶

In assessing the UK Government's Green Paper on 'Private Military Companies: Options for Regulation',⁷⁷ the House of Commons Foreign Affairs Committee recommended "that private military companies be expressly prohibited from direct participation in armed combat operations, and that firearms should only be carried — and if necessary, used — by company employees for purposes of training or self-defence"⁷⁸. Furthermore, the afore-mentioned instruction released by the US

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under Article 77 (2) of Additional Protocol I, regarding the involvement of children in armed conflicts. Interestingly, it affirmed that the notion covered the use of children "to guard military objectives, such as the military quarters of the various units of the parties to the conflict, or to safeguard the physical safety of military commanders".

⁷² Cf. the informal additional remarks by W. Hays Parks in the 2004 Report of the Second Expert Meeting on Direct Participation in Hostilities under International Humanitarian Law, 13: "Iraq is a special situation because it entailed belligerent occupation. Contractors were only present in significant numbers once the country was occupied. They were intended to provide services to the civilian population related to that occupation and for the reconstruction of Iraq. Each reconstruction contractor had to provide for his own security. As the insurgency increased and reconstruction security changed in nature, the phenomenon of armed security contractors reached an unprecedented scale".

⁷³ See 'U.S. Soldier's Family Brings Legal Action against British Private Security Firm', *The Guardian*, 30 October 2007, available at <http://www.guardian.co.uk/Iraq/Story/0,,2201538,00.html>.

⁷⁴ Cf. Cameron, *supra* note 6, at 591.

⁷⁵ Memorandum, *supra* note 31, at 6: "Blackwater personnel have participated in 195 incidents in Iraq from January 1, 2005, through September 12, 2007, that involved firearms discharges by Blackwater personnel. This is an average of 1.4 incidents per week. In 32 of those incidents, Blackwater personnel were returning fire after an attack, while on 163 occasions (84% of the shooting incidents), Blackwater personnel were the first to fire. U.S. military commanders have reported that Blackwater guards "have very quick trigger fingers," "shoot first and ask questions later," and "act like cowboys."

⁷⁶ US Congressional Budget Office Report, *Contractors' Support*, *supra* note 65, at 15.

⁷⁷ Foreign and Commonwealth Office, *Private Military Companies: Options for Regulations*, February 2002.

⁷⁸ House of Commons Foreign Affairs Committee, *Private Military Companies*, August 2002, at 30, para. 108.

Department of Defense on 3 October 2005 affirms that contractor personnel may be authorized “to be armed for individual self-defence⁷⁹”.

International humanitarian law explicitly permits certain individuals to bear and use arms in individual self-defence. There is also little doubt that the resort by civilians to armed force in personal self-defence should be distinguished from direct participation in hostilities: it was a widely shared view among the ICRC/ TMC Asser experts that “individual civilians using a proportionate amount of force in response to an unlawful and imminent attack against themselves or their property should not be considered as directly participating in hostilities⁸⁰”. Finally, the International Criminal Tribunal for the former Yugoslavia confirmed the status of certain individuals as civilians, who strictly speaking did not carry out military operations although they did bear arms.⁸¹

C. *Intelligence Activities*

Since September 2001 private military and security companies have been as important to the US military’s intelligence function as they have to its training, logistics or equipment maintenance roles.⁸² The tasks performed by private contractors can be divided into three main categories: the collection of information (from interrogations or through electronic means), the analytical function, and the participation in the extraordinary renditions.⁸³

The majority of commentators agree that information gathering activities may constitute direct participation in hostilities. As for the collection of information, an author distinguished between a person who gathers military intelligence in enemy-controlled territory and a civilian who retrieves data from satellites or listening posts, working in terminals located in his home countries.⁸⁴ In this regard, one cannot exclude that private contractors may fall within the definition of spies according to Article 29 (1) of the 1907 Hague Regulations and Article 46 of Additional Protocol I: in fact, the category includes persons, irrespective of their primary status, who, acting clandestinely or under false pretences, gather information in the territory controlled by the adversary. The relevance of the notion of spy will be made clear in the paragraph devoted to its legal consequences.

