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# Private military and security contractors: a face-off with the notion of direct participation in hostilities, in international armed conflicts<sup>1</sup>

## Summary

Private military and security companies (PMSCs) have become a significant feature in recent international armed conflicts. Under international humanitarian law, PMSCs are, for the most part, clothed with civilian status. As civilians, they are precluded from any direct participation in hostilities if they are to ensure their immunity against direct targeting, and yet they are increasingly performing duties once reserved for military personnel. This article analyses the functions traditionally undertaken by PMSCs in light of the International Committee of the Red Cross's (ICRC) interpretation of what constitutes unlawful direct participation in hostilities. This analysis offers advice to PMSCs, and those opposing them, as to what activities might compromise their civilian immunity against attack. This article also explores the legal consequences which result when PMSCs elect to participate directly in hostilities, despite their civilian status.

## Private militêre en sekuriteitskontraakteurs: konflik aangaande die idee van direkte deelname en vyandelikhede in internasionale gewapende konflikte

Private militêre en sekuriteitsmaatskappye (PMSMe) het 'n al meer beduidende rol begin speel in onlangse internasionale gewapende konflikte. In terme van internasionale humanitêre reg, word hierdie PMSMe meerendeels beklee met burgerlike status. Alhoewel hulle as burgerlikes uitgesluit word van enige direkte deelname aan vyandighede (indien hulle verseker wil wees van hul immuniteit tydens direkte aanvalle), verrig hulle toenemend meer take wat vantevore beperk was tot militêre personeel. Hierdie artikel ontleed die funksies wat tradisioneel deur die PMSMe verrig is in die lig van die Internasionale Komitee van die Rooikruis (ICRC) se interpretasie van wat onregmatige direkte betrokkenheid tot vyandelikhede uitmaak. Hierdie ontleding bied advies aan die PMSMe, en dié wat hulle teenstaan, rakende aktiwiteite wat hul burgerlike immuniteit mag aantas. Die artikel ondersoek

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1 This article is published (with the permission of Taylor & Francis Ltd) as a sequel to Bosch 2007:34-52, and reflects subsequent developments in international humanitarian law pursuant to the release of the ICRC's *Interpretive guide on the notion of direct participation in hostilities*. The author wishes to thank the anonymous reviewers of this article for their constructive comments.

ook die regsgevolge wanneer PMSMe die keuse maak om direk tot die konflik toe te tree, nieteenstaande hul burgerlike status.

## 1. Introduction

When the Cold War ended in the 1990s, “more than 6 million soldiers”<sup>2</sup> were demobilised; military and security functions were simultaneously outsourced at unprecedented<sup>3</sup> levels to a new player in international humanitarian law (IHL): the private military and security contractor (PMSC).<sup>4</sup> Subsequently, general military downsizing presented private security companies with a vast pool of ex-military personnel,<sup>5</sup> and a burgeoning market for their services. At present, there are an estimated 310 registered private military and security companies,<sup>6</sup> operational in “over 50 countries”<sup>7</sup> “from Albania to Zambia”,<sup>8</sup> with “access to an international, mobile, and largely anonymous pool of labor”.<sup>9</sup> It is not only states who are making greater use of PMSCs – “private corporations, international and regional inter-governmental organisations, as well as non-governmental organisations”<sup>10</sup> are also increasingly needing to employ PMSCs, in order to operate in situations of armed conflict.<sup>11</sup> In 2010, the industry itself was estimated to be worth between 200 and 300 billion US dollars annually,<sup>12</sup>

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2 Singer 2006:2.

3 In 1991, the ratio of military personnel to contractors was 50:1; by 2003, the ratio was less than 10:1 (Singer 2003:277). At the end of the Iraqi conflict, contractors working for the US government and military outnumbered US troops in Iraq (Amnesty International; Frye 2005:2610). The situation was much the same in Afghanistan, with “an estimated 10,000 security contractors” deployed in Afghanistan (Gaston 2008:223).

4 While some texts draw a distinction between private military companies (Singer 2006:3) and private security companies (Ishøy 2008:106-107), this article adopts the blanket term “private military and/or security contractors” (PMSCs) to refer to individual contractors who provide either military services or security services (UNHRC 2010). This approach is chosen because, as the Montreaux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict acknowledges, the line between purely security functions often blurs into functions with a military flavour, and so it seems to be pragmatic to deal with all permutations of the “beast” (ICRC 2008:37). Consequently, throughout this piece, PMSCs will be referred to, with the caveat that, under this umbrella-term, the contractors’ individual tasks might range from active combat, military support, training and non-lethal support, through to passive defence, and the protection and defence of civilians and their property.

5 Elsea *et al.* 2008:8-10.

6 De Nevers 2009:175. However, there is a notorious lack of verifiable data on the magnitude of the industry (Holmqvist 2007:7).

7 Singer 2006:3.

8 Kidane 2010:364.

9 Holmqvist 2007:7; De Nevers 2009:175.

10 Singer 2006:3.

11 Gillard 2006:525.

12 Singer 2006:3.

and was “becoming more mainstream and acceptable”.<sup>13</sup> Most academics agree that PMSCs are likely to be a permanent feature in “humanitarian, peacekeeping, and peace-enforcement operations”<sup>14</sup> in the future.<sup>15</sup>

The boom in the private security industry has been met with mixed responses. Some brand PMSCs as “mercenaries”,<sup>16</sup> while others tout them as the world’s future peacekeepers.<sup>17</sup> Certainly, IHL treaties (drafted “prior to and during the Cold War”<sup>18</sup>), make no specific reference to PMSCs by this appellation.<sup>19</sup> That is not to say, however, that PMSCs are status-less under IHL.<sup>20</sup> “In situations of armed conflict certain well-established rules and principles do clearly apply, which regulates both the activities of PMSC staff and the responsibilities of the States that hire them”.<sup>21</sup> Most legal scholars agree that, while it is theoretically possible for PMSCs to attain combatant<sup>22</sup> or mercenary<sup>23</sup> status, the likelihood of this being the case for the majority of PMSCs is very unlikely.<sup>24</sup> It is entirely more probable that most PMSCs who are employed “to provide support functions”<sup>25</sup> will be classified as civilians.<sup>26</sup> As such, “the normal rules of civilian status”

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13 Lytton 2006:307. In Iraq, even the Chief of the Coalition Provisional Authority (Paul Bremmer) and visiting dignitaries, were seldom without a Blackwater Security escort (Frye 2005:2611). In the Green Zone in Baghdad, it was not uncommon for Blackwater personnel to be involved in “prolonged gun battles ... defending the US government headquarters” (Elsea *et al.* 2008:11; Frye 2005:2611).

14 Singer 2006:3.

15 “The United Nations (UN) is beginning to realize this fact, and in its most recent guidance they have begun addressing ‘other security actors’ in recent UN guidelines” (Crofford 2006:8).

16 In response to the two international treaties on the eradication of mercenaries, proposed by the United Nations (1989 UN Mercenary Convention) and the African Union (1977 OAU Mercenary Convention), some states have introduced measures to ban or regulate the activities of PMSCs (for more on this, see Bosch & Maritz 2011:71-125).

17 Lilly 2000; Cameron 2006:573-598.

18 Kidane 2010:364.

19 ICRC 2008:37.

20 Gillard 2005:2. After all, IHL “contains criteria for determining this status ... and under IHL, every individual in the theatre of an international armed conflict has a primary status as either a combatant or a civilian” (Gillard 2005:2; Crofford 2006:8).

21 ICRC 2008:37.

22 PMSCs will enjoy the privileges associated with combatant status when they are “formally incorporated into the states armed forces” or when “they fulfil the customary IHL criteria for combatant status” (ICRC 2008:39, principle 26(b); Ishøy 2008:107; De Nevers 2009:176).

23 Salzman 2008:855.

24 ICRC 2008:36; Banks 2011:228-235; O’Brien 2006:3.

25 For example, equipment maintenance, logistic services, guarding diplomatic missions or other civilian sites, and catering.

26 ICRC 2008:principle 39; Ishøy 2008:107. There might then be room to argue that, where states have contracted PMSCs to assist the armed forces, it is sufficient to infer protected status, as “persons accompanying the armed forces”, even if the contract itself is insufficient to actively incorporate them

will be applicable to them.<sup>27</sup> That said, “there is no single simple answer applicable to all”<sup>28</sup> PMSCs. Much will turn on “the nature of their relationship with the state that hires them”, the “nature of the activities that they carry out”,<sup>29</sup> the “given time and place”,<sup>30</sup> and the circumstances surrounding the performance of their functions”.<sup>31</sup> As the Montreaux Document<sup>32</sup> concludes: “the status of PMSC personnel depends on their exact employment and functions”.<sup>33</sup> To this end, “the UN Working Group on the use of mercenaries has found that many private military and security companies are operating in a ‘grey zone’ which is not defined at all, or at the least not clearly defined by international legal norms”,<sup>34</sup> and remains “ambiguous at best”.<sup>35</sup> There is an urgent and pragmatic need for IHL to address the issue of “where the modern PMSCs fit into existing international law”,<sup>36</sup> and until a definitive answer is provided the legal status of individual PMSCs will have to be ascertained on a case-by-case basis.<sup>37</sup>

In this analysis, the article proceeds from the position that, for the most part, PMSCs will be classified as civilians, and as such are obliged to observe the restrictions placed upon their direct participation in hostilities if they are not to compromise their immunity against direct targeting. The PMSC “industry boom” seems to test the debate around which activities amount to direct participation in hostilities, in new ways. It poses new challenges such as whether preparation for military operations oversteps

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into the armed forces. In such cases, PMSCs will need to be in possession of an identity card identifying them as “civilians accompanying the armed forces” (McDonald n.d.:3). The benefit for PMSCs of this special category is that these individuals are granted POW status upon capture (McDonald n.d.:3).

