



ICRC

Expert Meeting on the Notion of "Direct Participation in Hostilities under IHL"
(Geneva, 23 to 25 October 2005)

Background Document Working Sessions VIII and IX: **Individual Contractors and Civilian Employees**¹

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¹ This Background Paper has been prepared by Avril McDonald for the Third Informal Expert Meeting on "Direct Participation in Hostilities under International Humanitarian Law" (Geneva, 23 to 25 October 2005). The remarks and positions expressed therein are intended to facilitate the discussion and neither claim to be comprehensive or exhaustive nor intend to limit the discussion or preconceive its outcome in any way. The paper is written in a personal capacity and does not necessarily express the views of the ICRC or the TMC Asser Institute.

1. THE PRINCIPAL ACTORS

A preliminary question concerns the terms by which the principal actors should be referred. Given that the terms describe a legal relationship, the question is of some importance and the group might consider whether for the sake of clarity and legal precision particular terms might be preferred. Below are the terms that either are or could be used:

1.1 The Contractors

The private military and security companies (PMCs) who contract (the primary contract) with the contractee client to provide a service, for which they subcontract (the secondary contract or the subcontract) with individual contractors. They are also described as the private contractors or (private) contractor companies.

It should first be noted that international law provides no definition of a private military or security or defence contractor. The difficulty in defining what is a military or security contractor, as both a matter of law and fact, is partly attributable to the wide range of services provided by companies falling under the loose umbrella of private military or security companies. For the purposes of this discussion, we refer to private companies, whether they style themselves as private military or security or defence companies, *inter alia*, who provide under contract to a contractee a range of military, quasi military and security services and the individuals to execute them, which may or may not involve those individuals in taking a direct part in hostilities (DPH) during an armed conflict. While the nature of the service contracted is obviously an important factor in ascertaining whether or not it does involve DPH, it is not determinative. Key is the activities actually engaged in.

1.2 The Individual Contractors

The individuals who are subcontracted by the PMCs to a public or private client to perform military or security functions are also characterized in various ways. They could be called individual contractors or contractor employees or contractor personnel, *inter alia*, although since they are subcontracted – and this creates an added legal distance between them and the client – the term subcontractor could also be used. While this term is often used to refer to companies who are hired by a principal contractor to execute part of a larger contract, it can also refer to individuals.

The legal position of the individual under international humanitarian law depends not so much on how they are characterised or even the work they are contracted to do but mainly on the activities in which they engage. One can distinguish between an individual hired to work for a state (including a state's armed forces or by a state department) and a subcontractor hired to work for a purely private organisation (including a non-state military force).

Assuming that they are civilians, if they take a direct part in hostilities, the principal consequence is that they lose their protection and can be attacked for the duration of their participation.

1.3 The Contractees

The contractees are the clients for the PMCs' (and, indirectly, the individual contractors') services. They can be either a public or private actor. In many cases, and increasingly so, individual contractors/subcontractors are hired by the armed forces of a state to perform many former military functions or support functions.² Individual contractors who work on behalf of a state could be considered as state contractors. It remains to be discussed whether individual contractors who are hired by a state could in any circumstances be considered as members of that state's armed forces. The responsibility of a state for the actions of an individual contractor is not clear.

The contractee could equally be a non-state actor involved in hostilities, such as an armed opposition group.

Individual contractors are also hired by many IGOs and NGOs to perform a variety of functions, in particular security, as well as by private companies. In each of these cases, the chances of DPH is small. In most cases, the use of force would involve self-defence. There would hardly be a link to the hostilities.

² In the US, for example, individuals are also subcontracted to work for various governmental departments other than defense, such as the Department of State, or by governmental agencies such as the CIA.

1.4 The Civilian Employees

Many civilians are employed directly by the armed forces. These individuals are not generally considered to be members of the armed forces. Instead, they are considered to be civilian employees of the Department of Defense. They do not fall under the military chain of command, and are not subject to military discipline.

Assuming that such people are at all times to be considered as civilians, they could be employed in jobs that could potentially involve their DPH.

Only individual contractors or civilian employees can potentially take a DPH; legal persons, such as the PMCs themselves, obviously cannot.

2. QUESTIONS RAISED IN SITUATIONS OF INTERNATIONAL ARMED CONFLICT

This background paper deals with both individual contractors and civilian employees of armed forces. In both cases there appears to be an assumption that they are *prima facie* civilians, although the group could examine whether this assumption is justified in all circumstances, in particular with regard to civilian employees and individual contractors who are required by virtue of their nature of their work or the contract to take to a direct part in hostilities.

