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U.S.-Hired Private Military and Security Companies in Armed Conflict: Indirect Participation and its Consequences

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Abstract

As private military and security companies are increasingly hired to perform a wide variety of tasks in times of armed conflict, the importance of determining how international humanitarian law applies to their employees cannot be understated. Since the vast majority of these employees are civilians, one important legal question is whether they are directly participating in hostilities and are therefore legitimate targets. This Article looks at the contractor activities authorized by U.S. law and policy and analyzes them using the narrow interpretation of direct participation in hostilities developed by the International Committee of the Red Cross. This interpretation provides protection to most of the private military and security employees the U.S. hires, as many of their activities fall outside this narrow conception of direct participation. This Article argues that using this narrow approach would provide civilian contractors with a material increase in protection on the battlefield. It also endeavors to demonstrate that the way U.S. law and policy currently limits contractor activities insufficiently protects civilian contractors.

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Introduction

The practice of using private military and security company (PMSC) employees in the context of an armed conflict is not a new one.¹ However, the extent to which they are used today and the scope of activities they are hired to perform is unprecedented² and has led to what Michael Schmitt termed the dramatic “civilianization” of conflict.³ PMSC employees have become a “prominent feature”⁴ of contemporary armed conflicts, and, in recent years, have increasingly been used to perform what were traditionally military functions.⁵ Indeed, the current transformation in the role of PMSC employees in armed conflict⁶ was very clear in the war in Iraq, where they were hired to maintain complex weapons systems, to collect and analyze intelligence, and even to interrogate prisoners of war and other detainees.⁷

This Article interchangeably uses the terms “PMSC” and “contractors” to denote for-profit business organizations hired by parties to an armed conflict to provide certain types of military or security services. These can include a wide array of activities, such as the training of armed or police forces, the programming and servicing of weapons, intelligence gathering and analysis, static and mobile security services, or logistics assistance.⁸ Examples of such organizations include the infamous Blackwater Worldwide,⁹ DynCorp International, Aegis, as well as Triple Canopy or Control Risks. Given the increasing presence of these types of firms in recent armed conflicts, the question of how international humanitarian law (IHL) applies to them is an important and unsettled issue. Indeed, there are very few specific references to contractors in IHL treaties, and there seems to be no discrete and specific regulation of either their status or their activities as such.¹⁰ However, many of their activities will fall within the scope of IHL and, depending on the circumstances, different areas of established IHL will apply to these actors,¹¹ to both regulate and protect them.

¹ Lindsey Cameron & Vincent Chetail, *Privatizing War – Private Military and Security Companies Under Public International Law* 1 (2013).

² Michael Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 *CHI. J. INT’L L.* 511, 512 (2004–2005).

³ *Id.* at 511.

⁴ U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, ¶ 9, U.N. Doc. S/2007/643 (October 28, 2007).

⁵ Int’l Comm. of the Red Cross [ICRC], *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 5 (Nils Merlzer ed., 2009) [hereinafter ICRC Interpretive Guidance].

⁶ Giulio Bartolini, *Private Military and Security Contractors as Persons Who Accompany the Armed Forces*, in *WAR BY CONTRACT – HUMAN RIGHTS, HUMANITARIAN LAW AND PRIVATE CONTRACTORS* 218, 234 (Francesco Francioni & Natalino Ronzitti eds., 2011).

⁷ See Schmitt, *supra* note 2, at 512.

⁸ See Cameron, *supra* note 1, at 1–2.

⁹ Now Xe Services LLC.

¹⁰ Louise Doswald-Beck, *Private Military Companies Under International Humanitarian Law*, in *CHESTERMAN & LEHNARDT, FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES* 115, 115 (2009).

¹¹ *Id.*

A. Categorizing PMSC in international law

IHL lays out different legal categories of individuals that determine the rights and protections they are afforded. In international armed conflicts (IACs), members of armed forces are combatants, which means *inter alia* that they can be lawfully targeted when the requirements of proportionality and military necessity are met, and if captured, are entitled to prisoner of war status. According to Article 4(A)(1) of the Third Geneva Convention (GC III), this status can be achieved *de jure* when individuals are hired by a state as members of its armed forces.¹² Individuals can also be *de facto* combatants if they fulfill the conditions of Article 4(A)(2) GC III—if (1) they are commanded by a person responsible for his subordinates (2) they have a fixed distinctive sign recognizable at a distance (3) they carry their arms openly and (4) they conduct their operations in accordance with the law and customs of war.¹³ The third way to qualify as a combatant is under the broader and more flexible criteria of Article 43(1) of Additional Protocol I (AP I).¹⁴ Under Article 43(1), a combatant is a member of an organized armed force, group and unit under a command responsible to that party for the conduct of its subordinates, and subject to an internal disciplinary system that enforces compliance with IHL.

Individuals can also qualify as “mercenaries” in an IAC, defined in Article 47 of AP I and other conventions such as the Organization of African Unity’s Convention for the Elimination of Mercenarism in Africa¹⁵ or the 1989 United Nations (UN) International Convention Against the Recruitment, Use, Financing and Training of Mercenaries.¹⁶ Unlike combatants, mercenaries are not entitled to prisoner of war status.¹⁷

Governing treaties in non-international armed conflicts (NIACs) do not define a “combatant” category as such,¹⁸ but Common Article 3 of the Geneva Conventions, which is applicable to this type of armed conflict, does refer to

¹² Protection of War Victims – Prisoners of War art. 4(A)(1), Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter GC III]. The Third Geneva Convention of 1949 is one of the four treaties of the Geneva Conventions, and it lays out the law on the humanitarian protections for prisoners of war in IACs. It replaces the 1929 Prisoners of War Convention, and, as the other three Geneva Conventions, it has been universally ratified.

¹³ *Id.* at art. 4(A)(2).

¹⁴ Protocol Additional to the Geneva Conventions of 12 Aug., 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43(1), June 8, 1977, 1125 U.N.T.S. 3. [hereinafter AP I]. The Protocol I and II treaties signed in 1977 are additional to the Geneva Conventions of 1949. They strengthen the protection of victims in international and non-international armed conflicts.

¹⁵ Org. of African Unity [OAU], Convention of the OAU for the Elimination of Mercenarism in Africa art. 1, July 3, 1977, O.A.U. Doc. CM/433/Rev. L. Annex 1.

¹⁶ G.A. Res. 44/34, ¶1 (Dec. 4, 1989). This convention prohibits the employment of mercenaries and makes any direct participation in hostilities or concerted act of violence by a mercenary an offense for the purpose of the convention.

¹⁷ AP I, *supra* note 14, at art. 47(1).

¹⁸ ICRC, Customary Study on International Humanitarian Law, Rule 3 (J-M Henckaerts, L. Doswald-Beck eds., 2005).

the category of “members of the armed forces.”¹⁹ For example, an individual part of a state’s armed forces will have belligerent rights. An organized armed group not incorporated in a state’s armed force would, however, be liable for prosecution for any belligerent act committed.

There has been much discussion about the status of PMSC employees under IHL.²⁰ This question of status is extremely fact-dependent, and consequently, these individuals may fall in a number of categories. In IACs, PMSC employees may in some circumstances be combatants. Although it is highly unlikely that they would achieve *de jure* combatant status under Article 4(A)(1) of GC III, they may fulfill the four conditions set out in Article 4A(2) GC III to be *de facto* combatants.²¹ However, most commentators have concluded that only in very peculiar circumstances will PMSC employees achieve combatant status under that article.²² A more viable way for PMSCs to qualify as combatants would be under Article AP I’s more flexible criteria, although debate exists as to the required connection between the PMSC and the state in these cases.²³ Regardless of the definition applied, however, the United States does not consider its PMSC employees to be combatants.²⁴ PMSC employees may alternatively qualify as mercenaries. However, the “mercenary” category has been defined quite narrowly, and existing definitions contain certain problematic requirements.²⁵ As a result, a very limited number of PMSC employees will fall within the definitions of mercenary or combatant laid down in the above-mentioned treaty law.²⁶ It seems, therefore, that only on rare occasions will private contractors be considered to be mercenaries or to have achieved combatant status.

In NIACs, PMSC employees might, in some circumstances, fall into the Common Article 3 category of “members of the armed forces.” As demonstrated in practice, rebel forces are unlikely to hire contractors, and

¹⁹ GC III, *supra* note 12, at art. 3. This article is common to the four Geneva Conventions of 1949.

²⁰ See Mirko Sossai, Status of Private Military Companies’ Personnel in the Laws of War: the Question of Direct Participation in Hostilities, 1 EUI Working Paper, AEL 2009/6; Bartolini, *supra* note 6; Luisa Vierruci, Private Military and Security Companies in Non-International Armed Conflicts, 13 EUI Working Papers, AEL 2009/14.

²¹ See Schmitt, *supra* note 2, at 526.

²² See Sossai, *supra* note 20, at 4.

²³ *Id.* at 94. Proponents of the formal approach argue that to be combatants under Article 43 AP I, PMSC employees would have to be formally incorporated by the state in the armed forces, in compliance with relevant domestic legislation. Others take a more functional approach, according to which PMSCs employees who are entitled to directly participate in hostilities on the state’s behalf should be included within the armed forces.

²⁴ U.S. DEP’T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD, ch. 1 (Jan. 2003), <http://www.globalsecurity.org/military/library/policy/army/fm/3-100-21/index.html>.

²⁵ See Doswald-Beck, *supra* note 10 at 122. This author identifies the requirement of being “recruited to fight” and that of being “neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict” as being problematic for PMSCs.

²⁶ Marina Mancini et al., *Old Concepts and New Challenges: Are Private Contractors the Mercenaries of the Twenty-First Century?* in WAR BY CONTRACT – HUMAN RIGHTS, HUMANITARIAN LAW AND PRIVATE CONTRACTORS, 321, 338–39 (Francesco Francioni & Natalino Ronzitti eds., 2011).