27 Rogers 2004:22. As civilians, PMSCs are not permitted to participate directly in hostilities, but are still, by law, permitted to carry “light, personal weapons for their own self-defence or the defence of those they are protecting” (Rogers 2004:22). In order to ensure their civilian status, PMSCs must take care not to “dress like members of the armed forces” or to “engage in combat-related activities” (Rogers 2004:22-23).

28 Gillard 2005:2; Kidane 2010:412.

29 Gillard 2005:2; ICRC 2008:36.

30 Kidane 2010:412.

31 Kidane 2010:419; ICRC 2008:principle 24.

32 ICOC 2010.

33 ICRC 2008:39.

34 Mancini *et al.* 2011:340.

35 Lytton 2006:307; Kidane 2010:364; De Nevers 2009:170.

36 Lytton 2006:307.

37 Crofford 2006:8. As Kidane points out, “not all activities of private military contractors can easily be classified as legal or illegal”, although “most of the private military contractors perform legitimate activities most of the time” (Kidane 2010:412).

the mark;<sup>38</sup> whether defensive<sup>39</sup> (as opposed to offensive) operations amount to direct participation; whether the “use of force in self-defence” amounts to direct participation in hostilities; whether the close proximity of PMSCs to the theatre of combat makes their activities more likely to be interpreted as direct participation in hostilities<sup>40</sup> and, lastly, whether the location of PMSCs far from the actual theatre of hostilities necessarily exempts them from being found participating directly in hostilities.<sup>41</sup> The author attempts to answer these questions by analysing the concept of direct participation in hostilities (as interpreted by the ICRC’s *Interpretive guide*) in light of the variety of roles played by PMSCs. To conclude, the author assesses the legal consequences which result in instances when it is determined<sup>42</sup> that the actions of PMSCs amount to unlawful direct participation in hostilities.

## 2. Understanding the IHL notion of direct participation in hostilities

Civilian status brings with it immunity against attack on account of the “fundamental principle of the law of war that those who do not participate in the hostilities shall not be attacked”.<sup>43</sup> Consequently, “civilians are protected persons, for so long as they do not act to compromise their protected status by engaging in combat related activities”,<sup>44</sup> “normally ... undertaken only by members of the armed forces”.<sup>45</sup> When a civilian engages in these combat-related activities (or to put it another way, “participates directly in hostilities”), that action “suspends their (civilian) protection against the dangers arising from military operations”,<sup>46</sup> exposing them to legitimate targeting,<sup>47</sup> and potential criminal prosecution for their

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38 Gasser proposes that direct participation involves not only “direct personal involvement but also preparation for a military operation, and intention to take part therein”, provided the activities “represent a direct threat to the enemy” (Gasser 1995:232; ICRC 1977:1679).

39 “IHL does not distinguish between offensive and defensive operations” and providing defence for “military objectives amounts to direct participation in hostilities” (Sossai 2011:208).

40 Some argue that “the closer an activity occurs to the physical location of fighting, the more likely it will be considered combat”, since “activity near the battlefield can usually be more closely linked to the infliction of harm on an enemy” (Ricou Heaton 2005:179-180).

41 Technological developments, which would allow individuals located far from the front lines to direct a weapon to strike a target remotely by computer, must be taken into account. Cameron (2007:9) argues that these activities would amount to direct participation in hostilities.

42 Cameron 2006:582.

43 Schmitt 2010:715.

44 Schmitt 2010:714.

45 Rogers 2004:19.

46 ICRC 2009:12.

47 “The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts ... thus a civilian who takes part

unauthorised participation in hostilities.<sup>48</sup> As the ICRC commentary on AP I article 51(3) explains: “only some specific actions will result in the civilian losing their immunity, and ... their loss of protection is limited to the length of time<sup>49</sup> during which they persist in their direct participation”.<sup>50</sup>

The restrictions concerning civilian direct participation in hostilities can be traced back to Article 82 of the 1863 *Lieber Code*. It is reiterated again in AP I article 51(3).<sup>51</sup> This principle can also be said to have achieved customary international law status, as was confirmed by the ICRC’s study into the customary international law status of IHL. The study concluded that no “official contrary practice was found”,<sup>52</sup> and on the whole the principle that civilians lose their immunity from prosecution when they participate in hostilities, is seen “as a valuable reaffirmation of an existing rule of customary international law”.<sup>53</sup>

### 3. Unpacking the treaty and customary IHL notion of “direct participation in hostilities”

While the principle is often cited, neither treaty law nor customary international law can offer a clear definition of what activities amount to direct participation in hostilities.<sup>54</sup> It is often stated that an “assessment of direct participation has to be made on a case-by-case basis”,<sup>55</sup> interpreting “the notion of direct participation in hostilities ... in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the object and purpose of IHL”.<sup>56</sup>

Despite the lack of a clear definition, it is generally understood that direct participation in hostilities amounts to “acts which, by their nature

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in an armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities” (Jensen 2011:1995-2003). The targeting decision, in such instances, does not have to take into account the principle of proportionality (Schmitt 2010:703).

48 ICRC 2009:12.

49 “Once he ceases to participate, the civilian regains his right to the protection under this section ... and he may no longer be attacked” (Jensen 2011:2003-2012).

50 Jensen 2011:2003-2012, 1995-2003.

51 “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities”.

52 Henckaerts & Doswald-Beck 2005:23.

53 Henckaerts & Doswald-Beck 2005:23.

54 Henckaerts & Doswald-Beck 2005:22; ICRC 2009:12, 41.

55 Henckaerts & Doswald-Beck 2005:22.

56 ICRC 2009:41. The International Criminal Tribunal for the Former Yugoslavia, when faced with this issue in the *Tadić* case, commented that “it is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time” (*Prosecutor v Dusko Tadić*:616).

or purpose may cause actual harm to enemy personnel and *matériel*”,<sup>57</sup> as distinct from acts which merely support the war effort,<sup>58</sup> such as supplying the “provision of supplies or services”<sup>59</sup> such as food and shelter, or generally “sympathising with them”.<sup>60</sup> The dilemma for those present in situations of armed conflict is that a considerable and controversial “grey zone” “exists between these two ends of the spectrum”.<sup>61</sup> So, for example, “to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly”.<sup>62</sup>

#### 4. The notion of direct participation in hostilities as understood by the ICRC’s *Interpretive guide*

In an attempt to provide guidance<sup>63</sup> for states interpreting the concept of “direct participation in hostilities”, and its implications for targeting decisions<sup>64</sup> involving civilians,<sup>65</sup> the ICRC convened a panel of experts to debate the issue and, in 2009, the ICRC produced the *Interpretive guide* on the notion of direct participation in hostilities.<sup>66</sup> The *Guide* approaches the issues as a series of enquiries: Does the “specific hostile act”<sup>67</sup> fall within the ambit of those restricted acts which amount to direct participation in hostilities? What is the temporal scope of the loss of immunity on account of their direct participation in hostilities?

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57 ICRC 2003-2005:1. Rogers (2004:19) cites the following examples: “attacks with roadside bombs on military patrols, sabotage of military communications installations, electronic interference with weapons systems or capturing members of the armed forces”.

58 Gasser 1995:211, 233.

59 Rogers 2004:19. “Support and logistical activities” carried out by civilians such as “catering, construction and maintenance of bases” do not constitute direct participation in hostilities, provided these civilians do no more than act in self-defence (Cameron 2006:588-589).

60 Gillard 2005:5.

61 Gillard 2005:5.

62 Pilloud *et al.* 1987:516.

63 While the *Guide* has not been without its critics, most commentators concede that “the Interpretive Guidance is superior to the various ad hoc lists”, because it provides “those tasked with applying the norm on the battlefield” with “guidelines against which to gauge an action” (Melzer 2010:877).

64 Goodman & Jinks 2010:638.

65 Schmitt 2010:704; Melzer 2009:347; Boothby 2010:755-756.

66 While the *Guide* is not legally binding, it has the “substantial persuasive effect” (Fenrick 2009:300; ICRC 2009:10) and “may even be viewed as a secondary source of international law ... analogous to writings of the ‘most highly qualified publicists’” (Van der Toorn 2009:22).