On the basis of the constitutive elements of the notion of ‘direct participation’, although intelligence gathering does not necessarily entail a material damage to the enemy, certain intelligence operations could still fall within the notion of hostilities in the view of some experts: for example, wire-tapping the enemy’s high command.⁸⁵ In line with the previous analysis, one should demonstrate a direct causal link between the intelligence information and the harm affecting the adversary. In this respect, the outsourcing of detainees’ interrogation to private contractors and their involvement in the torture

⁷⁹ Instruction 3020.41, 3 October 2005, para. 6.3.4. According to the US Army Field Manual, “Contractor employees [...] cannot take an active role in hostilities but retain the inherent right to self-defense. Because of their civilian background, they may possess neither the training nor experience to actively participate in force protection measures, and the rules governing warfare preclude them from doing so except in self-defense”. FM 3-100.21, *Contractors on the Battlefield*, 3 January 2003, para. 6-3.

⁸⁰ ICRC, ‘Report of the First Expert Meeting, Direct Participation in Hostilities under International Humanitarian Law’, Geneva, September 2003, at 7.

⁸¹ *The Prosecutor v. Tadic*, IT-94-1-T, judgment of 7 May 1997, paras. 640-643; *The Prosecutor v. Blaskic*, IT-95-14-T, judgment of 3 March 2000, paras. 402-410. The Tribunal referred to the final report of the Commission of Experts established pursuant to SC Res. 780 (1992), UN Doc. S/1994/674, para. 78.

⁸² Donald, ‘Private Security Companies and Intelligence Provision’, in A. Alexandra, D.-P. Baker and M. Caparini (eds.), *supra* note 1, 131.

⁸³ See Carroll, ‘Outsourcing US intelligence’, in *International Herald Tribune*, 27 August 2007, available at <http://www.iht.com/articles/2007/08/27/opinion/edcarroll.php>.

⁸⁴ See Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), at 27.

⁸⁵ ICRC, Summary Report 2005, *supra* note 7, at 29.

scandal at the Abu-Ghraib prison raises the issue of their legal qualification:⁸⁶ there seems to be little doubt that tactical and strategic interrogations aimed at obtaining relevant information at the operative level should be regarded as direct participation in hostilities.⁸⁷ Therefore, only legitimate combatants have the right to carry out such functions.

D. Other Examples of Direct Participation

Another field of activity in which PMSCs could be involved is rescue operations. Iraq provides more than one example of civilian crews which are used to rescue military personnel downed on land.⁸⁸

Rescue operations of military personnel are regarded as examples of direct participation in hostilities: it is therefore legitimate to attack the rescuers to impede or prevent the rescue activity, but protection should be assured to medical personnel, units or transports collecting the sick or wounded.⁸⁹ In this regard, it has been pointed out during the ICRC/TMC Asser second expert meeting that care must be taken when concluding that rescue operations constitute direct participation in hostilities, because Article 18 of the First Geneva Convention encourages the civilian population to care for wounded military personnel.⁹⁰

Finally, according to the US Air Force Commander's Handbook, the rescue of civilian or military hostages in situations of armed conflict might also amount to direct participation in hostilities.⁹¹ However, it has been stressed that it rather constitutes a law enforcement measure.⁹²

The case of the ammunition truck driver was source of much controversy during the expert meetings organized by the ICRC and the TMC Asser Institute. Although the experts agreed that the truck itself was a legitimate military objective, there was no agreement on the lawfulness of directly attacking the driver.⁹³ By applying the three elements of the notion identified in the previous paragraph, one can conclude that this kind of activity does not amount to a direct participation in hostilities: in any case, since the truck is a military target, the driver runs the risk of death or injury resulting from attacks on that target.⁹⁴

As for advice and military training aimed at improving capabilities of the regular armed forces, there is little doubt that they have a strategic importance but they do not necessarily produce an immediate direct impact on military operations.⁹⁵

⁸⁶ See 'Article 15-6 Investigation of the 800th Military Police Brigade' (Taguba Report, 2004), available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf.

⁸⁷ Cf. Schmitt, 'Humanitarian Law', *supra* note 11, at 544.

⁸⁸ McDonald, 'The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities', available at <http://www.wihl.nl>.

⁸⁹ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), at 327.

⁹⁰ Cf. Report of the Second Expert Meeting, Direct Participation in Hostilities under International Humanitarian Law, The Hague, 25 – 26 October 2004, at 13.

⁹¹ United States, *Air Force Commander's Handbook* (1980) paras. 2-8: "The rescue of military airmen downed on land is a combatant activity that is not protected under international law. Civilians engaged in the rescue and return of enemy aircrew members are therefore subject to attack. This would include, for example, members of a civilian air auxiliary, such as the US Civil Air Patrol, who engage in military search and rescue activity in wartime. Consistent with this position, the rescue of civilian or military hostages in situations of armed conflict might also amount to direct participation in hostilities".

⁹² Schmitt, 'Humanitarian Law', *supra* note 11, at 540.