The first main issue to be examined concerns whether individual contractors and civilian employees can be considered as members of armed forces under IHL applicable in international armed conflict. If they are, then they can be considered combatants,³ and the question of their direct participation in hostilities as civilians does not arise.

³ 'Members of the armed forces of a Party to the conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.' According to the ICRC, this is a rule of customary international law in international armed conflicts. CIHL, *Customary International Humanitarian Law*, Volume I: Rules (Geneva, ICRC/Cambridge, Cambridge University Press 2005) p. 11 (hereafter, CIHL).

2.1 Criteria for Membership of the Armed Forces

According to Article 43 of 1977 Additional Protocol I:

'The armed forces of a Party to a conflict consists of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflicts.'

The ICRC Study on Customary International Law considers this to be a rule of customary international humanitarian law applicable in international armed conflict.⁴

Since the adoption of Additional Protocol I, the assumption is that all members of the armed forces – with the exception of medical personnel and chaplains and members of civil defence forces – are combatants.⁵ Unless our individual contractors or civilian employees qualified as one of these exceptional members of the armed forces who are not combatants, arguably, *prima facie*, they should be considered as civilians.

2.1.1 *Could private contractors be considered as members of a state's armed forces?*

As stated, individuals who are hired under contract by the armed forces of a state through a private military company to perform certain functions are not generally considered by those states to be members of the armed forces either directly or indirectly or through their membership of groups that act alongside the armed forces. They are not considered to be

⁴ The CIHL Study articulates the rule thus: Rule 4: 'The armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.' 'For purposes of the principle of distinction, it may also be applicable to State armed forces in non-international armed conflict.' CIHL, *ibid.*, p. 14.

⁵ As the ICRC *Commentary* on Additional Protocol I states: 'The general distinction made in Article 3 of the Hague Regulations, when it provides that armed forces consist of combatants and non-combatants is no longer used. ... All members of the armed forces are combatants, and only members of the armed forces are combatants.' *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, ICRC 1987) p. 515, para. 1677 (Hereafter, *Commentary on AP I*).

combatants.⁶ At the domestic level, in order for an individual to become a member of the armed forces, a formal process of incorporation has to occur – the individual has to either voluntarily join the armed forces or be conscripted. In doing so, he becomes a combatant and loses his civilian immunity from attack. It is precisely because individual contractors are not recognized as combatants at least at the national level that the US Army Field Manual on Contractors recommends that they receive adequate protection in the field,⁷ Likewise, the UK Military Manual states that civilians who accompany the armed forces in the field, so far as possible, ‘should not be deployed to places where they are liable to come under enemy fire or to be captured’.⁸

It can be argued that membership of the armed forces under Article 43 is based purely on functional fact, and does not depend on any formal process of incorporation, either at an individual or group level.⁹ On the other hand, although it is true that formal incorporation is not a stipulated requirement for forces, units and group, it might be implied. It may be significant that the individual contractors do not operate under the command of the armed forces, at least *de jure*, and cannot be disciplined by the commanding officer.¹⁰ Their

⁶ US Department of Defense Instruction, Number 3020.41, ‘Contractor Personnel Authorized to Accompany the U.S. Armed Forces, October 3, 2005, states that where they accompany the armed forces in the field, they shall be considered as civilians accompanying the force, so long as such personnel have been designed as such by the force they accompany and are provided with the appropriate identification card under the provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War...’ p. 6.

⁷ ‘Contractor employees, because of their status as civilians authorized to accompany the armed forces in the field, bring with them an inherent need for force protection.’ *Contractors on the Battlefield*, FM 3-100:21 (100-21), January 2003, Headquarters Department of the Army, p. 6-1 (para. 6-3) (hereafter, FM on Contractors).

⁸ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, Oxford University Press 2004) p. 40, para. 4.3.7.

⁹ In her comments on the paper of Mike Schmitt during the 2004 meeting Louise Doswald-Beck’s view was that: ‘Combatant status: membership in armed forces does not depend on the technicalities of national law. Decisive are the requirements of international law and whom these persons actually appear to fight for in the eyes of the enemy. In terms of GC III, if Article 4 A [1] GC III does not cover these contractors, Article 4 A [2] GC III probably would. The need for formal uniforms is less important today and contractors are still sufficiently distinguishable by their equipment and outfits. As all other criteria are fulfilled, they can be attacked.’ Summary Report of the Second Expert Meeting on Direct Participation in Hostilities under International Humanitarian Law, The Hague, 25 – 26 October 2004, Co-organized by the ICRC and the TMC Asser Institute, p. 12 (hereafter, Summary Report).