67 ICRC 2009:45.

## 4.1 Specific hostile acts

According to the ICRC *Interpretive guide*, the specific hostile act must meet three cumulative criteria:<sup>68</sup>

- i The 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 (“threshold of harm”), and
- ii There must be a direct causal link between the 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 (“direct causation”), and
- iii The 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 (*‘belligerent nexus’*).<sup>69</sup>

### 4.1.1 Threshold of harm

The first criterion, referred to as the “threshold of harm” determination, requires that harm of a specifically military nature,<sup>70</sup> or harm (by inflicting death, injury or destruction)<sup>71</sup> of a protected person or object must be reasonably expected to result from a civilian’s actions before the civilian can be said to be participating directly in hostilities.<sup>72</sup> All that is required is the “objective likelihood<sup>73</sup> that the act will result in such harm”, not necessarily the actual “materialization of harm”.<sup>74</sup> It is, however, important that the harmful action is “in some way connected to the armed conflict”,<sup>75</sup> or as Melzer (the principal author of the ICRC’s *Interpretive*

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68 ICRC 2009:46.

69 ICRC 2009:47.

70 The act “must either harm the enemy’s military operations or capacity” (Melzer 2010:862), and includes “not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict” (ICRC 2009:47).

71 ICRC 2009:47, 49. For example “sniping attacks against civilians and bombardment of civilian villages or urban residential areas” (Schmitt 2010:723). “Political, diplomatic, economic, or administrative measures” (e.g. “building of fences or road blocks, the interruption of electricity, water, or food supplies, and the manipulation of computer networks”) “which may well be harmful to the civilian population, but which are not part of the hostilities” (Melzer 2010:862).

72 Melzer 2010:862.

73 Defined as “harm which may reasonably be expected to result from an act in the prevailing circumstances” (ICRC 2009:47).

74 Schmitt concedes that this is a sensible requirement, as it would be “absurd to suggest that a civilian shooting at a combatant, but missing, would not be directly participating because no harm resulted” (Schmitt 2010:724).

75 For example, a “prison guard may kill a prisoner for purely private reasons”, without his actions amounting to direct participation in hostilities, but were he



*guidelines*) puts it, it is an “integral part of armed confrontations”<sup>76</sup> and has a *belligerent nexus*<sup>77</sup>. Jensen,<sup>78</sup> Schmitt<sup>79</sup> and Van der Toorn<sup>80</sup> are all critical of the threshold of harm requirement for – what they term – its “under-inclusiveness”, and its failure to include within its ambit “those who directly support those who cause actual harm”.<sup>81</sup> In response to these critiques, Melzer warns that any proposal to lower the required threshold of harm in order to “extend loss of protection to a potentially wide range of support activities” will result in “undermining the generally recognised distinction between direct participation in hostilities and mere involvement in the general war effort”.<sup>82</sup>

The following activities satisfy the threshold of harm test: “acts of violence against human and material enemy forces”;<sup>83</sup> causing “physical or functional damage to military objects, operations or capacity”;<sup>84</sup> violent acts specifically directed against civilians or civilian objects;<sup>85</sup> sabotaging military capacity and operations;<sup>86</sup> electronic interference, exploitation, or attacks on “military computer networks”;<sup>87</sup> “wiretapping the adversary’s high command or transmitting tactical targeting information for an attack”;<sup>88</sup> restricting or disturbing military “deployments”; exercising any form of control or denying the military use of “military personnel, objects and territory to the detriment of the adversary”;<sup>89</sup> providing “logistics and communications”<sup>90</sup> assistance; clearing mines placed by the opposition; “repairing a battle-damaged runway at a forward airfield, so it can be used to launch aircraft”;<sup>91</sup> “guarding captured military personnel to prevent them being forcibly liberated”;<sup>92</sup> “building defensive positions at a military base certain to be attacked”;<sup>93</sup> “voluntarily and deliberately positioning themselves to create a physical obstacle to military operations of a party

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to engage in “a practice of killing prisoners of a particular ethnic group during an ethnic conflict [that] would meet the standard” (Schmitt 2010:723).

76 Melzer 2010:861.

77 Melzer 2010:862.

78 Jensen 2011:2221-2228.

79 Schmitt 2010:697-739.

80 Van der Toorn 2009:37.

81 Jensen 2011:2221-2228.

82 Melzer 2010:877.

83 For example, “killing and wounding of military personnel” (ICRC 2009:48).

84 ICRC 2009:47-48.

85 Solis 2010:203; ICRC 2009:49.

86 Solis 2010:203.

87 Schmitt 2010:715.

88 ICRC 2009:48.

89 ICRC 2009:48.

90 ICRC 2009:48.

91 “Because it constitutes a measure preparatory to specific combat operations likely to directly inflict harm on the enemy” (Melzer 2010:859).

92 ICRC 2009:48.

93 “Because it is likely to directly and adversely affect the enemy’s impending attack” (Melzer 2010:859).

to the conflict”;<sup>94</sup> disclosing any tactical targeting information, and training military personnel “for the execution of a pre-determined hostile act”.<sup>95</sup>

If those activities, performed by PMSCs, satisfy the threshold of harm requirement, then the following activities performed by PMSCs will not amount to a specific hostile act, for which they can expect to lose immunity from targeting: “building fences or roadblocks”;<sup>96</sup> “interrupting electricity, water, or food supplies”;<sup>97</sup> appropriating “cars and fuel”;<sup>98</sup> manipulating “computer networks”;<sup>99</sup> arresting or deporting “persons [who] may have a serious impact on public security, health, and commerce”;<sup>100</sup> refusing “to engage in actions that would positively affect one of the parties”;<sup>101</sup> rescuing “enemy aircrew members”;<sup>102</sup> the “development and production of improvised explosive devices” (IEDs) in a location remote from the hostilities,<sup>103</sup> and providing “generalized training to military personnel”.<sup>104</sup>

#### 4.1.2 The direct causation requirement

The purpose of this part of the test is to ensure that “general war effort”<sup>105</sup> and activities aimed at sustaining war<sup>106</sup> (although indispensable to the war effort, and which, in effect, do harm the adversary) would not satisfy the threshold criterion and amount to direct participation in hostilities.<sup>107</sup>

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94 ICRC 2009:56.

95 ICRC 2009:53.

96 ICRC 2009:48.

97 ICRC 2009:48.

98 ICRC 2009:48.

99 ICRC 2009:48.

100 ICRC 2009:48.

101 For example, refusing to provide information (Schmitt 2010:719).

102 Melzer 2010:860.

103 Melzer 2010:860.

104 ICRC 2009:53.

105 This includes all activities “objectively contributing to the military defeat of the adversary”; for example, “design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations” (ICRC 2009:53).

106 This would additionally include “political, economic or media activities supporting the general war effort”; for example, “political propaganda, financial transactions, production of agricultural or non-military industrial goods”, providing “finances, food and shelter to the armed forces and producing weapons and ammunition” (ICRC 2009:52-53).

107 As the ICRC *Interpretive guide* points out: “both the general war effort and war-sustaining activities may ultimately result in harm reaching the threshold required for a qualification as direct participation in hostilities, in fact ... some of these activities may even be indispensable to harming the adversary, such as providing finances, food and shelter to the armed forces and producing weapons and ammunition. However, unlike the conduct of hostilities, which is designed to cause the required harm, the general war effort and war sustaining activities also include activities that merely maintain or build up the capacity to cause such harm” (ICRC 1009:52).

Consequently, and in order to avoid depriving much of the civilian population of their protected status, there must be “a sufficiently close causal relation between the act and the resulting harm” for it to amount to direct participation in hostilities.<sup>108</sup>

According to the ICRC’s *Interpretive guide*, “direct causation should be understood as meaning that the harm in question must be brought about in one causal step”.<sup>109</sup> Where a specific act by an individual does not “on its own directly cause the required threshold of harm, their actions might still amount to direct participation where the individuals are part of a collective operation”.<sup>110</sup> As Sossai explains, “this means that the notion of direct participation of hostilities” comprises also those activities which cause harm “only in conjunction with other acts”.<sup>111</sup> Where the individual “act constitutes an integral part of a concrete and coordinated tactical (or collective) operation that directly causes such harm”,<sup>112</sup> the requirement of direct causation would be fulfilled, and the civilian would lose their immunity from attack.

Schmitt is critical of the *Guide*’s interpretation of direct causation, which excludes, from the parameters of “direct participation”, a range of “capacity-building activities”<sup>113</sup> which may not result “in direct and immediate harm to the enemy”,<sup>114</sup> despite the fact that they may have a marked effect on the belligerent’s capacity to win.<sup>115</sup> Melzer warns that Schmitt’s approach is “extremely permissive”, and “would invite excessively broad targeting policies, prone to error, arbitrariness, and abuse”.<sup>116</sup> Melzer maintains that there is no indication that “general *opinio juris* of states would condone the targeting of all persons who, at some point, have causally contributed to a hostile act, no matter how far removed from the potential materialization of harm”.<sup>117</sup>

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108 ICRC 2009:52.

109 The act must not only be causally linked to the harm, but it must also cause the harm directly. For example, “the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting and detonation of that device, do not cause that harm directly” (ICRC 2009:54, 55). In short, where an “individual’s conduct ... merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, is excluded from the concept of direct participation in hostilities” (ICRC 2009:53) (Melzer 2010:866).