⁹³ ICRC, 'Report of the First Expert Meeting', *supra* note 80, at 4.

⁹⁴ Cf. A.P. V. Rogers, *Law on the Battlefield* (2004), at 12.

⁹⁵ Boldt, *supra* note 12, at 522. The private firm MPRI worked in the Balkans during the mid-1990s training the Croatian Army. In 1995 Croatian forces performed unexpectedly well in the offensive against Serb forces in the Krajina region.

A further type of operation which is considered as direct participation is the maintenance and operation of a weapons system.⁹⁶ During the Iraqi invasion, contractors maintained and loaded weapons on many of the most sophisticated US weapons systems, such as the B-2 stealth bomber and the Apache helicopters.⁹⁷ It seems that geographical proximity to the battle zone is relevant for the legal characterization of this kind of activity, so that it constitutes evidence of their indispensable contribution to the military operations. In any case, performing routine maintenance does not have an immediate causal link with an operation affecting the adversary.⁹⁸

4. Legal Consequences Deriving from the Primary Status of PMSC Personnel

A. Contractors Personnel as Military Objectives

Having verified that employees of private military and security companies may have combatant status, the first consequence in this specific circumstance is that attacks can be directed against them, unless they are *hors de combat*.

On the contrary, if they are considered civilians, they are protected against attack “unless and for such time as they take part in hostilities”. The main question to be addressed in this context is the temporal scope of loss of protection: the time requirement, rendered by the expression ‘for such time’, determines that the civilian who has ceased taking a direct part in hostilities regains his or her protection. Three main interpretative approaches have been identified: the ‘specific acts approach’; the ‘affirmative disengagement approach’ and the ‘membership approach’.⁹⁹

The dilemma has been expressed by the Israeli Supreme Court judgment.¹⁰⁰ President Barak identified on the one hand, “a civilian who took a direct part in hostilities once, or sporadically, but detached himself from them (entirely, or for a long period) is not to be harmed”; on the other hand, the ‘revolving door’ phenomenon, namely civilians who have joined an armed group and then claim the benefit of immunity from attack as soon as they have dropped their arms. President Barak recognized the existence of a grey zone between these two extremes, where international law has not yet crystallized: therefore, he pointed out the importance of case-by-case verification. The merit of this solution lies in the rejection of a radical application of the ‘membership approach’ in international armed conflicts, which might allow attacks against members of an armed group as such, whatever function they were fulfilling.

As for the contractors’ activities, there is no doubt that a single employee performing an isolated act of direct participation in hostilities immediately regains the protection once the specific act in question is terminated. The most challenging scenario is represented by organized and structured private companies, which entered into a contract with a State to perform activities amounting to a direct participation in hostilities. It has been debated whether all their employees could be attacked at any time and any place or, alternatively, whether the personnel becomes a valid target only if they are

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MPRI denied playing any role in the attack, and maintained that its involvement was limited to classroom instruction. See Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation* (2002), at 13.

⁹⁶ Heaton, *supra* note 63, at 202.

⁹⁷ Singer, *Can't Win With 'Em*, *supra* note 3, at 2.

⁹⁸ Guillory, *supra* note 60, at 128.

⁹⁹ ICRC, Summary Report 2005, *supra* note 7, at 59: According to the ‘Specific Acts Approach’, the loss of civilian protection against lasts as long as the specific acts amounting to direct participation in hostilities; according to the ‘Affirmative Disengagement Approach’, the loss of civilian protection lasts from the first act amounting to direct participation in hostilities until the civilian disengages in a manner objectively recognizable to the adversary; finally, the “Membership Approach” essentially combines the two previous approaches: the “Affirmative Disengagement Approach” for the members of organized armed groups and the “Specific Acts Approach” for unorganized civilians.

¹⁰⁰ *The Public Committee against Torture in Israel et al.*, judgment, *supra* note 42, para. 40.

mandated to take a direct part in hostilities. It is significant that several experts of the ICRC/TMC Asser group proposed a “limited membership approach”, which combines the ‘membership’ element with the activity performed by the individual member within the group. This ‘in-between’ solution seems to strike the right balance, since it overcomes the problems posed by the ‘revolving door’ phenomenon: as observed in the 2005 report, if a contractor’s employee fulfils a function which implies taking a direct part in hostilities on a regular or continuous basis, then that individual “would lose protection against direct attack for as long as that function was being fulfilled¹⁰¹”.