PMSCs are mostly hired by states.²⁷ Private contractors could potentially be incorporated into a state's armed forces if provided for in that state's domestic law. They could also, in certain circumstances, constitute an armed group hired by a state to perform combat functions. However, if not actually incorporated in the state armed forces, the organized armed group would not possess any belligerent rights. In theory, therefore, the PMSC employee could be prosecuted for any belligerent act committed, which may, given its relationship to the state, potentially lead to state responsibility.²⁸ In practice, however, this risk is minimal, as the enemy party would be a non-state armed group that would likely not have a system of laws in place necessary to prosecute these acts. In those less common cases where a non-state armed group would hire private contractors, they could either be incorporated in that group²⁹ or become a separate organized armed group. Theoretically, a PMSC could even become an independent non-state party to the conflict.³⁰ However, for a PMSC to qualify as an organized armed group, it would have to fulfill the demanding criteria set out in Article 1(1) of Additional Protocol II (AP II) if the NIAC is taking place in a country that has ratified that protocol.³¹

It is clear that, whether in an IAC or a NIAC, a great majority of PMSC employees will be civilians. Under IHL, civilians are defined negatively under Article 50 of AP I as persons who are not combatants. PMSC employees will often constitute a particular type of civilian. Traditionally, many PMSC activities would have been covered by the category of persons "accompanying the armed forces," as provided for in Article 4(A)(4) of GC III.³² This category includes persons such as civilian members of military aircraft crews, war correspondents, and supply contractors, who, if captured, will be entitled to prisoner of war status. The United States has long used civilian contractors, and its continued policy today is that certain civilian personnel supporting the U.S. armed forces may be identified as "persons accompanying the armed forces."³³ However, the fact that PMSC employees now perform many

²⁷ See Schmitt, *supra* note 2, at 522.

²⁸ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, at 65 (June 27, 1986). This ICJ judgment established "effective control" by a state of the operations of an armed group as a condition for state responsibility.

²⁹ Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL 641, 663 (2010).

³⁰ See ICRC Interpretive Guidance, *supra* note 5, at 39–40.

³¹ Protocol Additional to the Geneva Conventions of 12 Aug., 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609. [hereinafter AP II]. If AP II is not applicable, one may look at the criteria laid out in *Prosecutor v. Boskoski*, Case No. IT-04-82-T, Trial Judgment, ¶ 199–203 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 10, 2008). In this case, the court looked at the presence of a command structure, the capacity of the group to carry out operations in an organized manner, the level of logistics, the level of discipline and the ability to implement the basic provisions of common Article 3 and the representative character of the group as well as its ability to speak with one voice. This is not, however, customary international law. See Luisa Vierruci, *Private Military and Security Companies in Non-International Armed Conflicts: Jus ad Bellum and Jus in Bello Issues*, 19 (European Univ. Inst., Working Paper No. 14, 2009).

³² GC III, *supra* note 12, at art. 4(A)(4).

³³ U.S. Dep't of Def., Instruction 3020.41, Operational Contract Support ¶ 6.1.1 (2011) [hereinafter DODI 3020.41].

different activities that are also performed by state armed forces may create problems for distinction, a principle crucial to the protection of civilians. The goal of this Article is to look at how activities authorized by U.S. law and policy to be performed by PMSC employees fit within a narrow interpretation of direct participation in hostilities (DPH).

Distinction is a principle of customary international law,³⁴ also found in Articles 48 and 51(3) of AP I and Article 13(3) of AP II. It is based on the existence of mutual responsibilities between military forces who must refrain from directly targeting the civilian population, and civilians who must refrain from engaging in hostilities.³⁵ Distinction is “at the heart of the question of who can be targeted.”³⁶ Indeed, in an IAC, when a civilian engages in an act that constitutes DPH, he loses the protection afforded to him under IHL and becomes a legitimate target.³⁷ In a NIAC, members of non-state armed groups have neither the combatant’s privilege nor the combatant’s immunity. A civilian will never be a legitimate target, and in targeting individuals such as PMSC employees, whether fighting or not, members of non-state armed groups open themselves up to prosecution by the enemy state.

However, the question of DPH remains important. Indeed, if the target is a civilian who has been directly participating, those members of the non-state armed group that conduct the attack, although not committing an international war crime, will be subject to the relevant domestic law and risk domestic prosecution.³⁸ On the other hand, the targeting of an innocent civilian, as, for example, a PMSC employee who is indirectly participating, is an international war crime.³⁹ The notion of DPH is therefore essential to the analysis of PMSC employee activities, to the protection they are afforded under IHL, and to the consequences their targeting may have for those that target them.

Indeed, the fewer activities they perform that constitute DPH, the more private contractors will benefit from the protections IHL provides to civilians and the graver the consequences will be for any who target them. The international community has recognized and emphasized this in both the Montreux Document and the UN Draft Convention on Private Military and Security Companies. Part Two of the Montreux Document on good practices relating to PMSCs stresses the need for states to “take into account factors

³⁴ Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice*, in *NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY* 181, 187 (Kenneth Watkin & Andrew Norris eds., 2012).

³⁵ W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 *N.Y.U. J. INT’L L. & POL.* 769, 772–73 (2010).

³⁶ See Watkin, *supra* note 29, at 646.

³⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(3), June 8, 1977, 1125 *U.N.T.S.* 3. [hereinafter AP I].

³⁸ See ICRC Interpretive Guidance, *supra* note 5, at 84.

³⁹ See Rome Statute of the International Criminal Court art. 8(2)(e)(i), July 17, 1998, U.N. Doc. A/CONF.183/9; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *INT’L COMM. OF THE RED CROSS [ICRC], CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, 3 (2005).

such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities” when determining which services ought not be contracted out.⁴⁰ Article 8 of the UN Draft Convention goes even further; it contains an outright ban on DPH by private contractors.⁴¹ U.S. law and policy would appear to be going in the same direction, as the various relevant instruments seem to be aimed at restricting contractors’ DPH. However, there is no international consensus on the meaning of “direct participation in hostilities,” and treaty law provides no guidance.⁴²

The United States’ choice to categorize PMSC employees as civilians should go hand in hand with rules restraining these employees from performing activities that may cause them to lose the protections their civilian status entitles them to. As this Article will demonstrate, this is not systematically the case when the concept of DPH is understood in a restrictive manner. This Article also looks at whether this narrow interpretation effectively increases the protection of PMSC employees under IHL and domestic laws of enemy forces.

This Article will look at (I) current U.S. law and policy on the employment of PMSC personnel in the context of armed conflict through the lens of a narrow interpretation of the concept of DPH and (II) whether the protection this provides extends beyond the protection against direct attack.

I. A Narrow Interpretation of Direct Participation in Hostilities as Applied to the United States’ Use of PMSCs

A. *An Overview of Current U.S. Law and Policy*

In its recent conflicts in Iraq and Afghanistan, the United States has hired a great number of private contractors to perform a wide variety of tasks. For instance, in January 2016, there were 2,028 PMSC employees performing tasks for the U.S. Department of Defense (DOD) in Iraq and 30,455 in Afghanistan.⁴³ These numbers show the extent to which the use of PMSCs pervades contemporary armed conflicts.⁴⁴ Not only are PMSCs widely used, they are contracted to perform a wide array of functions in armed conflict, which creates significant risks for these employees under IHL. This section looks at the two policy documents, DOD Instruction (DODI) n° 3020.41 on

⁴⁰ ICRC & SWISS FED. DEP’T OF FOREIGN AFFAIRS [FDFA], THE MONTREUX DOCUMENT 16 (2009) [hereinafter *Montreux Document*], https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

⁴¹ Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council, annexed to Human Rights Council, Rep. of the UN Working Group on the Use of Mercenaries as a Means of Violating and Impeding the Exercise of Rights of Peoples to Self-Determination, U.N. Doc. A/HRC/WG.10/1/2 (July 2, 2010).

⁴² See Pomper, *supra* note 34, at 188.

⁴³ U.S. Deputy Assistant Sec’y of Def., Program Support, Contractor Support of U.S. Operations in the USCENTOM Area of Responsibility (2016).

⁴⁴ See Sossai, *supra* note 20, at 1.

contractor personnel authorized to accompany the U.S. Armed Forces⁴⁵ and DODI n° 1100.22 on Policy and Procedures for Determining Workforce Mix,⁴⁶ that together provide a picture of the type of activities PMSCs can perform. It also looks at the National Defense Authorization Act (NDAA) of 2009—the U.S. law that more generally delimitates wartime activities of contractors.⁴⁷ Finally, it compares the U.S. position to relevant international instruments.

In 2005, DOD adopted Instruction n° 3020.41 on contractor personnel authorized to accompany the U.S. Armed Forces.⁴⁸ As well as exemplifying the U.S. position according to which PMSC personnel are considered “civilians accompanying the armed forces,” it outlines the ways in which PMSCs can provide support to contingency or other military operations conducted by the U.S. Armed Forces, and the limits of that support.

Indeed, DODI 3020.41 lists the types of support activities that contractors may be hired for, such as “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.”⁴⁹ Importantly, it makes clear that this support is limited to “indirect participation in military operations.”

However, it should be noted that despite this reference to indirect participation, these activities can be carried out “in a theatre of operations.”⁵⁰ In providing more detail about the provision of security services, DODI 3020.41 stresses the importance of using contracts for such services “cautiously in contingency operations where major combat operations are ongoing or imminent.”⁵¹ The U.S. military may therefore contract out security services, but only for functions that are other than “uniquely military.”⁵² If procuring functions other than uniquely military ones nonetheless involve the protection of military assets, DODI 3020.41 requires determinations to be made on a case-by-case basis, taking into account the nature of the operation, the type of conflict, any applicable status agreement related to the presence of U.S. forces, and the nature of the activity being protected.⁵³ Furthermore, in the case of ongoing or imminent major combat operations, the use of PMSCs to guard military supply routes, facilities, personnel or property, is much more restricted, and requires the authorization of the geographic Combatant

⁴⁵ U.S. Dep’t of Def., Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces (2005). This Instruction was revised in 2011. *See* DODI 3020.41, *supra* note 33.