110 ICRC 2009:55; Melzer 2010:865.

111 Sossai 2011:206.

112 Examples of such acts would include, *inter alia*, “the identification and marking of targets, the analysis and transmission of tactical intelligence to attacking forces, and the instruction and assistance given to troops for the execution of a specific military operation” (ICRC 2009:55) (Kalshoven & Zegveld 2011:102).

113 Schmitt 2010:727.

114 Schmitt 2010:736.

115 Schmitt 2010:725.

116 Melzer 2010:867.

117 Melzer 2010:868.

In light of this requirement of causation, the following activities have been said to satisfy the direct causation enquiry: “a coordinated tactical operation that directly causes harm” (of the required threshold);<sup>118</sup> “taking part in military or hostile acts, activities, conduct or operations”;<sup>119</sup> “bearing, using or taking up arms” in combat;<sup>120</sup> “conducting attacks”<sup>121</sup> or “participating in attacks against enemy personnel, property or equipment”;<sup>122</sup> operating “weapons which unlawful combatants use”<sup>123</sup> or supervising the “operation of weaponry”;<sup>124</sup> “sabotaging military installations”<sup>125</sup> and lines of communication”;<sup>126</sup> capturing combatants or their equipment;<sup>127</sup> gathering<sup>128</sup> military intelligence<sup>129</sup> (in enemy-controlled territory);<sup>130</sup> analysis or transmission of “tactical intelligence” or “military information”<sup>131</sup> to attacking forces”<sup>132</sup> “for their immediate use”;<sup>133</sup> “acting as lookouts, or observers on behalf of military forces”;<sup>134</sup> identifying and “marking of targets”;<sup>135</sup> “instruction and assistance given to troops for the execution of a specific military operation”;<sup>136</sup> “providing logistical support”<sup>137</sup> such as transporting weapons in proximity to combat operations;<sup>138</sup> “transporting unlawful combatants to or from the place where the hostilities are taking place”;<sup>139</sup> delivering ammunition to combatants;<sup>140</sup> “performing mission-essential work at a military base”,<sup>141</sup> and serving as guards for military objects or personnel.<sup>142</sup>

The following activities, often performed by PMSCs, will not satisfy the direct causation test: “driving military transport vehicles”<sup>143</sup> and

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118 ICRC 2009:55.

119 Watkin 2010:707.

120 Watkin 2010:707.

121 Schmitt 2010:708.

122 Watkin 2010:707.

123 For example, “manning an anti-aircraft gun” (Watkin 2010:707).

124 Schmitt 2010:708.

125 Watkin 2010:707.

126 Schmitt 2010:708.

127 Schmitt 2010:708.

128 Melzer 2010:867; Ricou Heaton 2005:177-178.

129 Ricou Heaton 2005:180.

130 Schmitt 2010:708.

131 Schmitt 2010:708.

132 ICRC 2009:55.

133 Watkin 2010:707.

134 Watkin 2010:707.

135 ICRC 2009:55.

136 ICRC 2009:55.

137 Ricou Heaton 2005:177-178.

138 Watkin 2010:707.

139 Schmitt 2010:708.

140 Schmitt 2010:708.

141 Ricou Heaton 2005:177-178.

142 Watkin 2010:707.

143 Watkin 2010:706.

“transporting arms and munitions”<sup>144</sup> in a combat zone;<sup>145</sup> “participating in activities in support of the war or military effort”;<sup>146</sup> providing logistical and general support;<sup>147</sup> aiding combatants by providing “general strategic analysis”;<sup>148</sup> recruiting and general<sup>149</sup> training of personnel<sup>150</sup> (including the “recruitment of suicide bombers”);<sup>151</sup> “design, production and shipment of weapons”<sup>152</sup> (including the “purchase, assembly, storage or smuggling of materials in order to build suicide vests”<sup>153</sup> or improvised explosive device(s));<sup>154</sup> advising on the “correct maintenance of the weapons”;<sup>155</sup> “voluntary human shielding”;<sup>156</sup> “contributing funds to a cause”<sup>157</sup> or partaking in “economic sanctions”;<sup>158</sup> “expressing sympathy for the cause of one of the parties to the conflict”;<sup>159</sup> distributing propaganda supporting unlawful combatants,<sup>160</sup> and “failing to act to prevent an incursion by one of the parties to the conflict”.<sup>161</sup>

### 4.1.3 The *belligerent nexus* requirement

This leg of the test requires that “an 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”.<sup>162</sup>

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144 Watkin 2010:707.

145 At the ICRC Expert Meeting “everyone agreed that the truck itself represented a military objective, disagreement surrounded the driver” (Schmitt 2010:710).

146 For example, working in “military vehicle maintenance depots” or munitions factories, or “providing supplies or services” or “working in canteens” (Watkin 2010:706-707; Schmitt 2010:710, 728).

147 For example, accompanying and supplying food (Ricou Heaton 2005:181) or selling goods (Watkin 2010:707) and medicine (Schmitt 2010:708) to one of the parties to the conflict.

148 Schmitt 2010:708.

149 While generalised training of recruits “undeniably contributes to a party’s military prowess ... the causal link between the training and subsequent combat action is attenuated” (Schmitt 2010:728). However, “training for a particular type of mission” where the training may “reasonably be regarded as a preparatory measure integral to a predetermined hostile act or operation” may qualify as direct participation in hostilities (Melzer 2010:867).

150 Solis 2010:204.

151 Melzer 2010:865; Watkin 2010:707.

152 Fenrick 2009:293.

153 Melzer 2010:865.

154 Melzer 2010:865.

155 Watkin 2010:707.

156 Melzer 2010:865.

157 Schmitt 2010:708, 727.

158 Schmitt 2010:28.

159 Watkin 2010:707.

160 Schmitt 2010:708.

161 Watkin 2010:707.

162 Melzer 2010:872; ICRC 2009:64; Kalshoven & Zegveld 2011:102.

So, for example, the following activities will satisfy the *belligerent nexus* requirement: preparatory collection of tactical intelligence;<sup>163</sup> transporting of personnel;<sup>164</sup> transporting and positioning of weapons and equipment,<sup>165</sup> and the loading of explosives in a suicide vehicle.<sup>166</sup> On the other hand, “armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party<sup>167</sup> cannot amount to any form of ‘participation’ in hostilities taking place between these parties”.<sup>168</sup>

So, for example, if civilians are found causing harm in:

- (a) individual self-defence or defence of others;
- (b) in exercising power or authority over persons or territory;
- (c) as part of civil unrest against such authority, or
- (d) during inter-civilian violence.

These acts lack the *belligerent nexus* required for a qualification as direct participation in hostilities.<sup>169</sup>

On this basis, “the hiding or smuggling of weapons<sup>170</sup> and the financial or political support of armed individuals”<sup>171</sup> will not satisfy the *belligerent nexus* requirement.

Schmitt is in favour of formulating the *belligerent nexus* test in the alternative, to read “in support of a party to the conflict or to the detriment of another”.<sup>172</sup> Melzer cautions against a “disjunctive reading of the two elements”, for the reasons that it can give rise to situations where it would be permissible to respond with military force against criminal elements who had no connection to the armed conflict.<sup>173</sup> Melzer argues that, if “either element is missing” (support of a party to the conflict and the intention to act to the detriment of another party), the “violence in question becomes independent of the armed struggle taking place between the parties to a conflict”.<sup>174</sup>

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163 Solis 2010:204-205.

164 Solis 2010:204-205.

165 Solis 2010:204-205.

166 Solis 2010:204-205.

167 For example, “looting or civil unrest that merely takes advantage of the instability incident to conflict” (Schmitt 2010:735).

168 Melzer 2010:873.

169 Van der Toorn 2009:19; ICRC 2009:64; Melzer 2010:873.

170 Solis 2010:204-205.

171 Solis 2010:204-205.

172 Schmitt 2010:736.

173 Melzer 2010:873.

174 Melzer 2010:873.

#### 4.1.4 Conclusions regarding PMSCs and the specific hostile acts

If we examine the activities, which PMSCs have reportedly been carrying out, we can conclude that some of these activities amount to hostile acts which fulfil the threshold of harm, direct causation, and *belligerent nexus* tests.

##### 4.1.4.1 PMSCs involved in combat operations

PMSCs – at the so-called tip of Singer’s spear<sup>175</sup> – have been “hired for the explicit purpose of engaging in combat operations”<sup>176</sup> (a practice which the ICRC has documented)<sup>177</sup>, or for providing “operational support in combat”<sup>178</sup> (sometimes even operating weapons systems)<sup>179</sup>, and their actions, which target enemy personnel, “military objects, operations or capacity”,<sup>180</sup> clearly satisfy the initial threshold of harm requirement. So, for example, when Russian, Latvian and Ukrainian PMSCs were hired during the Eritrea and Ethiopia War (1998-2000) to fly the Sukhoi 27 fighters and the MiG 29 interceptors which Ethiopia and Eritrea had purchased, these individuals were clearly participating directly in hostilities.<sup>181</sup> These kinds of incidence of hiring PMSCs is not limited only to advanced fighter jet pilots – actually it is commonplace for PMSCs to be hired to fly helicopters,<sup>182</sup> purely because the skills required are so rare. While most PMSCs are reticent to advertise their combat services, some such as Lockheed Martin and Military Professional Resources Inc (MPRI) list their “products to include the provision of combat capability”.<sup>183</sup> Blackwater, which boasts having the “largest private training center in the United States”, maintains that, at its centre, PMSCs are trained in “urban combat” and “boarding hostile” vessels,<sup>184</sup> all activities which reach the initial threshold of harm requirement. When PMSCs engage in these kinds of “coordinated, tactical, hostile operations”,<sup>185</sup> which involve attacking “enemy personnel, property or equipment”,<sup>186</sup> these acts clearly also satisfy the direct causation leg of the test for direct participation in hostilities. For this reason, the “policy

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175 Singer (2003:91-2) “likens military provider firms, which may engage in direct combat or command and control functions as the ‘tip of the spear’ while those support firms providing logistics and other non-lethal services are at the base of the spear, and private security companies or ‘military consultant firms’ fall somewhere in between” (Gaston 2008:225).