Finally, the test-case of the ammunition truck driver has demonstrated that the civilian employees of private companies, though not taking a direct part in hostilities, assume the risk of being injured because of their vicinity to military objectives. Therefore, subject to the principle of proportionality,¹⁰² attacks directed against such targets are lawful if the civilian losses are not excessive in relation to the concrete and direct military advantage.

B. Legal Regime Applicable upon Capture

There is no doubt that the issue of the entitlement of prisoner-of-war status is relevant in the “major hostilities” phase more than in the situation of belligerent occupation.¹⁰³ Again, if the members of private companies fall within the category of legitimate combatants, they should consequently be accorded the prisoner-of-war status. In addition, they are entitled to the same treatment if they satisfy the conditions to be qualified as civilians accompanying the armed forces under Article 4 of the Third Geneva Convention. Even if they fall within one of the previous categories, persons engaged in espionage are not entitled to prisoner-of-war status.¹⁰⁴

The most controversial issue is whether civilians accompanying armed forces retain that status if they take a direct part in hostilities. The preferable position is expressed by the UK Military Manual, which affirms that they “remain non-combatants, though entitled to prisoner of war status, so long as they take no part in hostilities¹⁰⁵”. The opposite approach has been supported by the US Department of Defense.¹⁰⁶

Contractors’ employees who do not benefit from the protection of the Third Geneva Convention may be protected by the Fourth Geneva Convention, if they fall within the category of persons described by Article 4 of that treaty. According to an author, the fact that a person has directly participated in hostilities is not a criterion for excluding the application of the Fourth Geneva Convention: he rightly observed that Article 5 uses the term “protected persons” with regard to persons detained as spies or

¹⁰¹ ICRC, Summary Report 2005, *supra* note 7, at 82.

¹⁰² The principle of proportionality in attack is a rule of customary international humanitarian law: though it does not explicitly appear in treaty law, its content is enshrined in Articles 51 (5) (b) and 57 (2) of Additional Protocol I. Cf. see J. Henckaerts and L. Doswald-Beck (eds.), *supra* note 8, vol. I, at 46; see Dinstein, ‘Collateral Damage and the Principle of Proportionality’, in D. Wippman and M. Evangelista (eds.), *supra* note 53, 211.

¹⁰³ ICRC, Summary Report 2005, *supra* note 7, at 70.

¹⁰⁴ Article 29(1) of the Hague Regulations; Article 46 (1) of Additional Protocol I.

¹⁰⁵ Para. 4.3.7. See, Ipsen, *supra* note 2, at 107.

¹⁰⁶ Instruction 1100.22, ‘Guidance for Determining Workforce Mix’, 7 September 2006, para. E3.2.5.5.1. The position has been explained during the meeting organized by the University Centre for International Humanitarian Law in Geneva: “while civilians lose the “protection afforded by this Section...for such time as they take a direct part in hostilities” under Article 51(3) of AP I, this provision is referring only to Section I of Part IV: General Protection Against Effects of Hostilities. The issue of POW status, this position observes, is dealt with in a Section II of Part III: Combatant and Prisoner-of-War Status. Where persons falling within Article 4A(4) do take a direct part in hostilities, this will not, therefore, deprive them of POW status if captured.” *Expert Meeting*, *supra* note 7, at 14.

saboteurs as well as persons definitely suspected of or engaged in activities hostile to the security of the State or of the Occupying Power.¹⁰⁷

Finally, it is worth recalling that, in relation to an international armed conflict, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment shall be treated humanely in all circumstances and are nevertheless entitled to certain fundamental guarantees under Article 75 of Additional Protocol I.¹⁰⁸

In this context, one should stress the interaction between these guarantees and the fundamental human rights protected at both universal and regional level, in particular with regard to the deprivation of liberty, the conditions of detentions and the procedural safeguards.¹⁰⁹

C. *Criminal Liability*

Once civilians taking a direct part in hostilities are captured, they may be prosecuted for the mere fact of fighting, in conformity with the applicable domestic criminal law.¹¹⁰ In any case, they may not be punished without previous trial. The law of international armed conflicts prescribes this also in the specific case of espionage.¹¹¹ Moreover, under Article 5 of the Fourth Geneva Convention, civilian contractors directly participating in hostilities are not “deprived of the rights of fair and regular trial”.

Finally, civilian contractors who commit serious violations of international humanitarian law, may be prosecuted for war crimes.¹¹² Since judicial proceedings against PMSC employees have been very rare, several commentators have already emphasized the difficulties and the limitations in the exercise of criminal jurisdiction.¹¹³

5. Concluding Remarks

Military outsourcing indeed constitutes a challenge to the law of international armed conflicts, which is based on the paradigm of the State monopoly on the use of force. Nevertheless, the present analysis shows that PMSCs do not operate in a legal vacuum. Once certain criteria are satisfied, their personnel may be considered either combatants or civilians, or even civilians accompanying the armed forces.