⁴⁶ U.S. Dep’t of Def., Instruction 1100.22, Policy and Procedures for Determining Workforce Mix (2010) [hereinafter DODI 1100.22].

⁴⁷ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No 110-417 (2008) [hereinafter 2009 NDAA].

⁴⁸ U.S. DEP’T OF DEFENSE, *supra* note 45. This Instruction was revised in 2011. *See* DODI 3020.41, *supra* note 33.

⁴⁹ DODI 3020.41, *supra* note 33, at ¶ 6.1.1.

⁵⁰ *Id.* at ¶ 2.2.

⁵¹ *Id.* at ¶ 4.4.2.

⁵² *Id.* at ¶ 6.3.5.

⁵³ *Id.*

Commander.⁵⁴ Finally, DODI 3020.41 states that contractor personnel may also be authorized to be armed for individual self-defense.⁵⁵

In 2010, the DOD re-issued Instruction n° 1100.22 on Policy and Procedures for Determining Workforce Mix, which establishes, *inter alia*, U.S. policy concerning the allocation of activities between the military, civilian DOD personnel, and private contractors during an armed conflict.⁵⁶ This instruction confirms the U.S. position that PMSC personnel are civilians and not to be used in combat operations. Indeed, it clearly states that combat operations are designated for military performance only, thereby excluding not only contractors but also DOD civilian employees.⁵⁷ These are defined as those operations that entail the use of “destructive combat capabilities,” including in offensive cyber operations, electronic attacks and missile and air defense.⁵⁸

Also reserved to the military is the operation of a weapons system, such as a UAV, a bomber, or an inter-continental ballistic missile, against an enemy or a hostile force, whether inside or outside of a theater of operations.⁵⁹ However, DODI 1100.22 specifies that technical advice on the operation of a weapons system, or any other kind of support that does not require the exercise of discretion, performed in direct support of combat operations, is not confined to performance by the military.⁶⁰

The instruction further mentions other types of activities that, in certain circumstances, may be performed by private contractors. PMSCs may be hired to perform defensive security operations but are excluded from participating in some activities expressly identified in the instruction. Excluded activities include operations in a hostile environment as part of a larger armed force in direct support of combat, operations in which there is a high likelihood that the situation could evolve into combat, assisting, reinforcing or rescuing private security contractors or military units who become engaged in hostilities, or actions that require the exercise of discretion, the outcome of which could significantly affect U.S. objectives with regard to life, liberty of property or private persons, a military mission, or international relations.⁶¹ DODI 1100.22 also provides that private contractors may have certain roles in intelligence and counterintelligence operations. They may participate in interrogations as linguists, interpreters, report writers, etc. when adequate security is available. Roles of direction and control are however excluded, such as any such operation that is performed in a hostile area.⁶² Furthermore, any intelligence operation requiring the exercise of substantial discretion or requiring military-unique skills cannot be contracted out.⁶³ Finally, private contractors can

⁵⁴ *Id.* at ¶ 6.3.5.2.

⁵⁵ *Id.* at ¶ 4.4.1.

⁵⁶ DODI 1100.22, *supra* note 46.

⁵⁷ *Id.* at 18.

⁵⁸ *Id.* at 19.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 19–20.

⁶² *Id.* at 23.

⁶³ *Id.* at 36.

provide training on the mechanics, supply, maintenance, functionality or operation of military equipment or weapons.⁶⁴

These two complementary DOD Instructions both disallow the use of contractors in combat operations or to operate certain weapons systems. They explain the ways in which contractors can perform security services or participate in intelligence operations, and list a certain number of support activities contractors can perform. As policy instruments, these instructions are susceptible to being cancelled or modified by any new DOD Instruction. However, any new instruction will have to comply with the law outlined in the NDAA.

Two sections in particular of the 2009 National Defense Authorization Act⁶⁵ address the issue of private contractors in armed conflict. Section 832(1) deals with the question of security operations. It provides that private contractors should not be hired to perform such operations in “uncontrolled or unpredictable high-threat environments” where the risks are uncertain and could reasonably be expected to require deadly force that is “more likely to be initiated by personnel performing such security operations than to occur in self-defense.” Such tasks “should ordinarily be performed by members of the Armed Forces.” This section is in accord with the above-mentioned policy documents, however it is interesting to note that it seems to be providing guidance for policy-makers rather than setting out a strict prohibition. Indeed, the use of the word “should” does not suggest the existence of an obligation, but rather a preferred course of action. The reference to ordinary performance by the armed forces further suggests that there are some circumstances in which civilian contractors may undertake that performance. By contrast, Section 1057(1) prohibits without qualification the use of private contractors for the interrogation of enemy prisoners of war and other detainees, although they can be used as linguists, interpreters, report writers, etc.⁶⁶

It is clear from these three documents that both U.S. law and policy consider PMSC personnel to be civilians, and, more specifically, civilians accompanying the armed forces. All three clearly restrict the role of PMSC personnel to prevent their involvement in operations involving the use of offensive force. This was also the case in more specific policy directives, such as that issued by the U.S. embassy in Baghdad in 2008, which prohibited contractors working for the U.S. Department of State and USAID from engaging in “offensive combat operations.”⁶⁷ Similarly, a 2009 order applicable to contractors working for the DOD in Iraq strictly prohibited them from taking a direct or active part in hostilities, such as engaging in combat

⁶⁴ *Id.* at 35.

⁶⁵ National Defense Authorization Act for Fiscal Year 2009, PL 110-417 (2009) [hereinafter NDAA 2009].

⁶⁶ *Id.* at ¶ 1057(3). This language is mirrored in DODI 1100.22, *supra* note 46.

⁶⁷ Luisa Vierruci, *Private Military and Security Companies in Non-International Armed Conflicts*, EUI Working Papers, AEL 2009/14, at 8 (citing U.S. Embassy Baghdad Iraq, Policy Directives for Armed Private Security Contractors in Iraq, Directive II para B.10 (May 2008)).

action with hostile forces, other than in self-defense.⁶⁸ Although likely not based specifically on any attempt to ensure that private contractors be entitled to civilian immunity under IHL, the idea of restricting their activities to indirect participation is present in these documents.

The United States is participated in the international process that led to the Montreux Document, and its support suggests that it agrees with the expressed concern of limiting contractors' DPH. However, the United States has stated that it is not prepared to support the creation of a legally binding document such as the proposed U.N. Convention on Private Military and Security Companies, which contains a prohibition on the direct participation of private contractors.⁶⁹ Its main concern with such a treaty is the elaboration of a "one-size-fits-all approach" that the United States believes would be impractical given the different concerns of states and of various different sectors of the PMSC industry, and that may also threaten certain military or humanitarian operations.⁷⁰

Any international instrument that had the effect of restricting permissible uses of PMSC personnel in armed conflict would diverge from the approach reflected in U.S. law and policy. U.S. law on these issues is rather permissive,⁷¹ and all other applicable rules come from policy documents.⁷² Taken together, this suggests the United States feels no obligation to enact a legal instrument prohibiting the direct participation of private contractors, but rather prefers to maintain a degree of flexibility in its operations. In fact, U.S. regulations seem to be aimed principally at permitting the widest possible range of employment of PMSC personnel in armed conflict,⁷³ although they have admittedly narrowed in recent years.⁷⁴ Indeed, in the collection of intelligence for U.S. operations in Iraq, for example, contractors have been hired to perform numerous tasks, including the use of drones, the analysis of

⁶⁸ *Id.* at 9 (citing Fragmentary Order 09-109, Overarching FRAGO for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management and Oversight of Armed Contractors/DOD Civilians and Private Security Companies, Annex C, para 3.A. (March 2009)).

⁶⁹ U.S. Mission to the U.N., Statement by the Delegation of the United States of America, Open-Ended Intergovernmental Working Group on Private Military and Security Companies, The option of elaborating a legally binding instrument, (August 13–17, 2012), <https://geneva.usmission.gov/2012/08/31/pmscs-igwg-%E2%80%93u-s-statement-on-the-option-of-a-legally-binding-instrument/>.

⁷⁰ *Id.*

⁷¹ See 2009 NDAA, *supra* note 47.

⁷² Note, however, that some of the provisions contained in the DOD instructions have been implemented in the Federal Acquisition Regulations §7.503. For example, §7.503(c)(8) states that contracts shall not be used for the direction and control of intelligence and counterintelligence operations. See GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 7.503 (April 2015).

⁷³ See Bartolini, *supra* note 6, at 234.

⁷⁴ See Moshe Schwartz, The Department of Defense's Use of Private Security Contractors in Afghanistan and Iraq: Background, Analysis, and Options for Congress, CRS REPORT FOR CONGRESS 5 (May 13, 2011).

satellite data, and even the interrogation of detainees.⁷⁵ Others have been used to analyze intelligence data, which they transmitted in the form of targeting coordinates to UAVs or other weapons platforms.⁷⁶

While the U.S. position may be sensible in terms of maintaining flexibility in the use of contractor personnel, it also puts contractors at risk of losing the protections IHL provides civilians. As a result, the most protective approach to the concept of DPH would be a narrow one. Indeed, a broader interpretation of this concept could lead to a significant number of private contractors being classified as civilians that are directly participating in hostilities, with the substantial risk that they could be targeted, particularly if working for the U.S. in a NIAC.⁷⁷ There is also the risk that these contractors could then be prosecuted for their unlawful involvement in hostilities,⁷⁸ although this would mostly be in cases, such as in an IAC, where the capturing party is a state that might treat them as unprivileged belligerents who can be prosecuted for their participation in hostilities.