176 Ricou Heaton 2005:188; De Nevers 2009:1.

177 ICRC 2012.

178 McDonald n.d.:1.

179 ICRC 2008:36.

180 ICRC 2009:47-48.

181 Kidane 2010:400-401.

182 Frye 2005:2610.

183 Kidane 2010:393.

184 Elsea *et al.* 2008:8.

185 ICRC 2009:55.

186 Watkin 2010:707.

directives issued by the US Embassy in Baghdad prohibited PMSCs working for the Department of State and the Agency for International Development from engaging in ‘offensive combat operations’.<sup>187</sup>

#### 4.1.4.2 PMSCs operating and maintaining weaponry

Similarly, when PMSCs are hired to operate<sup>188</sup> weapons, “supervise the operation of weaponry”<sup>189</sup> and maintain weapons, as has been the case in recent international armed conflicts, this satisfies the direct causation leg of the test for direct participation in hostilities – particularly when these activities are carried out in close proximity to the theatre of hostilities.<sup>190</sup> So, for example, when PMSCs “flew on targeting and surveillance aircraft and operated Global Hawk and Predator UAVs in Afghanistan and Iraq”,<sup>191</sup> not only did their actions rise to the required threshold of harm, but they also satisfied the direct causation leg of the test. Similarly, when PMSCs “maintained and loaded weapons on many of the most sophisticated US weapons systems” during the Iraqi war, including the “loading of hellfire missiles and laser-guided smart bombs on unmanned aerial vehicles or drones”,<sup>192</sup> their actions met both the threshold of harm and the direct causation test for direct participation in hostilities.

Another major source of support, often provided by PMSCs, includes advising on the “correct maintenance of the weapons” systems,<sup>193</sup> as was the practice of firms such as Halliburton or Kellogg, Brown & Root.<sup>194</sup> The maintenance of sophisticated military systems often requires skills that military members simply do not possess.<sup>195</sup> Moreover, this maintenance often takes place “in close proximity to the battlefield”.<sup>196</sup> According to the *Interpretive guide*, this type of maintenance activity does not satisfy the direct causation requirement of the test for direct participation in hostilities.

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187 Mancini *et al.* 2011:334.

188 Sossai 2011:211; McDonald n.d.:1.

189 Schmitt 2010:708.

190 Kidane 2010:396.

191 Ricou Heaton 2005:191.

192 Sossai 2011:211; McDonald n.d.:1.

193 Watkin 2010:707. Conversely, “performing routine maintenance which does not have an immediate causal link with an operation affecting the adversary does not qualify as direct participation in hostilities” (Sossai 2011:211; Singer 2003:16).

194 Gaston 2008:225.

195 “Examples of weapons in the United States inventory dependent on contractor maintenance include the F-117 Stealth fighter, the M1-A1 tank, the Patriot missile, the B-2 stealth bomber, the Apache helicopter, and many naval surface warfare ships” (Ricou Heaton 2005:190).

196 Ricou Heaton 2005:190; Holmqvist 2005:57; ICRC 2012.



#### 4.1.4.3 PMSCs involved in sabotage operations

With most PMSCs being ex-military (often with “special op’s” credentials), it is not surprising that they are “involved in covert operations”<sup>197</sup> aimed at sabotaging the military installations,<sup>198</sup> capacity, logistics and lines of communication<sup>199</sup> of the opposition. These activities not only reach the required threshold of harm, but also satisfy the direct causation requirement needed to amount to direct participation in hostilities.

#### 4.1.4.4 PMSCs guarding captured belligerents

PMSCs have also rather infamously been employed to capture<sup>200</sup> and guard “captured military personnel to prevent them being forcibly liberated”.<sup>201</sup> The scandal, which ensued when it was discovered how PMSCs were carrying out their duties at Abu Ghraib detention centre, cast them in a bad light and prompted academics to question whether these duties can ever be abdicated by the state to private entities. It is generally agreed that certain inherently state functions<sup>202</sup> simply cannot be outsourced to PMSCs, including “the role of commander over a POW camp”<sup>203</sup> or responsible officer over “a place of internment”,<sup>204</sup> as was the case in Abu Ghraib.<sup>205</sup> To this end, article 9 of the proposed treaty on PMSCs states that “each State Party shall define and limit the scope of activities of PMSCs and specifically prohibit the outsourcing to PMSCs of functions which are defined as inherently State functions”. Probably, and most notably, this will put an end to PMSCs interrogating detainees.<sup>206</sup> In fact, in the aftermath of the “Abu Ghraib prison torture scandal the US, in its National Defense Authorisation Act for Fiscal Year 2009, concluded that interrogation ... is an inherently governmental function and it cannot be transferred to private sector contractors”.<sup>207</sup> Those issues aside, it is clear from the ICRC *Interpretive guide* that these activities satisfy the

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197 Gaston 2008:227.

198 Watkin 2010:707.

199 Schmitt 2010:708.

200 Schmitt 2010:708.

201 ICRC 2009:48.

202 The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination includes “among such functions are direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees and other functions that a State Party considers to be inherently State functions” (UNHRC 2010).

203 GC III:article 39; Sossai 2011:198.

204 GC IV:article 99; Sossai 2011:198.

205 Ishøy 2008:106.

206 Holmqvist 2005:57; Gaston 2008:227; McDonald n.d.:1; ICRC 2012.

207 Sossai 2011:211.

threshold of harm requirement and the direct causation test, and might implicate PMSCs in activities which amount to unlawful direct participation in hostilities.

#### 4.1.4.5 PMSCs providing targeting information

Another activity which PMSCs are often involved in, which satisfies the threshold of harm requirement and the direct causation test, is their assisting a party to the conflict with “tactical targeting information for an attack”,<sup>208</sup> Their ex-military backgrounds and their presence in “enemy-controlled territory”<sup>209</sup> place PMSCs in an advantageous position to gather<sup>210</sup> military intelligence.<sup>211</sup> Sometimes PMSCs gather their intelligence by interrogating detainees,<sup>212</sup> “performing analysis,<sup>213</sup> maintaining and supporting intelligence computer and electronic systems, or providing intelligence in the form of aerial reconnaissance and satellite imagery”.<sup>214</sup> So, for example, PMSCs were often contracted by the US government to gather “intelligence useful for US operations in Iraq”, to “analyze intelligence data”, and most importantly to transmit “targeting co-ordinates to unmanned aerial vehicles or other manned or unmanned platforms that fire weapons”.<sup>215</sup> Similarly, “Air Scan, a Florida-based company, has provided aerial intelligence-gathering services in Angola, the Balkans, Colombia, and Sudan”.<sup>216</sup> Provided one can “demonstrate a direct causal link between the intelligence information and the harm affecting the adversary”,<sup>217</sup> the activities are deemed to satisfy the *belligerent nexus* test<sup>218</sup> and will amount to direct participation in hostilities.<sup>219</sup> Probably the easiest way to illustrate the causal link is to show that the intelligence was passed on to attacking forces<sup>220</sup> “for their immediate use”, to assist parties in identifying and marking<sup>221</sup> military targets. Under these circumstances, when PMSCs gather intelligence, their actions qualify as “direct participation”.<sup>222</sup>

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208 ICRC 2009:48.

209 Schmitt 2010:708. “However, a distinction can be drawn between a person who gathers military intelligence in enemy controlled territory” (which amounts to direct participation in hostilities and classifies the individual as a spy, as per HR article 29(1)), “and a civilian who retrieves data from satellites or listening posts, working in terminals located in his home country” (Sossai 2011:210).