The notion of ‘direct participation in hostilities’ is essential to whether contractors’ personnel can be targeted. But it also offers a valuable tool for the debate on the equally fundamental question concerning the legitimacy of outsourcing activities which are inherently governmental, for the reason that it actually contributes to the setting of specific limits on the State practice of hiring military companies. Since only legitimate combatants can directly participate in hostilities in the course of an international armed conflict, the notion defines a criterion to determine what functions private companies may perform and what degree of control the State should exercise. In fact, under Article 43 of Additional Protocol I, employees of military companies could fall within the category of legitimate

¹⁰⁷ See Dörmann, ‘The Legal Situation of “Unlawful/Unprivileged Combatants”’, 85 *IRRC* (2003) 45, at 50.

¹⁰⁸ Cf. also Article 45 (3) of Additional Protocol I. On the fundamental guarantees under customary international humanitarian law, see J. Henckaerts and L. Doswald-Beck (eds.), *supra* note 8, vol. I, at 299.

¹⁰⁹ This article does not deal with the issue of the applicability of human rights law during an armed conflict, from the point of view of both the territorial scope of the treaties and the relationship with humanitarian law.

¹¹⁰ See *inter al.* C. Rousseau, *Le droit des conflits armés* (1983) at 68.

¹¹¹ Cf. Article 30 of the 1907 Hague Regulations.

¹¹² Provided there is a connection between the offence and the armed conflict, war crimes may be perpetrated by civilians against either members of the enemy armed forces or other civilians. See A. Cassese, *International Criminal Law* (2003), at 48.

¹¹³ However, as for the recent development in US practice, see *supra* at 7.

combatants, if the State establishes a certain qualified factual link between them and its regular armed forces.

A precise indication of what constitutes ‘direct participation in hostilities’ is hard to find in treaty law. However, the above examination of recent practice leads to the conclusion that the notion should be narrowly defined in order to prevent arbitrariness and avoid the killing of innocent civilians. According to the rationale behind the principle of distinction, instead of undermining the protection of the civilian population, the States that intend to use private contractors for tasks previously performed by the regular armed forces entailing direct participation in hostilities, should meet the criteria for their qualification as legitimate combatants.

Thus, civilian employees who do not take part in hostilities enjoy immunity from targeting. However, individuals working for a private company in the surroundings of a military objective could be at risk of injury incidental to the attack of that target, as so-called “collateral damage” under the principle of proportionality as set out in Article 51 (5) (b) of Additional Protocol I.

The outsourcing of military functions to the private sector constitutes a highly sensitive issue not only for the present US political debate but also for the future potential role of these companies in peacekeeping and peace enforcement operations. It is noteworthy that PMSCs wish to play an increasing role in this field. An overview of recent practice shows that private firms have already been used in the context of UN peacekeeping not only for logistical support but also for tasks like site protection, transportation of troops and police training functions.¹¹⁴ Yet the main question remains whether private contractors could be actively engaged during UN peacekeeping operations or UN-authorized operations: though at the moment it is unlikely that the Security Council, being unable to find States willing to contribute with its own troops, could turn to private companies for such missions,¹¹⁵ one could still conceive the case of a State deploying private contractors in that framework. But it seems problematic on the basis of Chapter VII of the UN Charter that the mandate of an operation authorized or instituted by a Security Council resolution could be carried out by a private firm.

¹¹⁴ UN Doc. A/59/227, ‘Outsourcing Practices: Report of the Secretary-General’, 11 August 2004; see Lilly, ‘The Privatization of Peacekeeping: Prospects and Realities’, *Disarmament Forum* (2000) 53. It is significant that the UN Working Group on the use of mercenaries (UN Doc. A/HRC/7/7, 9 January 2008, at 26) recommended that “United Nations departments, offices, organizations, programmes and funds establish an effective selection and vetting system and guidelines containing relevant criteria aimed at regulating and monitoring the activities of private security/military companies working under their respective authorities. They should also ensure that the guidelines comply with human rights standards and international humanitarian law”.

¹¹⁵ Cf. University Centre for International Humanitarian Law, *Expert Meeting*, *supra* note 7, at 63. In addition, see Witter, ‘Private Firms Eye Darfur’, *Washington Times*, 2 October 2006, 10.