B. *A Narrow Framework for Direct Participation in Hostilities*

While Article 43(2) of AP I gives combatants the right to directly participate in hostilities in an IAC, civilians do not enjoy such a privilege and indeed, Article 51(3) effectively suspends the protections against direct attack afforded to civilians by IHL “for such time as they take a direct part in hostilities.” Understanding the scope of the “direct participation in hostilities” concept is therefore crucial for civilian private contractors hired to perform activities in an armed conflict. If their activities are considered to be direct participation in the hostilities, the contractors will become legitimate targets in an IAC and, in both IACs and NIACs, targeting them will not constitute an international war crime. Unfortunately, despite these important implications, the concept of “direct participation in hostilities” has not been defined in treaty law and has given rise to much debate⁷⁹ and argument about its precise meaning, which continues to divide IHL experts.

The International Committee of the Red Cross (ICRC) has put forward a narrow approach to the concept of DPH. This provides greater protection for

⁷⁵ See Schmitt, *supra* note 2, at 512. Note that the interrogation of detainees by PMSC employees would no longer be authorized today in light of the prohibition contained in the 2009 NDAA.

⁷⁶ U.S. Cong., Congressional Budget Office, *Contractors’ Support of U.S. Operations in Iraq 22* (Aug. 2008), <http://www.cbo.gov/ftpdocs/96xx/doc9688/08-12-IraqContractors.pdf>.

⁷⁷ It is important to note, however, that a non-state actor’s targeting of PMSC employees, even under a wide interpretation of direct participation in hostilities, is not lawful under U.S. law, because, at least from the U.S. perspective, the non-state actor is not entitled to any belligerent rights.

⁷⁸ See Bartolini, *supra* note 6, at 234.

⁷⁹ See Sossai, *supra* note 20, at 8 (“There is no agreed definition of what constitutes “direct participation in hostilities”); Michael Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC. J. 5 (2010) (explaining that the proceedings to produce the ICRC Interpretive Guidance were highly contentious, with aspects of the draft being so controversial that several experts asked their names to be deleted as participants).

civilians in the context of armed conflict. It both reduces the number of civilian contractors that can be directly targeted, and, given the proportionality principle, will be more protective of contractors working near military targets. This is in contrast with the U.S. position, developed below, that allows a wider range of activities to fall within the scope of DPH, thereby weakening the IHL protections of civilian contractors.

1. The ICRC Interpretive Guidance

In 2009, the ICRC published the Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.⁸⁰ This document was the product of six years of discussion and research involving approximately forty international law experts and was aimed at clarifying the IHL governing a civilian's loss of protection for his involvement in hostilities.⁸¹ However, due to the presence in the draft of many controversial ideas, a number of these experts asked that their names be deleted as participants prior to its publication,⁸² which led the ICRC to publish the study without naming its participants and to include in its foreword the express statement that it reflects solely the ICRC's views.⁸³ Given this dissension and the fact that the ICRC Interpretive Guidance is not a treaty, it is clear that it does not constitute authoritative law and does not settle the issue.⁸⁴ Indeed, the United States has rejected it as an authoritative statement of the law.⁸⁵ Among other U.S. criticisms, the study was considered too rigid and complex to provide an adequate format for soldiers making split-second targeting decisions,⁸⁶ and an inaccurate depiction of state practice.⁸⁷ However, the Interpretive Guidance has certainly advanced the understanding of this complicated concept⁸⁸ and does provide a useful framework from which to analyze the type of activities that may constitute "direct participation in hostilities."

The ICRC Interpretive Guidance approaches the issue in a functional way and specifies that the study examines the concept of DPH only for the purposes of the conduct of hostilities,⁸⁹ and does not apply to issues regarding the status of civilians upon capture. It nonetheless makes clear that the concept of DPH should be interpreted in the same manner in both NIACs and IACs.⁹⁰ For our purposes, it is also important to note that the criteria the Interpretive Guidance lays out for DPH should apply identically to all civilians, including

⁸⁰ See ICRC Interpretive Guidance, *supra* note 5.

⁸¹ See Schmitt, *supra* note 79. Relevant to this Article was the controversy around the limited notion of "harm" in the first DPH requirement, which excludes from the concept of DPH acts by civilians designed to improve a party's military operations or capacity as opposed to weakening the enemy. *Id.* at 27.

⁸² *Id.* at 6.

⁸³ See ICRC Interpretive Guidance, *supra* note 5, at 6.

⁸⁴ See Bartolini, *supra* note 6, at 234.

⁸⁵ See Pomper, *supra* note 34, at 186.

⁸⁶ See Watkin, *supra* note 29, at 662.

⁸⁷ See Pomper, *supra* note 34, at 186.

⁸⁸ See Schmitt, *supra* note 79, at 1.

⁸⁹ See ICRC Interpretive Guidance, *supra* note 5, at 11.

⁹⁰ *Id.* at 44.

private contractors.⁹¹ However, the Interpretive Guidance notes that “particular care” and “due consideration” should be given to the geographical and organizational closeness of these contractors with the armed forces and the hostilities,⁹² meaning that their proximity to the armed forces or other military objectives must be taken into account in the DPH analysis.

The Interpretive Guidance identifies three constitutive elements of DPH: the threshold of harm, direct causation, and a nexus to hostilities. All three must be fulfilled before a civilian can be considered to be directly participating in hostilities.

To meet the threshold of harm requirement, “a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack.”⁹³ This first requirement sets out an objective test that looks at the reasonably expected harm from the individual’s acts. It covers all hostile acts, both offensive and defensive.⁹⁴ It is important to note that the Interpretive Guidance expressly refers to an “adverse effect” and gives examples such as sabotage or restricting the logistics of the enemy. None of the examples refer to activities that enhance or support the military acts or operations of a party to the conflict. Nonetheless, in the background discussions, it was suggested that the threshold of harm would be met by all activities aimed at ultimately winning the war.⁹⁵ Interestingly, the ICRC sets out different thresholds of harm depending on the target that is affected. If a military operation or the military capacity of a party to the conflict is affected, the required threshold is the likelihood of an adverse effect. Potentially any kind of harm would suffice to reach this low threshold.⁹⁶ If persons or objects that are protected against direct attack, such as civilians and civilian objects, are affected, the first element of “direct participation in hostilities” will be fulfilled only if there is a likelihood of death, injury or destruction.⁹⁷ This latter threshold, which could arguably have been dealt with in the third requirement of a belligerent nexus,⁹⁸ sets a much higher bar for direct participation in hostilities.

⁹¹ *Id.* at 37.

⁹² *Id.*

⁹³ *Id.* at 47.

⁹⁴ See Sossai, *supra* note 20, at 12.

⁹⁵ Third Expert Meeting on the Notion of Direct Participation in Hostilities Summary Report, International Committee of the Red Cross 19 (2005).

⁹⁶ The Interpretive Guidance specifies that if the harm is of a military nature, the threshold requirement will generally be satisfied regardless of quantitative gravity. See ICRC Interpretive Guidance, *supra* note 5, at 47.

⁹⁷ See *id.* at 49.

⁹⁸ Were the threshold the same (i.e. the likelihood of an adverse effect) whether the target affected was a military operation or the military capacity of a party to the conflict, or persons and objects that are protected against direct attack, many acts would fall within that first element (e.g. the interruption of electricity supplies). However, given that the three elements the Interpretive Guidance lays out are meant to be cumulative, the acts that the ICRC intended to exclude by raising the threshold of harm for acts affecting persons or objects protected against direct attacks would most likely fall outside direct participation due to the lack of a belligerent nexus.

The second element is that of direct causation. The Interpretive Guidance states that “there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.”⁹⁹ There can therefore be direct causation when the conduct in question only causes harm in conjunction with other acts. An otherwise innocent activity may become direct participation in hostilities if it constitutes an integral part of a concrete and coordinated tactical operation that directly causes the requisite harm.¹⁰⁰ Direct causation is the key principle for the direct participation analysis and is at the core of the debate on contractor participation.¹⁰¹ The ICRC Interpretive Guidance requires that the harm (that reaches the required threshold) be brought about in one causal step. There is no accepted standard of causation in international law¹⁰² and the ICRC has chosen a very strict one for determining whether an activity qualifies as direct participation in hostilities. This narrow theoretical position is justified by the need to protect a greater number of civilians.¹⁰³ Furthermore, since the direct causal link significantly narrows the activities that might constitute direct participation by civilians,¹⁰⁴ it arguably better reflects the principle of distinction. However, this approach has been widely criticized. The United States in particular has interpreted the notion of direct participation in hostilities much more broadly, the argument being that this will encourage civilians to remain “as distant from the conflict as possible,”¹⁰⁵ thereby increasing their protection. Nonetheless, commentary to AP I and AP II appear to “support the premise of a high threshold.”¹⁰⁶

The final element to the DPH analysis is the belligerent nexus requirement. “[T]he act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.”¹⁰⁷ This is an objective criterion;¹⁰⁸ the mention of a specific design does not entail that it requires subjective intent.¹⁰⁹ The determination is based on the conduct of the civilian, in conjunction with the prevailing circumstances, and whether the civilian’s conduct can reasonably be perceived as an act designed to support one party to a conflict to the detriment of another.¹¹⁰ Presumably, a contractor hired to support U.S. forces would meet this element.

⁹⁹ See ICRC Interpretive Guidance, *supra* note 5, at 46.

¹⁰⁰ See *id.* at 54–55.

¹⁰¹ *Id.*

¹⁰² See Sossai, *supra* note 20, at 11.