210 Melzer 2010:867; Ricou Heaton 2005:177-178; Frye 2005:2610.

211 Ricou Heaton 2005:180; Singer 2003:16; Gaston 2008:227; Holmqvist 2005:57; ICRC 2012; Frye 2005:2610.

212 Sossai 2011:211.

213 Elsea *et al.* 2008:3.

214 Ricou Heaton 2005:191-192.

215 Mancini *et al.* 2011:335.

216 Singer 2003:16.

217 Sossai 2011:211.

218 Solis 2010:204-205.

219 ICRC 2008:36.

220 ICRC 2009:55.

221 ICRC 2009:55.

222 Schmitt 2004:532-544.

#### 4.1.4.6 PMSCs providing military training

PMSCs are also often hired to provide military training because of their ex-military history. While generalised “advise and military training aimed at improving the capacities of the regular armed forces” does not rise to the required threshold of harm, since it does “not necessarily produce the immediate direct impact on military operations”,<sup>223</sup> the *Interpretive guide* does prohibit training<sup>224</sup> of military personnel<sup>225</sup> where their training is intended “for the execution of a predetermined hostile act”.<sup>226</sup> So, for example, when MPRI “reportedly helped prepare Croatia’s armed forces to plan a successful offensive in 1995 against the Serbs in Krajina”,<sup>227</sup> this would rise to the threshold of harm and fulfil the direct causation test. Likewise, when “contractors from Vinnell Corporation were teaching the Saudi National Guard how to use heavy weapons systems and accompanied the Guard into battle against Iraqi forces in the battle of Khafji”,<sup>228</sup> during the first Gulf War, these activities rose to the required threshold of harm needed to amount to direct participation in hostilities. That said, when PMSCs provide unarmed security services such as military advice and training<sup>229</sup> to military personnel in situations of armed conflict, these activities do not reach the required threshold of harm. So, for example, the security training<sup>230</sup> provided to the Iraqi security forces<sup>231</sup> by MPRI<sup>232</sup> and DynCorp International<sup>233</sup> (who also “provided civil police training in Bosnia, Kosovo, East Timor, Afghanistan and Iraq and demobilized the Liberian army of 2005 and trained a new force”) was not considered to be direct participation in hostilities. Provided PMSCs ensure that the training<sup>234</sup> of military personnel<sup>235</sup> is “generalized”<sup>236</sup> (i.e. not for a specific military operation), or they are only providing “general strategic analysis”<sup>237</sup> and “strategic advisory services”,<sup>238</sup> they do not run the risk of being found in violation of the prohibition against direct participation in hostilities.

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223 Sossai 2011:212.

224 Ricou Heaton 2005:179.

225 Ricou Heaton 2005:179.

226 ICRC 2009:53; Sossai 2011:212; ICRC 2009:55.

227 Ricou Heaton 2005:179; Holmqvist 2007:6.

228 Ricou Heaton 2005:179.

229 Holmqvist 2005:57.

230 Elsea *et al.* 2008:3.

231 Elsea *et al.* 2008:3.

232 Kidane 2010:393.

233 Stephens & Lewis 2006:31.

234 ICRC 2012.

235 Solis 2010:204; Ricou Heaton 2005:179.

236 ICRC 2009:53; Schmitt 2010:728; Meizer 2010:867.

237 Schmitt 2010:708.

238 Gaston 2008:227.

#### 4.1.4.7 PMSCs manning roadblocks, effecting arrests and rescues

While these instances of PMSC involvement in hostilities often make news headlines, the reality remains that “only very few engage in active combat”.<sup>239</sup> PMSCs are also hired to build and man roadblocks,<sup>240</sup> to arrest persons who threaten public security,<sup>241</sup> to undertake rescue operations<sup>242</sup> in respect of “enemy aircrew members”<sup>243</sup> or civilians<sup>244</sup> – all being activities which are not considered to be direct participation in hostilities.

#### 4.1.4.8 PMSCs providing logistical support

Another area which, noted by the ICRC,<sup>245</sup> is often contracted out to PMSCs is the provision of “logistical support”.<sup>246</sup> In Iraq alone, it is estimated that “20 to 30 per cent of the essential military support services in Iraq are provided by contractors”.<sup>247</sup> Since logistical support is crucial to the military capacity to defeat the opposition, it does, according to the *Interpretive guide*, satisfy the direct causation element of the test for direct participation in hostilities. That said, the *Interpretive guide* exempts the “driving of military transport vehicles”<sup>248</sup> and the “transporting of arms and munitions”<sup>249</sup> in a combat zone<sup>250</sup> from activities which amount to direct participation in hostilities, because these activities fail to meet the direct causation leg of the test (although they clearly satisfy the *belligerent nexus* test).<sup>251</sup> So, for example, when MPRI<sup>252</sup> and Halliburton or Kellogg, Brown & Root were reported to have provided transport for troops,<sup>253</sup> while other PMSCs are reported to have transported weapons and ammunition, these activities would not amount to direct participation in hostilities.

#### 4.1.4.9 PMSCs carrying out guarding functions

By far the predominant service provided by PMSCs<sup>254</sup> in conflict situations is that of being private armed guards. So, for example, in Iraq, it was not

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239 Blain 2007.

240 ICRC 2009:48.

241 ICRC 2009:48.

242 McDonald n.d.:1.

243 Melzer 2010:860.

244 Sossai 2011:212.

245 ICRC 2012.

246 Ricou Heaton 2005:177-178; McDonald n.d.:1; Ishøy 2008:106; Kidane 2010:393.

247 Ricou Heaton 2005:189.

248 Watkin 2010:706.

249 Watkin 2010:707.

250 Schmitt 2010:710.

251 Solis 2010:204-205.

252 Kidane 2010:393.

253 Gaston 2008:225; Schmitt 2010:708; McDonald n.d.:1.

254 Holmqvist 2005:57; McDonald n.d.:1; Ishøy 2008:106.

uncommon for PMSCs to be hired to guard US, British, or NATO military bases,<sup>255</sup> embassies,<sup>256</sup> checkpoints,<sup>257</sup> convoys “moving equipment and supplies”<sup>258</sup> and the armed forces.<sup>259</sup> PMSCs have provided security for a variety of premises,<sup>260</sup> and “close protection of persons”.<sup>261</sup> The “British firm Aegis had 3 contracts to perform these functions in Iraq, while 23,000 PMSCs were performing these functions for the US Department of Defence as of 2009 in Iraq and Afghanistan”.<sup>262</sup> Included in those hiring guarding capacity, are those in civilian and government buildings,<sup>263</sup> “construction, consulting and engineering” corporations (particularly those undertaking reconstruction work in conflict zones),<sup>264</sup> large mining corporations,<sup>265</sup> high-ranking<sup>266</sup> personnel, US defence lawyers gathering evidence for detainee cases,<sup>267</sup> diplomats, and relief workers. PMSCs are often at pains to explain that they are not using force in an offensive manner when they act as guards and, consequently, they argue that their actions cannot constitute direct participation in hostilities.<sup>268</sup> However, the legal reality remains that IHL “does not draw a distinction between offensive or defensive operations”,<sup>269</sup> and “engaging in defensive combat [might] also constitute[s] direct participation in hostilities”.<sup>270</sup> The *Interpretive Guide* supports the conclusion that some guarding activities do satisfy the direct causation requirement of the test for direct participation in hostilities.<sup>271</sup>

When assessing the actions of PMSCs who claim to be acting defensively as a security guard, two factors will have to be considered in deciding whether their defensive use of force amounts to direct participation in hostilities. First, who or what sites are they guarding (i.e. the status of the sites under IHL) and, secondly, against whom are they using force.<sup>272</sup> These two factors determine whether PMSCs “can lawfully use force, even defensively, without endangering their status and protections under

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255 Sossai 2011:207.

256 Sossai 2011:207.

257 Sossai 2011:207.

258 Elsea *et al.* 2008:3; Gaston 2008:226; Sossai 2011:207.

259 Kidane 2010:393.

260 ICRC 2012.

261 ICRC 2012.

262 Sossai 2011:207.

263 Elsea *et al.* 2008:3.

264 Ricou Heaton 2005:187; Gaston 2008:227.

265 Erinys “won a \$80 million contract ... to provide security for Iraqi oil refineries and pipelines”, although it was claimed that this was to prevent looting by criminals, it was just as effective as “diminishing the enemy’s access to oil” (Sossai 2011:208; Blain 2007).

266 Gaston 2008:227; Elsea *et al.* 2008:3; Sossai 2011:207.

267 Gaston 2008:227.

268 Dinstein 2004:58; Salzman 2008:883.

269 Gillard 2005:5.

270 Mancini *et al.* 2011:334.

271 Ishøy 2008:107.

272 De Nevers 2009:180.

IHL”.<sup>273</sup> If they are guarding military personnel,<sup>274</sup> or military objectives,<sup>275</sup> they are affecting military operations and can be considered to be participating directly in hostilities. When PMSCs are “retained to protect military installations, such as barracks and military hardware ... these are military objectives and defending them amounts to taking direct part in hostilities”.<sup>276</sup> While they, themselves, are not technically legitimate military targets, if they defend military objectives they become legitimate targets for attack.<sup>277</sup>

If, on the other hand, PMSCs are guarding civilians<sup>278</sup> or civilian objects, they will not be considered to be participating in hostilities,<sup>279</sup> provided they only use force in self-defence, or in defence of those civilians they are protecting,<sup>280</sup> or in defence against criminal elements. So, for example, Blackwater employees protecting US State Department officials in Iraq will not be found to be participating directly in hostilities when using force to protect their “clients, since these diplomats cannot lawfully be attacked”.<sup>281</sup> That said, the Iraqi conflict can attest that it is not uncommon for PMSCs acting as armed guards to “become involved in exchanges of fire” where it was almost impossible to differentiate engaging with combatants from deterring “criminal attacks”.<sup>282</sup> So, for example, in Najaf (Iraq), on 4 April 2004, “Blackwater’s contractors tasked with the protection of the Coalition Provisional Authority Headquarters”<sup>283</sup> “took positions on a rooftop alongside US Army and Spanish forces”,<sup>284</sup> and “repulsed an attack by hundreds of Shiite militia members, with combat lasting for more than three hours”.<sup>285</sup> In Afghanistan and Iraq, the US and UK governments hired a variety of PMSCs (Blackwater, Dynacorp International, Military Professional Resources Inc (MPRI), Triple Canopy, EOD Technology, Aegis, ArmorGroup, Control Risks and Erinyes)<sup>286</sup> to provide “services including

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273 De Nevers 2009:180; Eisea *et al.* 2008:17.