¹⁰ Mike Schmitt has stated: ‘Since civilian employees and private contractors do not wear uniforms denoting combatant status, seldom fall under the formal command of military personnel, and generally lie beyond the reach of military discipline that the armed forces use to enforce adherence to the “laws and customs of war,” it

behavior is regulated both through the terms of the contract (with the onus on the contractor to discipline them) and, in some cases, under the domestic law of the host or the sending state.¹¹

It should be noted that individual contractors and civilians do not necessarily comply with the conditions of combatancy, including the principle of distinction or take positive steps to distinguish themselves from the civilian population, and the question must be asked whether the opposing party would be able to distinguish them as combatants.

As to whether individuals can be considered as members of the armed forces of a party to the conflict of which they are not nationals, there would not appear to be any obstacle.¹²

Questions for discussion

- Ø As long as individuals are not directly employed by the military, that is, as long as they remain contractors, can they at the same time be members of a state's armed forces?

would be stretch to style them members of the armed forces.' 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees', 5 *Chicago Journal of International Law* (2004) pp. 511 at 526.

¹¹ US Department of Defense Instruction, Number 3020.41, states that 'Defense contractors are responsible for ensuring employees perform under the terms of the contract; comply with theatre orders, and applicable directives, laws, and regulations; and maintain employee discipline. . . . However, the ranking military commander may, in some emergency situations (e.g., enemy or terrorist actions or natural disaster), direct contingency contractor personnel to take lawful action as long as those actions do not require them to assume inherently governmental responsibilities barred under subparagraph 6.1.5. ...Outside the assertion of criminal jurisdiction for misconduct, the contractor is responsible for disciplining contingency contractor personnel. Commanders have limited authority to take disciplinary action against contingency contractor personnel. However, the commander has authority to take certain actions affecting contingency contractor personnel, such as the ability to revoke or suspend security access or impose restriction from installations or facilities. Only the Department of Justice may prosecute misconduct under applicable Federal law,....absent a formal declaration of war by Congress (which would subject civilians accompanying the armed forces to UCMJ jurisdiction). Contingency contractor personnel are subject to the domestic criminal laws of the HN, absent a SOFA or international agreement to the contrary.' *Supra* n. 6, p. 15, para. 6.3.3.

¹² Rogers has noted that: 'The Protocol makes no reference to nationality, nor is the question mentioned in the ICRC *Commentary* on the Additional Protocol. It would seem, therefore, that so long as a person is a member of the armed forces of a party to the conflict, or of armed forces for which a party to the conflict is responsible, irrespective of his nationality, he is entitled to combatant, and prisoner-of-war, status.' A.P.V. Rogers, *Law on the Battlefield*, 2nd edn. (Manchester, Manchester University Press 2004) p. 32.

- Ø Under IHL, could the individual contractors be considered as members of the armed forces without formally joining them by virtue of their *de facto* involvement as persons fighting on behalf of a Party to an armed conflict?¹³
- Ø Can individual contractors be considered as members of the armed forces without coming under the command and control of the armed forces?
- Ø Could they be considered as members if they fell under *de facto* if not *de jure* military command, if they were coming under orders?
- Ø Can individual contractors be considered as members of the armed forces of a state if they do not owe their allegiance to that state, that is, contractors of a different nationality?
- Ø If individual contractors can be considered as members of the armed forces, what are the criteria that define their membership?

2.1.2 *Could civilian employees be considered as members of the armed forces of a Party to the conflict?*

Although individual civilians can be employed by the armed forces, even on a permanent and pensionable basis, they are not generally considered by those armed forces to be members of the armed forces within the meaning of Article 43 of Additional Protocol I, which refers to ‘all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates...’. They have not undergone the process of formal incorporation into the armed forces which is required at the domestic level. The former recognition in the Hague Regulations that the armed forces could consist of both combatants and non-combatants no longer exists¹⁴ since the adoption of Additional Protocol I, which the above-mentioned exception of medical, religious and civil defence personnel.

As to whether they could be considered as *de facto* members of the armed forces, at the 2003 expert meeting, Mike Schmitt argues that: ‘simple logic further requires that civilian

¹³ This was certainly the view of Louise Doswald-Beck at the 2004 Expert Meeting in her Comments on the Paper of Mike Schmitt. The Summary Report summarized her remarks as follows: ‘In terms of AP I, contractors are fulfilling governmental functions and therefore clearly fall within the scope of the notion of "armed forces" according to Article 43 AP I. This is not eliminated by the obligation of notification in Article 43 [3] AP I, which is not a constitutive requirement.’ Summary Report, *supra* n. 9, p. 12.