¹⁰³ See Third Expert Meeting on the Notion of Direct Participation in Hostilities Summary Report, International Committee of the Red Cross 19, 60 (2005).

¹⁰⁴ See Watkin, *supra* note 29, at 658.

¹⁰⁵ Michael Schmitt, “Direct Participation in Hostilities” and 21st Century Armed Conflict, in *CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION* 509 (Horst Fischer et al. eds. 2004).

¹⁰⁶ See Schmitt, *supra* note 2, at 533.

¹⁰⁷ See ICRC Interpretive Guidance, *supra* note 5, at 46.

¹⁰⁸ *Id.* at 59.

¹⁰⁹ Although the ICRC Interpretive Guidance states that the act must be “specifically designed” to directly cause the harm, this refers to the objective purpose of the act or operation, expressed in its design. The belligerent nexus requirement does not depend on the subjective intent, or the mindset, of the person accomplishing the act or operation. See *Id.*

¹¹⁰ *Id.* at 63–64.

Given the cumulative approach, and the way these constitutive elements are defined, this is indeed a narrow and restrictive interpretation of the concept.

2. The temporal aspect of the loss of protection

Civilians lose their protection against direct attack “for such time as they take a direct part in hostilities.”¹¹¹ The ICRC Interpretive Guidance stipulates that this not only includes the immediate execution of the specific hostile act, but also preparatory measures that are carried out with a view to executing that act, as well as the deployment and return from executing the act. Whether or not a civilian contractor can be targeted in an IAC will therefore depend in the first instance on whether he is directly participating in hostilities at the time the attack is launched. In a NIAC, where fighters do not possess the belligerent privilege, whether the targeting of a civilian contractor by these fighters will constitute an international war crime depends on that same determination.

However, the ICRC Interpretive Guidance has introduced the “continuous combat function” (CCF) concept, whereby members of non-state organized armed groups lose their protection against direct attack when their continuous function in that group is to directly participate in hostilities.¹¹² If a civilian contractor qualified as having a CCF in an armed group, this would affect the temporal aspect of his loss of protection.¹¹³ Indeed, that contractor could be targeted at all times, and not only when his specific acts constitute direct participation in hostilities, and his targeting would not constitute a war crime. According to the ICRC, in a NIAC, the CCF concept applies to non-state organized armed groups, whose members consist of individuals whose continuous function is to take a direct part in hostilities.¹¹⁴ The ICRC Interpretive Guidance therefore limits status-based targeting in a NIAC to CCF members of a non-state armed group.¹¹⁵ It makes clear that in IACs, private contractors hired by states (but not formally incorporated into their armed forces) who directly participate in hostilities remain civilians and only lose their protection against direct attack for such time as their direct participation lasts, and it states that this same reasoning can be applied in NIACs.¹¹⁶

¹¹¹ See AP I, *supra* note 14, at art. 51(3).

¹¹² See ICRC Interpretive Guidance, *supra* note 5, at 27.

¹¹³ See Cameron, *supra* note 1, at 433.

¹¹⁴ See ICRC Interpretive Guidance, *supra* note 5, at 33.

¹¹⁵ The idea that the continuous combat function concept applies to members of organized armed groups in a non-international armed conflict can be found in ICRC, Direct Participation in Hostilities: Questions & Answers (June 2, 2009), <https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm>, and has been upheld by commentators. See, e.g., Dapo Akande, *Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities*, EJIL: TALK! (June 4, 2009), <http://www.ejiltalk.org/clearing-the-fog-of-war-the-icrcs-interpretive-guidance-on-direct-participation-in-hostilities/>; Emily Crawford, IDENTIFYING THE ENEMY: CIVILIAN PARTICIPATION IN ARMED CONFLICT 74–75 (2015).

¹¹⁶ See ICRC Interpretive Guidance, *supra* note 5, at 38–39. Although the study is not particularly clear when discussing “contractors and employees who, to all intents and purposes, have been incorporated into the armed forces of a party to the conflict,” it does seem to

Therefore, the CCF concept only applies in the rare cases where private contractors are hired by non-state armed groups.

In addition, if it were accepted that in a NIAC, state armed forces could also be defined by the CCF concept, it would lead to major problems of distinction in cases where, for example, an IAC becomes a NIAC. Indeed, a civilian contractor who would be targetable “for such time” as he is directly participating in hostilities in an IAC would become targetable at any time when the conflict becomes a NIAC if he participated in hostilities continuously.¹¹⁷ Although some critics argue this causes state armed forces and non-state armed groups to be defined differently, thereby providing unequal protections to their members, IHL does not legally require that belligerents be treated equally.¹¹⁸

This Article looks at the activities of PMSCs employed by the United States. As a result, it does not delve into a deeper analysis of the CCF concept. Rather, it focuses on whether U.S.-hired contractors perform activities that may lead them to directly participate in hostilities, thereby threatening the protections afforded by their civilian status.

3. The United States Position

The United States has taken a different path to determining which civilians are targetable. It seems to apply a “totality of circumstances” approach.¹¹⁹ It purports to look at all the relevant considerations, including the nature of the harm caused by the civilian’s conduct, the “causation or integration” between the civilian’s action and the harm, the nexus to hostilities, and the temporal and geographic proximity to military operations to determine whether a civilian is directly participating in hostilities.¹²⁰ As it takes a “totality of circumstances” approach, the United States does not consider these factors to be cumulative.¹²¹ Although there are similarities to the Interpretive Guidance requirements, the U.S. factors are more loosely defined, giving rise to a broader interpretation of the DPH concept. Furthermore, the U.S. government has made clear it does not consider the Interpretive Guidance to be an authoritative statement of the law.¹²² Even if not considered law, however, the Guidance remains relevant because it “catalyzed important discussion among the U.S. government . . . about the topics that are addressed” in the study.¹²³ This led to the position developed below.

distinguish between those contractors who are incorporated into a state armed force (“through a formal procedure under national law”) and those who are incorporated into an organized armed group (“*de facto* by being given a continuous combat function”).

¹¹⁷ *Id.* at 417.

¹¹⁸ See Cameron, *supra* note 1, at 418.

¹¹⁹ See Pomper, *supra* note 34, at 186.

¹²⁰ *Id.* at 190.

¹²¹ *Id.*

¹²² *Id.* at 186.

¹²³ *Id.* at 187.

The U.S. view proposes to take into account the nature of the harm by looking at whether the individual's activity is directed at "(i) adversely affecting one party's military capacity or operations or enhancing the capacity/operations of the other, or (ii) killing, injuring or damaging civilian objects or persons."¹²⁴ The first consideration is similar to the ICRC's threshold of harm requirement, although, in addition to the possible adverse effect of an activity, it explicitly mentions the possibility that the activity will be intended to enhance the capacity or operations of a party. In warfare, harm and benefit are relative concepts,¹²⁵ as actions that weaken one side will benefit the other. However, if a distinction between the two is drawn, this consideration that the United States takes into account may include a wider array of activities in the concept of DPH than the ICRC's approach.

The United States recognizes the need for "causation or integration" between the action taken by the civilian and the harm, and although it is not enough that the act merely occur during hostilities, there can be more than one causal step between the two in the U.S. view.¹²⁶ This allows more flexibility than the ICRC view, according to which there must be one causal step between the harm and the civilian act that caused it.

The U.S. view also takes into consideration the nexus to hostilities by looking at whether the individual's activity is "linked to an ongoing armed conflict and is intended either to disadvantage one party, or advance the interests of an opposing party, in that conflict."¹²⁷ This seems like a less stringent definition than the Interpretive Guidance's belligerent nexus requirement. The U.S. reference to a "link" and an "intent" shows a less restrictive standard than the Interpretive Guidance. The ICRC requires an act committed with a "specific intent" that is so closely related to the hostilities that it constitutes an integral part of the hostilities.¹²⁸

Therefore, although the U.S. view does take into consideration elements that are similar to the three ICRC requirements when assessing DPH, these individual elements in themselves are less restrictive and encompass a wider variety of activities. Furthermore, the fact that these elements are not required to be cumulative, a further restricting aspect of the ICRC test, will, in most circumstances, lead to more frequent findings of DPH. The United States therefore seems to have defined a position that would make private contractors more likely to be considered to be directly participating in hostilities. Of course, the United States' purpose is likely not to remove immunity from attack from a greater number of its own contractors. The goal is more likely to increase flexibility in making targeting decisions. Its position appears to be that the Interpretive Guidance of the ICRC does not provide enough deference to military decision-making,¹²⁹ that it is too rigid and complex and does not give

¹²⁴ *Id.* at 190.

¹²⁵ See Schmitt, *supra* note 79, at 27.

¹²⁶ See Pomper, *supra* note 34, at 190.

¹²⁷ *Id.*

¹²⁸ See ICRC Interpretive Guidance, *supra* note 5, at 58.

¹²⁹ See Pomper, *supra* note 34, at 185.

an accurate picture of practice that states could realistically aspire to.¹³⁰ The result, nonetheless, is that the narrow position of the ICRC ostensibly appears to be more protective of contractors than the U.S. approach.

C. U.S. Contractors: Valid Targets?

In some ways, the academic exercise of going through the DPH analysis could seem pointless. Indeed, determinations whether contractors are directly participating in hostilities are highly situational and necessarily contextual.¹³¹ Furthermore, in practice they are made based on the information that was reasonably available at the time of the determination.¹³² Nonetheless, in the context of contractors in particular, categorizing them as direct participants or not is central to their protection, and the need for clarity is significant. This Article therefore examines the main activities for which PMSCs are hired by the U.S. government through the more protective lens of the ICRC's narrow approach to the notion of "direct participation in hostilities."

It is generally accepted that direct participation in hostilities is distinct from the general population's support of a war,¹³³ such as providing political, economic or ideological support, building infrastructure, or even working in a munitions factory.¹³⁴ However, from the above-mentioned U.S. law and policy instruments, it is clear that U.S.-hired PMSCs' activities go beyond this more general support and include logistical support, security services, intelligence collecting and analysis, and training activities.