274 “Military officers are legitimate military targets”; consequently, PMSC employees risk coming under attack when protecting them (De Nevers 2009:180).

275 When PMSCs “use ... force ... to defend these [military] sites”, their actions amount to “direct participation in hostilities” (Gillard 2006:540).

276 Gillard 2005:5; ICRC 2008:36.

277 The presence of PMSCs at military targets not only puts them at increased “risk of harm”, but “if they use force in defense of this target they become legitimate targets of attack themselves” (De Nevers 2009:180).

278 Civilians enjoy complete immunity from attack, as do diplomats, “neither are legitimate targets” (De Nevers 2009:180).

279 De Nevers 2009:180.

280 Since attacks which target civilians are illegal under IHL, any such attacks are considered “criminal acts”, and as a result PMSCs “may lawfully defend themselves and those they are protecting ... without being viewed as taking a direct part in hostilities” (De Nevers 2009:180).

281 De Nevers 2009:181.

282 Mancini *et al.* 2011:334.

283 Mancini *et al.* 2011:334.

284 Sossai 2011:207.

285 Mancini *et al.* 2011:334.

286 Mancini *et al.* 2011:331.

static security of sites, escort security, convoy security and personal security details of high-ranking individuals”.<sup>287</sup> While they might have initially been recruited as “security guards”, they often became “private soldiers militarily armed”<sup>288</sup>, “often receiving *ad hoc* military training before being dispatched to Iraq or Afghanistan”.<sup>289</sup>

What then of dual-use sites (i.e. pipelines, radio towers, and electricity stations), which “could be seen to help a war effort owing to their role in supporting the state and its armed forces”?<sup>290</sup> In light of the presumption in favour of protected status for dual-use sites, the latter should be afforded civilian status, until the status of the installation can be deemed to be definitely military in nature. Only once the installation is classified as a military objective, can those PMSCs guarding it be targeted for participating directly in hostilities. As regards the issue of against whom PMSCs are guarding the particular site or persons, if they are using force in defence against criminal elements,<sup>291</sup> rather than parties to the conflict, their actions do not have the necessary *belligerent nexus* to amount to direct participation in hostilities.<sup>292</sup>

It is worth restating that “armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party<sup>293</sup> cannot amount to any form of ‘participation’ in hostilities taking place between these parties”.<sup>294</sup> On this basis, PMSCs who cause harm in “individual self-defence or defence of others”, or “in exercising power or authority over persons or territory” lack the *belligerent nexus* required for a qualification as direct participation in hostilities.<sup>295</sup> To this end, the UK government stated in its Green Paper that “private military companies be expressly prohibited from direct participation in armed conflict operations, and that firearms should only be carried and, if necessary, used by company employees for purposes of training or self-defence”.<sup>296</sup> Likewise, the US Department of Defence’s instruction of 3 October 2005 stated that “contractor personnel may be authorised to be armed for individual self-defence”.<sup>297</sup>

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287 Mancini *et al.* 2011:331.

288 Mancini *et al.* 2011:332.

289 Mancini *et al.* 2011:332

290 De Nevers 2009:186.

291 For example, “thieves and marauders, rather than enemy combatants” (Dinstein 2004:58).

292 De Nevers 2009:180.

293 Schmitt 2010:735.

294 Melzer 2010:873.

295 Van der Toorn 2009:19; ICRC 2009:64; Melzer 2010:873.

296 Foreign Commonwealth Office 2002; Sossai 2011:209.

297 Sossai 2011:209.

#### 4.1.4.10 PMSCs supporting the war effort

Another category of activities traditionally carried out by PMSCs<sup>298</sup>, which does not satisfy the direct causation requirement of the test, are those activities that are in “support of the war or military effort”.<sup>299</sup> This category includes: building military bases;<sup>300</sup> “working in military vehicle maintenance depots or munitions factories”,<sup>301</sup> and “providing supplies or services”<sup>302</sup> (such as catering<sup>303</sup> and selling goods<sup>304</sup> and medicine<sup>305</sup> to one of the parties to the conflict).<sup>306</sup> While PMSCs providing these services will not be deemed to be participating directly in hostilities, they are in “dangerously close proximity to combat”.<sup>307</sup>

### 5. The legal consequences for PMSCs found to be participating directly in hostilities

#### 5.1 The temporal scope of the loss of civilian immunity

Once a PMSC is classified as a civilian, their direct participation in hostilities does not result in the loss of their primary civilian status,<sup>308</sup> but it does temporarily suspend their civilian “protection against direct attack”<sup>309</sup> and exposes them to prosecution<sup>310</sup> for any violations of IHL, or domestic crimes committed, “for such times as” they engage in direct participation in hostilities.<sup>311</sup> According to the ICRC’s *Interpretive guide*, the scope of the “for such time” window will also include “measures preparatory<sup>312</sup> to the execution of a specific act”... “as well as the deployment to and the return

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298 Gaston 2008:225.

299 Watkin 2010:707.

300 Ricou Heaton 2005:189.

301 Watkin 2010:706; Schmitt 2010:710.

302 Watkin 2010:707; Schmitt 2010:728.

303 As was the practice of MPRI, Halliburton or Kellogg, Brown & Root (Schmitt 2010:708, 710; Ricou Heaton 2005:181; McDonald n.d.:1; Gaston 2008:225; Kidane 2010:393).

304 Watkin 2010:707.

305 Schmitt 2010:708.

306 Watkin 2010:707.

307 Ricou Heaton 2005:189.

308 ICRC 2009:70.

309 ICRC 2009:70.

310 ICRC 2009:83.

311 ICRC 2009:70; Melzer 2009:329; Ishøy 2008:107; Rogers 2004:22.

312 The ICRC *Interpretive guide* cites the following as examples of acts, which, if carried out as preparation for the undertaking of a specific hostile act, amount to direct participation in hostilities: “equipping, instructing, and transporting personnel; gathering intelligence; and preparing, transporting and positioning weapons and equipment” (ICRC 2009:65-67). (ICRC 2009:53-55; Sossai 2011:211-212; Melzer 2010:867; Ricou Heaton 2005:177-178, 180; Frye 2005:2610; Singer 2003:16; Gaston 2008:227; McDonald n.d.:1; Holmqvist 2005:57; ICRC 2012).



from the location of its execution”, as they “constitute an integral part of that act”.<sup>313</sup> These preparations for a specific hostile act are to be distinguished from preparatory activities which merely establish “the general capacity to carry out hostile acts”, or exhibit a generalised “campaign of unspecified operations”.<sup>314</sup> When a PMSC is no longer engaged in direct participation (and consequently, no longer poses a threat to the opposition), they regain their full civilian immunity<sup>315</sup> from direct attack, giving rise to what is called the ‘revolving door’ of civilian protection.<sup>316</sup> This temporary suspension of a civilian’s immunity from attack is only afforded to civilians who participate in hostilities in a “spontaneous, unorganized or sporadic basis”.<sup>317</sup>

## 5.2 Continuous combat function

The revolving door of protection is not extended to “members of organized armed groups belonging to a non-state party to an armed conflict”,<sup>318</sup> While this category of participant also loses immunity from direct attack, as is the case with a regular civilian, they, however, “cease to be civilians ... for as long as they assume their continuous combat function”,<sup>319</sup> and “can be attacked on a continuous basis”<sup>320</sup> for the duration of their membership of the group<sup>321</sup> or “until he or she ceases to assume such function”.<sup>322</sup> Since the loss of civilian protection, which results for those who assume a continuous combat function is more serious (in that it lasts for the duration of their integration<sup>323</sup> into, or membership of the group), it is necessary that only those group members who actually engage in the continuous combat function lose civilian immunity from attack.<sup>324</sup> These “members of an organized armed group who do not regularly perform

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313 Boothby 2010:747-750; Melzer 2010:880-881.

314 ICRC 2009:66. Examples of such general preparations (which do not amount to direct participation in hostilities) include “the purchase, smuggling, production, and hiding of weapons; recruitment and training of personnel; and financial, political, and administrative support to armed actors” (Melzer 2010:881; Boothby 2010:747).

315 The rationale behind this is that “even the fact that a civilian has repeatedly taken a direct part in hostilities, either voluntarily or under pressure, does not allow a reliable prediction as to future conduct” (ICRC 2009:71).

316 ICRC 2009:70. “By which an individual becomes immune from attack once he or she returns safely home and until he or she commences another operation” (Roberts 2009:41). The concept is not without its critics. See Watkin 2010:687; Van der Toorn 2009:1; Boothby 2010:757.

317 ICRC 2009:71.

318 ICRC 2009:71; Fenrick 2009:209.

319 ICRC 2009:70.

320 ICRC 2009:72.

321 Melzer 2010:883; Rogers 2004:19; ICRC 2009:71.

322 ICRC 2009:72.

323 Van der Toorn 2009:7.

324 Melzer 2010:846; Jensen 2011:2141-2149. Included in this exempted group are “political and administrative personnel, as well as other persons not exercising a combat function” (Van der Toorn 2009:7).

combat duties continue to enjoy full civilian protection from attack unless they directly participate in hostilities”.<sup>325</sup> Similarly, “private contractors and civilian employees”, contracted to organised armed groups, “were entitled to protection from direct attack unless and for such time as they engaged in direct participation in hostilities”.<sup>326</sup> Consequently, the loss of civilian protection against attack would not apply to “recruiters, trainers, financiers, propagandists, or those who purchase, smuggle, store, manufacture, or maintain weapons and other military equipment”.<sup>327</sup> According to the *Interpretive Guide*, “once a member has affirmatively disengaged<sup>328</sup> from a particular group, or has permanently changed from its military to its political wing,<sup>329</sup> he can no longer be regarded as assuming a continuous combat function, and must be presumed<sup>330</sup> a civilian protected against attack unless and for such time as he directly participates in hostilities”.<sup>331</sup>

On those occasions when PMSCs are found participating (either directly or in the preparation for such activities) in hostilities as part of an “organised armed group belonging to a non-state party to an armed conflict”, it is possible that they may be seen as adopting a continuous combat function and will “lose their entitlement to protection against direct attack”,<sup>332</sup> and might face prosecution upon capture.<sup>333</sup> PMSCs are unlikely to fall into this category unless they train armed forces for specific hostile acts, accompany their trainees into battle and engage enemy combatants, or gather military intelligence for targeting purposes, on a continuous basis.

If PMSCs are captured after being found to be participating in hostilities, “they run the risk, ... of being accused of perfidy, [or] unprivileged

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325 Schmitt 2010:704.

326 Watkin prefers to apply the continuous loss of civilian immunity from attack “not only to fighting personnel of organized armed groups, but essentially to any person who could be regarded as performing a ‘combat’, ‘combat support’, or even ‘combat service support’ function for such a group, including unarmed cooks and administrative personnel” (Melzer 2010:913). Van der Toorn shares a similar concern that the “continuous participation requirement ... imposes a very high threshold and would likely exclude a large number of individuals”, who for all intents and purposes are “carrying out substantial and continuing integrated support functions for such groups”, but “who fight for the group on a regular but not continuous basis” (Watkin 2010:664; Melzer 2010:837, 850).

327 Jensen 2011:2137-2146.

328 “Disengagement from an organized armed group need not be openly declared; it can also be expressed through conclusive behaviour, such as a lasting physical distancing from the group and reintegration into civilian life or the permanent resumption of an exclusively non-combat function” (ICRC 2009:72).

329 Melzer 2010:891.

330 ICRC 2009:73.

331 Melzer 2010:891.

332 ICRC 2009:73.

333 Melzer 2010:847; ICRC 2009:83; Roberts 2009:41.

belligerency”,<sup>334</sup> and can “be prosecuted for mere involvement in hostilities”,<sup>335</sup> without any benefit of POW status.<sup>336</sup>

## 6. Conclusion

In summary, most legal scholars agree that, while there is no legal obstacle to PMSCs being classified as combatants or mercenaries, most agree that the attainment of either of these conditions is likely to be rare.<sup>337</sup> While “there is no single simple answer applicable to all”,<sup>338</sup> it is more common that PMSCs will remain classified under IHL as civilians. As ordinary civilians, PMSCs must take care not to “participate directly in hostilities”.<sup>339</sup> Despite this legal position, PMSCs as “civilians are increasingly performing duties once reserved for military personnel and becoming increasingly intertwined with, and essential for combat operations”,<sup>340</sup> In the words of the Coalition Provisional Authority official in Iraq, “the military role and the civilian-contractor role are exactly the same”.<sup>341</sup> Even the UN working group concedes that its most recent draft treaty on PMSCs does not aim to ban outright their use; rather it aims at setting standards and “regulating the activities of PMSCs and their personnel”.<sup>342</sup>

There is widespread agreement that, when PMSCs “engage in combat activities” (such as the accounts of “Executive Outcomes and Sandline International contracting to fight wars for the governments of Sierra Leone and Angola in the 1990’s”),<sup>343</sup> these activities amount to unlawful direct participation in hostilities. While these kinds of activities have received “widespread condemnation”, PMSCs have reinvented themselves,<sup>344</sup> “rejecting ... an explicit combat role”, to the extent that “some scholars argue that a norm against offensive missions is emerging”.<sup>345</sup> “British

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334 Rogers 2004:22.

335 Sossai 2011:215; ICRC 2008:39.

336 Solis 2010:199.

337 ICRC 2008:36; Banks 2011:228-235.

338 Gillard 2005:2; Kidane 2010:412.

339 Rogers 2004:22.

340 Ricou Heaton 2005:179.

341 Ricou Heaton 2005:179.

342 ICRC 2008:36.

343 De Nevers 2009:179.

344 EOD Technologies Inc. claims to provide “munitions response, security services, and critical mission support. Its security services include armed security, guard force and reaction force training, surveillance and surveillance detection, counter IED response services, and security consulting” (Kidane 2010:364). ArmorGroup International plc provides “protective security; [a] risk management consultancy; security training; development, humanitarian, and construction support; and weapons reduction and mine action services ... to more than 5,000 security professionals, government officials, and corporate executives and their families worldwide” (Elsa *et al.* 2008:11). DynCorp International LLC provided “police training and related services in Iraq” (Elsa *et al.* 2008:9). Singer 2003:92; De Nevers 2009:175; Holmqvist 2007:5.

345 De Nevers 2009:179.

industry officials argue ... that British companies are 'purely defensive', while US industry representatives, in discussing offensive actions, insist that 'none of the companies do it'.<sup>346</sup> Others argue that it still happens, but that PMSCs do not advertise these services openly, and "have simply learned to avoid public view".<sup>347</sup> Regardless of how they brand themselves, where PMSCs have been "hired for the explicit purpose of engaging in combat operations",<sup>348</sup> sabotaging military capacity, operating weapons systems in the theatre of hostilities, guarding captured military personnel, gathering military intelligence for identifying military targets, conducting training for predetermined hostile acts, their actions clearly satisfy the threshold of harm requirement. Since a large part of the role performed by PMSCs is the provision of guarding services, it must be noted that sometimes even defensive guarding can violate the notion of direct participation in hostilities. Much turns on the nature of the site being guarded, the IHL status of individuals being protected, and the nature of the attack (i.e. carried out by criminals or linked to the armed conflict). That said, as civilians, they would by law still be permitted to carry "light, personal weapons for their own self-defence or the defence of those they are protecting".<sup>349</sup>

To conclude then, some "activities undertaken by PMSC can, depending on the circumstances"<sup>350</sup> be "covered by the notion of direct participation in hostilities as specified in the ICRCs Interpretive Guidance".<sup>351</sup> When PMSCs do participate directly in hostilities on a sporadic basis, they will temporarily lose their civilian immunity "for such time as" their behaviour continues. When PMSCs engage in specific hostile acts which satisfy the direct causation and *belligerent nexus* tests, and they do so on a continuous basis, they will forfeit their civilian immunity until they abandon their membership of the group, or adopt a non-combative function.

If PMSCs do participate directly, they may become legitimate targets for the opposition,<sup>352</sup> as do any civilians who participate in hostilities with state authorisation. Once they are rendered "hors de combat", they are once again clothed with their civilian immunity from attack.<sup>353</sup> Should they fall into enemy hands after such participation, they will still be treated humanely as civilians, held to account for their unauthorised actions,<sup>354</sup> and afforded the "regular and fair judicial guarantees" extended to civilians.<sup>355</sup> They will not enjoy POW status, unless they possess an identity card, as "civilians accompanying the armed forces".

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346 De Nevers 2009:179.

347 De Nevers 2009:179.

348 Ricou Heaton 2005:188.

349 Rogers 2004:22.

350 Tougas 2009:338.

351 Mancini *et al.* 2011:334.

352 Dworkin 2004:2.

353 Gasser 1995:233.

354 Kidane 2010:400-401.

355 GC IV:article 5(3); AP I:article 75; Gasser 1995:211; ICRC 2012.

In the end, it is imperative for the international community to understand just how PMSCs fit into the existing IHL structure, so that when, for example, “Blackwater employees, protecting a diplomatic convoy, fire upon and kill Iraqi’s” in Nisoor Square (as was the case in September 2007),<sup>356</sup> IHL can make legal sense of the status of the participants, their legal obligations, and ensure that IHL responds appropriately.

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356 Elsea *et al.* 2008:8.

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