1. Logistic Services

As noted earlier, DODI 3020.41 authorizes contractors to perform logistic services for the U.S. military and specifies that these can be carried out in a theater of operations. This section will first look at the direct causation requirement of DPH and the element of geographic proximity before analyzing specific logistic services such as billeting, transporting munitions, maintenance and technical advice on weapons programs.

Given the nature of these activities, direct causation is the decisive criterion in preventing logistics contractors from meeting the ICRC's DPH test. Indeed, even if the logistical support did cause the required threshold of harm, it would not, in most circumstances, be one causal step away from that harm. Given that the threshold for harm in relation to the military is low, it might be argued that activities such as feeding soldiers reach that threshold. As noted above, the Interpretive Guidance discussion of the harm requirement includes no examples that refer to activities that enhance or support the military acts or operations of a party to the conflict, although the background discussions suggested that the threshold of harm would be met by all activities aimed at

¹³⁰ *Id.* at 186.

¹³¹ *See* Schmitt, *supra* note 2, at 533.

¹³² *See* Pomper, *supra* note 34, at 188.

¹³³ *Id.* at 189.

¹³⁴ *See* Sossai, *supra* note 20, at 10; Cameron, *supra* note 1, at 455.

ultimately winning the war.¹³⁵ In addition, the ICRC direct causation requirement includes conduct that only causes harm in conjunction with the act or acts that directly cause the requisite harm.¹³⁶

When determining whether a contractor directly caused the harm, geographical proximity to active hostilities may be relevant.¹³⁷ However, geographic proximity is neither necessary nor determinative for a finding of DPH.¹³⁸ One identifiable issue in looking at a contractor's integration in an operation and his geographical proximity to the hostilities is that people performing identical functions in different areas might be categorized differently.¹³⁹

From the Interpretive Guidance's language on causation, it can be deduced that logistical support such as billeting or messing, or the transportation of food or non-military supplies would not satisfy the direct causation element, even were they to be performed in the "theater of operations." Furthermore, there would be no belligerent nexus, as such activities, although sometimes providing vital support to a party to the conflict, could hardly be described as being specifically designed to be to the detriment of the enemy party.

There has been much discussion about the transport of munitions and whether or not the driving of an ammunition truck is a legitimate target. There seems to be a consensus that if that truck is driving to an active firing position, then the driver is almost certainly directly participating in hostilities.¹⁴⁰ However, according to the Interpretive Guidance, it seems that in all other circumstances, the driver would have to be considered an innocent civilian. The difficulty with this analysis is that it may not always be possible to ascertain the destination of a vehicle,¹⁴¹ and the determination will therefore depend on the information reasonably available at the time.¹⁴²

DODI 3020.41 also mentions the performance of maintenance functions for military equipment. However, while maintenance functions can consist of widely varying activities, no additional detail is provided. The ICRC approach seems to exclude any contractor performing maintenance functions outside of hostilities,¹⁴³ although some commentators argue, controversially, that if that contractor is key in facilitating a deadly attack, that person must be a valid target.¹⁴⁴ For the ICRC, the main consideration would seem to be

¹³⁵ ICRC, Third Expert Meeting on the Notion of Direct Participation in Hostilities Summary Report, 19 (Oct. 23–25, 2005).

¹³⁶ See ICRC Interpretive Guidance, *supra* note 5, at 54–55.

¹³⁷ See Sossai, *supra* note 20, at 9.

¹³⁸ See ICRC Interpretive Guidance, *supra* note 5, at 55.

¹³⁹ See Bartolini, *supra* note 6, at 226.

¹⁴⁰ See ICRC Interpretive Guidance, *supra* note 5, at 56; Watkin, *supra* note 29, at 684.

¹⁴¹ See Bartolini, *supra* note 6, at 226.

¹⁴² Note that when there is insufficient information, a person is presumed to be a civilian.

¹⁴³ Maintaining weapons and other equipment outside specific military operations is not DPH. See ICRC Interpretive Guidance, *supra* note 5, at 34–35.

¹⁴⁴ See Watkin, *supra* note 29, at 681.

whether the contractor maintaining military equipment is integrated in a *specific* military operation. Whether the maintenance would constitute DPH may therefore depend on the type of equipment. Indeed, were a contractor hired to, for example, maintain combat drones operating in the theater, this may be considered to directly cause the required threshold of harm. Furthermore, it would fulfill the belligerent nexus requirement, since operating these drones in the theater would probably be making an indispensable contribution to a military operation.¹⁴⁵ On the other hand, the routine maintenance of regular weapons or vehicles would probably not fulfill the causal link requirement, even near the front, if the equipment is not being prepared for a specific military operation or battle. It could also be argued that simple maintenance in and of itself would be insufficient to constitute DPH.¹⁴⁶

DODI 1100.22 further mentions that contractors may provide technical advice on the operation of weapons systems.¹⁴⁷ If this advice extends to the operation and programming of weapons to mount specific attacks, the ICRC might consider it to be direct participation in hostilities.¹⁴⁸ However, more general advice, such as advice aimed at improving the capabilities of the regular armed forces, might be too remote.¹⁴⁹

In applying the ICRC's narrow approach to the concept of DPH, most of the logistical support and maintenance that the United States authorizes PMSC personnel to provide appears to fall outside of DPH. Indeed, only in cases where the support provided by the contractor implies his integration in a specific military operation—such as driving an ammunition truck to the front line or maintaining technical or essential military equipment near or at the immediate battlefield—will this contractor become a valid target. Given the more flexible causation requirement proposed by the U.S. view of DPH, contractors performing weapon maintenance functions, even outside the area of hostilities, may be considered to be directly participating. U.S. experts have criticized the ICRC approach as overlooking the importance of logistics in the conduct of military operations.¹⁵⁰ Although this may be true, the large number of civilian contractors providing such services to the U.S. military and the desirability to afford them the protections of IHL would seem to call for, and support, a narrow approach to the concept of DPH.

2. Security Services

One of the major areas in which PMSCs are hired in armed conflict contexts is that of security services. U.S. law and policy authorizes civilians to be hired for such contracts only for defensive activities that do not constitute combat support.¹⁵¹ For example, private contractors are excluded from

¹⁴⁵ Sossai, *supra* note 20, at 11.

¹⁴⁶ See Cameron, *supra* note 1, at 447–48.

¹⁴⁷ DODI 1100.22, *supra* note 46, at 19 § c(2).

¹⁴⁸ See Cameron, *supra* note 1, at 448.

¹⁴⁹ See Sossai, *supra* note 20, at 15.

¹⁵⁰ See Watkin, *supra* note 29, at 684.

¹⁵¹ See DODI 1100.22, *supra* note 46, at 19–20, § d(1)(a)–(e).

performing security activities in direct support of combat, such as battlefield circulation control and area security.¹⁵² PMSCs may be hired to provide security for other than uniquely military functions,¹⁵³ and, on a case-by-case determination, this can include the protection of military assets.¹⁵⁴ They should be kept out of uncontrolled or unpredictable high-threat environments where they would likely initiate deadly force.¹⁵⁵

Two main considerations should be taken into account when looking at whether security services could be characterized as DPH.¹⁵⁶ The first one is whether the person or object to be protected is a military objective. The second consideration is whether the attacker belongs to a party to the conflict, and is therefore a combatant.¹⁵⁷ If the protected object or person is a military objective, a security contractor will probably be directly participating in hostilities if he responds to an attack by a combatant. He would therefore not be considered a civilian immune from attack. If the attacker is a common criminal, the security contractor remains a non-targetable civilian, even if the person or object he is protecting is a military objective. It is important to note that if the attacker is a member of a non-state armed group, he does not have the privilege to engage in hostilities and cannot lawfully attack the contractor either, even if the contractor is believed to be directly participating in hostilities.

If U.S. contractors are employed to provide convoy security for food supply trucks, it is relatively clear that they are not directly participating in hostilities—they are civilians and the object being protected is non-military.¹⁵⁸ For example, the four Blackwater contractors that were ambushed and killed in Fallujah in 2004 were not directly participating in hostilities because they were providing convoy security for a food caterer.¹⁵⁹ Although seemingly straightforward, this test will sometimes be difficult to apply in practice because even while the classification of some objectives as military, such as military means of transportation or buildings where combatants and their armaments are located, is relatively straightforward,¹⁶⁰ that of others, such as dual-use facilities, is more complex. The object must contribute effectively to military action, and its destruction, capture, or neutralization has to offer a definite military advantage.¹⁶¹ In addition, a state employing security contractors may have little incentive to make it clear whether an object is

¹⁵² *Id.*

¹⁵³ *See* DODI 3020.41, *supra* note 33, at 23, § f.

¹⁵⁴ *See id.* at 9, Enclosure 2, §1(a)(2). Each service to be performed by contractor personnel in applicable contingency operations shall be reviewed on a case-by-case basis to ensure compliance with DODI 1100.22 (i.e. if it is not inherently governmental).

¹⁵⁵ *See* 2009 NDAA, *supra* note 47, at § 832(1).

¹⁵⁶ *See* Sossai, *supra* note 20, at 12.

¹⁵⁷ *Id.*

¹⁵⁸ *See* Schmitt, *supra* note 2, at 544.

¹⁵⁹ Walter Pincus, *U.S. Pays Steep Price for Private Security in Iraq*, WASHINGTON POST, Oct. 1 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/30/AR2007093001352.html>.

¹⁶⁰ *See* Sossai, *supra* note 20, at 12.

¹⁶¹ *Id.* at 106.

military or not when attacks from insurgents are the primary threat, since contractors are always legally protected from such attacks.

Although U.S. policy excludes contracting out security services for purely military persons or objects, it leaves open the possibility of hiring PMSC personnel for the protection of assets or activities of a military nature. However, the reference to the factors to be taken into account, such as the nature of the operation and the type of conflict, should invite the consideration that contracting out certain security activities may entail the contractor's direct participation in hostilities. For example, if the operation is risky and may require combat, or if the protected object or activity is a military objective, the government might decide not to contract out a security service. This is assuming, of course, that the enemy is an IHL-abiding entity—otherwise there is little incentive to make these distinctions at all. The factors at issue are similar to those that should be considered when making a “direct participation in hostilities” determination and might consequently reduce the number of occasions in which security contractors would be directly participating. Furthermore, DOD instructions restrict security activities in major combat operations or high-threat environments. These are the activities that are more likely to be for the protection of military objectives, which are more likely to be attacked by a party to the conflict rather than common criminals.

Therefore, although U.S. policy does not prohibit all security contracts that might constitute DPH, it does create obstacles to using private contractors in certain circumstances, and it therefore limits the risk that private contractors will be used to directly participate in hostilities. If the ICRC DPH definition were applied, it would further restrict the number of U.S. security contractors likely to be determined to be directly participating. Applying the “totality of circumstances” non-cumulative U.S. approach is less protective. Because the nexus of hostilities is particularly relevant for determining whether security contractors are directly participating in hostilities, the less stringent U.S. definition, requiring only a “link” to an ongoing conflict and an “intent” to advantage one party, will bring more security activities under the DPH umbrella.

3. Intelligence Collecting and Analysis

U.S. law and policy authorizes the use of PMSC personnel for intelligence services in certain circumstances. According to DODI 1100.22, private contractors could provide support in intelligence and counterintelligence operations in cases where the knowledge and skills required are not military-unique, and that do not require the exercise of substantial discretion in applying government authority.¹⁶² Furthermore, it requires these operations take place outside hostile areas. The 2009 NDAA also contemplates the possibility of PMSC personnel performing intelligence activities in the context of an armed conflict, although it specifically excludes

¹⁶² See DODI 1100.22, *supra* note 46, at 23 ¶ g.

the “interrogation of enemy prisoners of war, civilian internees, retained persons, other detainees, terrorists, and criminals.”¹⁶³

The threshold question in the DPH analysis here is that of the causal link between the intelligence information that is being collected or analyzed and the harm affecting the enemy party. The ICRC Interpretive Guidance states that the collection of intelligence of other than a tactical nature will not constitute DPH.¹⁶⁴ For example, producing geopolitical estimates, even if crucial to the war effort, will not be DPH.¹⁶⁵ However, if the intelligence is gathered with “a view to the execution of a specific hostile act,” the contractor may be performing a preparatory measure, thereby becoming a valid target.¹⁶⁶ Collecting intelligence regarding the location and disposition of enemy units is tactical, as it is helpful for commanders in the field, and has to be acted upon in a timely manner. The analysis and transmission of intelligence by contractors, if it is tactical in nature and for the benefit of attacking forces, is DPH.¹⁶⁷ Indeed, most commentators agree that both the collection and the analysis and transmission of tactical intelligence should be considered DPH.¹⁶⁸ The United States has not outlined such a specific requirement regarding intelligence collecting. However, since it does not require only one causal step between the activity and the harm, DPH could potentially include more than strictly tactical intelligence activities. Furthermore, as opposed to the Interpretive Guidance, the U.S. “nature of the harm” requirement includes activities directed towards *enhancing* the operations of a party, which is particularly salient for intelligence activities.¹⁶⁹

Following the narrow approach of the ICRC Interpretive Guidance, the collection and analysis of other types of intelligence, such as operational or strategic intelligence, by private contractors will not deprive them of their protections under IHL. In fact, some U.S. experts also share this view.¹⁷⁰ The language used in DODI 1100.22 does not seem to exclude the possibility of private contractors being hired for the purpose of collecting, analyzing or transmitting intelligence of a tactical nature. However, it does require that such contractors operate outside hostile areas. One author has argued that the geographic area where intelligence is collected matters. Therefore, a civilian who is gathering intelligence in enemy-controlled territory would be directly participating in hostilities. One who is retrieving data from satellites or listening posts in his country, away from the hostilities, would not.¹⁷¹ If this reasoning is adopted—and depending, of course, on the interpretation given to the term “hostile areas” used in DODI 1100.22—it would seem that most U.S. PMSC personnel hired for intelligence purposes would not be directly

¹⁶³ See 2009 NDAA, *supra* note 47, at § 1057(1).

¹⁶⁴ See ICRC Interpretive Guidance, *supra* note 5, at 35.

¹⁶⁵ Schmitt, *supra* note 2, at 543.

¹⁶⁶ See ICRC Interpretive Guidance, *supra* note 5, at 66.

¹⁶⁷ *Id.* at 54.

¹⁶⁸ E.g. Schmitt, *supra* note 2, at 543; Watkin, *supra* note 29, at 659.

¹⁶⁹ See Pomper, *supra* note 34, at 190.

¹⁷⁰ See Watkin, *supra* note 29, at 659.

¹⁷¹ Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 27 (2004).

participating in hostilities.¹⁷² However, a strict application of the ICRC Interpretive Guidance would suggest looking at the nature and purpose of the intelligence, i.e. whether the activity is performed with a view to the execution of a specific hostile act. For example, some authors argue that the use of advanced technologies such as unmanned aerial vehicles for the analysis of information that is “immediately relevant to and used in military operations” would be DPH.¹⁷³ However, the ICRC Interpretive Guidance specifies that in situations where geographical proximity is not a factor, “the duration of direct participation in hostilities will be restricted to the immediate execution of the act and preparatory measures forming an integral part of that act.”¹⁷⁴ As a result, PMSC personnel hired by the U.S. for intelligence operations will only be directly participating in hostilities if they are closely integrated with military operations through the collection, analysis or transmission of tactical intelligence. Even if the contractor was situated in a base away from the battlefield, the Interpretive Guidance states geographical proximity is merely indicative, and that the causal relationship can remain direct despite a lack of geographical proximity.¹⁷⁵ In any case, if such a contractor were directly participating in hostilities, he would be placed at minimal risk because his loss of protection would only last for as long as he is actually collecting, analyzing or transmitting the information. In addition, enemy forces aspiring to abide by the ICRC’s Interpretive Guidance would require a significant amount of real-time intelligence in order to determine whether this contractor is currently engaging in activities immediately relevant to tactical operations.

4. Training Activities

According to DODI 1100.22, the U.S. can hire PMSCs to assist government instructors or to provide training on the mechanics, supply, maintenance, functionality, or operation of military equipment or weapons.¹⁷⁶ The ICRC Interpretive Guidance indicates that for most military training functions, the causal link will be indirect and would not meet the ICRC’s causal link criterion.¹⁷⁷ Once again, because the U.S. DPH view does not require only one causal step, a greater number of training activities would be qualified as DPH.

The defining factor will be whether the training is tactical in nature. If a PMSC is hired to provide training that is essential for the specific requirement of a particular combat operation, it may be considered to be DPH. One example is contractors who provide onsite training during combat missions.¹⁷⁸ It is likely, however, that although the training of military personnel could fall within this understanding of the notion of DPH, providing training for military

¹⁷² Schmitt, *supra* note 2, 512. According to Schmitt, civilians conducting intelligence collection were often working from outside the areas of operations.

¹⁷³ See Cameron, *supra* note 1, at 454.

¹⁷⁴ See ICRC Interpretive Guidance, *supra* note 5, at 68.

¹⁷⁵ *Id.* at 55.

¹⁷⁶ See DODI 1100.22, *supra* note 46, at 35.

¹⁷⁷ See ICRC Interpretive Guidance, *supra* note 5, at 53.

¹⁷⁸ Joshua P. Nauman, *Civilians on the Battlefield: By Using U.S. Civilians in the War on Terror, Is the Pot Calling the Kettle Black?* 91 NEB. L. REV. 459, 468 (2013).

equipment will be too remote. Michael Schmitt concludes that DPH depends on the “extent of nexus to, and impact on, specific combat operations.”¹⁷⁹ Training for basic officership and soldiering would therefore not be DPH. A further consideration that may put training activities outside of the scope of DPH is that part of the belligerent nexus element that requires an act to be specifically designed to be detrimental to the opposing party.¹⁸⁰ Under the ICRC approach, therefore, if U.S. contractors strictly engage in training and do not actually participate in combat operations, this will rarely constitute DPH.

After examining the main categories of activities for which PMSCs may be hired in the context of an international or non-international conflict, it is clear that a narrow approach of the concept of DPH, such as that suggested by the ICRC Interpretive Guidance, would result in characterizing most of the U.S. PMSC personnel as civilians who are not directly participating in hostilities. In contrast, the U.S. approach may lead to a greater number of their activities being characterized as DPH. The fact that the United States takes a “totality of the circumstances approach” makes these abstract descriptions more difficult. Nonetheless, it is a broader approach under which private contractors may more easily lose the immunity they have from being made the object of attack. This concern for more operational flexibility,¹⁸¹ although important, might therefore endanger a greater number of the United States hired contractors.

II. Non-Directly Participating PMSC Personnel and the Effectiveness of Their Protection Under IHL

A. *Proportionality and the Risks Inherent in PMSC Activities in Armed Conflict*

If not directly participating in hostilities, civilian contractors cannot be made the object of direct attack. This rule is set out in Article 51(2) of AP I and Article 13(2) of AP II and is a rule of customary international law.¹⁸² Attacks are limited to “strictly military objectives.”¹⁸³ However, even where a military objective is targeted, the fundamental IHL principle of proportionality comes into play in considering whether to launch such an attack. Under the principle of proportionality, attacks may only be directed against a military objective in which the loss of civilian life, injury to civilians and damage to civilian objects is not expected to be “excessive in relation to the concrete and direct military advantage anticipated.”¹⁸⁴ This is linked to the principle of precaution laid out in Article 57(2)(ii) of AP I that requires parties to an IAC to *inter alia* “take all feasible precautions in the choice of means and method of attack with a view to avoiding, and in any event to minimizing, incidental loss

¹⁷⁹ See Schmitt, *supra* note 2, at 544.

¹⁸⁰ See ICRC Interpretive Guidance, *supra* note 5, at 46.

¹⁸¹ See Pomper, *supra* note 34, at 191.

¹⁸² ICRC, Customary Study on International Humanitarian Law, Rule 1 (J-M Henckaerts, L. Doswald-Beck eds., 2005).

¹⁸³ See AP I, *supra* note 14, at art. 52.

¹⁸⁴ See *id.* at art. 51(5)(b).

of civilian life, injury to civilians and damage to civilian objects.”¹⁸⁵ Both of these principles are customary international law norms applicable to both IACs and NIACs.¹⁸⁶

As a result, although civilian contractors who are not directly participating cannot be directly targeted, and although their presence must be taken into account when conducting a proportionality analysis, the risk remains that they might become “collateral damage.” While this risk threatens all civilians in an armed conflict context, the nature of private contractors’ activities accentuates this danger. Their roles regularly bring them into close contact with legitimate military objectives. For example, subject to the U.S. laws and policies described earlier, the United States may hire PMSCs to transport ammunition, protect military assets, or maintain military equipment. Despite the fact that his or her life will have to be taken into account in the proportionality analysis, the balance will nonetheless often weigh against the contractor due to the military value of the persons or objects with which he or she works. In a number of circumstances, the evaluation of the status of a private contractor will therefore be of limited practical relevance in the actual conduct of hostilities.¹⁸⁷ Although the narrow ICRC approach to DPH outlined above may result in the classification of most PMSC activities as indirect participation, the risk that the hired contractor will nevertheless be lawfully injured by an enemy attack is non-negligible given his or her proximity to military objectives.¹⁸⁸

Furthermore, the legal protection afforded by the IHL principle of proportionality will only be actual and effective when facing enemy forces that aspire to respect the Geneva Conventions. In most recent conflicts in which the United States has been a party, insurgents targeted civilian contractors regardless of whether or not they believed them to be directly participating in hostilities. The increased protection for private contractors brought about by the use of the ICRC’s narrow definition of “direct participation in hostilities,” therefore, only goes so far. It does not provide a complete guarantee of safety, as there may be some collateral casualties among even private contractors who are not directly participating in hostilities. Nonetheless, civilian status provides protection from direct or indirect attack to PMSC personnel who are not working in proximity to a military objective and determined to be participating only indirectly. Civilian status also provides increased protection insofar as indirectly participating contractors’ lives will have to be taken into account in any operation by the enemy, and it may work in favor of preventing an attack if the military objective’s destruction fails to outweigh the value of the contractors’ lives.

¹⁸⁵ See *id.* at art. 57(2)(ii).

¹⁸⁶ The principles of proportionality and precaution are not included expressly in AP II for NIACs, but rule 14 and 15, respectively, of the ICRC Customary Study on IHL sets them out as customary international law norms that are therefore equally applicable in NIACs. See ICRC, *Customary Study on International Humanitarian Law*, Rule 14–15 (2005).

¹⁸⁷ See Bartolini, *supra* note 6, at 227.

¹⁸⁸ *Id.*

B. *A Decreased Risk of Prosecution?*

The status of civilians accompanying armed forces and the corresponding right to prisoner of war status in case of capture are not applicable to NIACs. There is therefore no doubt that a private contractor who falls into the hands of the enemy party in a NIAC could theoretically be prosecuted for acts committed that violate applicable criminal law.¹⁸⁹ With respect to U.S. PMSC personnel, however, this possibility seems remote, given that the non-state armed forces currently opposing the United States in NIACs in Iraq, Afghanistan and Syria generally do not have any kind of a legal system under which they might be prosecuted. If such a legal system were to exist, any determination of DPH would have little influence on whether or not a private contractor will be prosecuted. Indeed, if they perform an act prohibited by the enemy party's hypothetical domestic law—whether or not it is DPH—they could be prosecuted. The only way a narrow approach of DPH might provide additional protection against prosecution to a U.S. contractor in a NIAC is therefore in the very improbable case that the non-state armed group possesses some kind of legal system under which DPH is criminalized. Further, absent statehood, this theoretical group's laws are unlikely to be respected. Finally, if PMSC personnel commit serious violations of IHL, they may be prosecuted for war crimes,¹⁹⁰ in which case the definition of DPH is irrelevant.

In an IAC, U.S. contractors currently have the status of civilians accompanying the armed forces and will therefore be entitled to prisoner of war status under Article 4(A)(4) of GC III if they are captured by the opposing state party. Although this gives them the right to a number of rights and protections under GC III, they are not combatants and the combatant's immunity against prosecution for his lawful participation in hostilities does not apply to them to shield them against charges for their direct participation in hostilities.¹⁹¹ As a result, the enemy state in whose hands they fall may prosecute them for crimes under national law (for example, crimes related to their participation in attacks against the enemy state) and under international law (violations of obligations to respect or protect that are applicable to all, whether privileged belligerent or not).¹⁹² Similar to the analysis of a private contractor in the hands of a non-state group, it is unclear that a narrow DPH definition would better protect private contractors from prosecution by an enemy state. To the extent that the prosecution of a private contractor depends on the relevant domestic law and this law could potentially treat even acts that constitute *indirect* participation as crimes, taking a narrow interpretation of DPH may not be more protective. The concept of DPH may not be relevant to domestic criminal liability because of differing standards of culpability under domestic and international law. Indeed, it will likely not be a required element of a crime under domestic law. For example, if a private security contractor

¹⁸⁹ Sossai, *supra* note 20, at 18.

¹⁹⁰ See Doswald-Beck, *supra* note 10, at 136.

¹⁹¹ See Schmitt, *supra* note 2, at 520; ICRC, Expert Meeting on the Notion of "Direct Participation in Hostilities under IHL" 17 (Oct. 23–25, 2005), <https://www.icrc.org/eng/assets/files/other/2005-06-background-doc-ws-viii-ix-icrc.pdf>.

¹⁹² See Montreux Document, *supra* note 40, at 15.

kills someone in self-defense, this may not be DPH. That contractor may nonetheless be found guilty under the applicable domestic law, depending on how that law defines the crime of murder or manslaughter, or the defense of self-defense.

In a NIAC, the definition of DPH will not, in a vast majority of cases, influence the risk of prosecution of U.S. contractors. Regardless of whether the U.S. or the ICRC view is adopted, enemy forces (1) will likely not possess a legal system under which to prosecute and even if they do, (2) will not likely have any provision criminalizing DPH. In an IAC, captured U.S. contractors can be prosecuted for crimes under international law (under which DPH is not a crime) and under domestic law (where it is unlikely that the DPH concept will be relevant). As in NIACs, therefore, using the U.S. or ICRC understanding of DPH will probably have little impact on the risk of prosecution.

Conclusion

As the United States relies more and more on PMSCs, a main source of concern is the erosion of the principle of distinction.¹⁹³ Indeed, the United States is classifying as civilians individuals who are clearly an integral part of the armed forces. It creates a “confusing and dangerous environment for military forces engaged in combat.”¹⁹⁴ It also weakens the protection that IHL affords civilians. This Article suggests that by applying the narrow ICRC interpretation to the conventionally undefined concept of DPH, a great majority of the activities undertaken by PMSC personnel hired by the United States would fall under indirect participation and therefore protect them from being legally susceptible to direct attack in an armed conflict.¹⁹⁵ Despite the fact that the principle of proportionality does not hold a state liable for non excessive deaths of civilians that are proximate to a military objective, and that a restrictive interpretation of DPH might not necessarily increase private contractor protection from prosecution for indirect participation in armed conflict that an enemy nonetheless treats as a crime under its domestic law, it does provide some measure of additional protection. It provides more civilian contractors with protection against direct attack and may occasionally tip the balance of proportionality towards the decision not to attack a military target.

U.S. policy does not limit contractor activities in a manner consistent with even the narrow ICRC approach on DPH. In a number of areas, the policy documents are not sufficiently restrictive, or leave open the possibility of extensive civilian involvement with the proper authorization. The U.S. position of categorizing private contractors as civilians therefore threatens the sanctity

¹⁹³ See Cameron, *supra* note 1, at 435–36.

¹⁹⁴ See Schmitt, *supra* note 2, at 546.

¹⁹⁵ It must be noted that a lot of these contractors have consciously assumed a risk of being susceptible to attack that comes with their jobs, and that they are being generously compensated for their activities. Although this is not the position of this article, there is an argument to be made that extending civilian protections to such individuals compromises the protection of other civilians.

of the principles of distinction and proportionality and may undermine their application by enemy forces.

Issues of distinction will remain even if we apply the ICRC's narrow approach to DPH. However, the ICRC's approach will provide more extensive protection for the individual contractor and will arguably better reflect the IHL principle of distinction,¹⁹⁶ and therefore increase the protection of civilians in general.¹⁹⁷

¹⁹⁶ The argument is that a wide approach leaves an excessive margin of appreciation and does not provide sufficient safeguards. *See Sossai, supra* note 20, at 11.

¹⁹⁷ If such a narrow interpretation of direct participation in hostilities leads to a protection of civilian contractors in armed conflict that some may consider to be unrealistic, an author has suggested that states should decide to categorize contractors that perform what is traditionally understood to be military work as combatants, thereby safeguarding the protection that civilians are entitled to under IHL. *See Doswald-Beck, supra* note 10, at 137.