¹⁴ Article 3, 1907 Hague Regulations.

government employees cannot circumvent formal incorporation by fulfilling the less stringent requirements established by Article 4 A (2) GC III for *de facto* membership in the armed forces. While this would be theoretically possible for private contractors, they would only rarely fulfil the four criteria of the said article.¹⁵

Questions for discussion

- Ø Could individual civilians who are employed directly by the military be considered as members of the armed forces in any circumstances?
- Ø Could civilians operating in the field under the military chain of command be considered as combatants?

2.1.3 *Might the group to which the civilian belongs qualify as part of the armed forces?*

Even if an individual has not directly joined the armed forces, it is possible that he could be considered a member by virtue of his membership of a force, group or unit that belongs to the armed forces. The question is then whether the group itself is part of the armed forces, which requires determining, *inter alia*, what is meant by ‘force, group or unit’ and what is required by IHL in order for a group to be capable of being recognized as such and as part of the armed forces.

It is clear that the requirements of organization and discipline that Article 43 imposes on armed forces apply not only to the armed forces as a whole but to all constituent forces, groups and units that make up the armed forces. Individual members of a force, group or unit are also obliged to comply with IHL. A force, group or unit can be considered as part of the armed forces of the party to a conflict when it has the following features: (1) A level of organization, (2) Which demonstrates itself in responsible command and control of subordinates. The group must have an internal disciplinary system, which shall, *inter alia*, enforce compliance with IHL. It is not clear whether in order to be considered as part of the armed forces there is an additional requirement of formal incorporation of the group into the armed forces and notification of this to the other Parties. The ICRC, for example, does not consider notification to be a constitutive prerequisite of armed forces. On the other hand, notification of the other parties to the conflict might be considered an implied requirement. Article 43(3) of Additional Protocol I requires a Party that has incorporated a paramilitary or law enforcement agency into its armed forces to notify the Parties to the conflict, and one

¹⁵ Summary Report, *supra* n. 9, p. 11.

could argue that such a requirement is implicit for all organized armed forces, groups and units.¹⁶ If organized armed forces, groups and units are not recognized as part of the armed forces by the party they are claimed to represent, arguably there is no duty on the other parties to recognize them as part of the armed forces.

Questions for discussion

- Ø Which is the force, group or unit of which civilian employees or individual contractors could be members, and which could be part of the armed forces?
- Ø Could a PMC be considered as an armed group to which the individual contractors belong and which is part of the armed forces? Could, for example, Haliburton be considered as a group which is part of the US Armed Forces?
- Ø Does the force, group or unit refer to the part of the armed forces to which individual contractors or civilian employees are affiliated?
- Ø Does the group to which the individual contractors or civilian employees belong demonstrate the requisite level of organization and discipline, including compliance with IHL?
- Ø If the group of which the individual contractor is a member is acting alongside the armed forces, could it be considered as part of the armed forces without explicit incorporation and notification?

2.1.4 *Could individual contractors be considered as members of other militia and members of other volunteer corps forming part of the armed forces?*

Article 1 of the Hague Regulations states that: 'The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly;

¹⁶ The Summary Report noted Mike Schmitt's remarks at the 2004 meeting with respect to *de jure* membership in armed forces: 'According to Article 43 [3] AP I, even armed law enforcement and paramilitary organizations cannot become *de jure* members of armed forces without formal incorporation and notification. Therefore - *a fortiori* - the same must be the case for civilian employees and private contractors. Formal incorporation requirements depend on national law.' Ibid.

4. To conduct their operations in accordance with the laws and customs of war.¹⁷

These militia and volunteer corps form part of the armed forces of a Party to the conflict or fight alongside it.

Questions for discussion

- Ø Could individual contractors be considered as members of other militia and members of other volunteer corps forming part of the armed forces?
- Ø Even if the individual contractors could be considered as members of militia or other volunteer corps, would such corps have to be formally incorporated into the armed forces in order for them to be considered as members of the armed forces?

2.2 Definition of "Civilian accompanying Armed Forces"

Individual contractors and civilian employees could in some cases be considered as '[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, ... supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card . . .'¹⁸

The ICRC Study on Customary International Humanitarian Law points out that 'civilians accompanying armed forces ... are not members of the armed forces by definition'.¹⁹ The US Army Manual *Contractors on the Battlefield* states that '[c]ontractors and their employees are not combatants but civilians "authorized" to accompany the force in the field . . . They are responsible for the welfare of the armed forces.'²⁰ Elsewhere it states: 'Contractor employees ... cannot take an active role in hostilities but retain the inherent right of self-defence'.²¹

¹⁷ While Additional Protocol I introduced new rules, it did not abrogate those in the Hague Regulations. See *Commentary, supra* n. 5, p. 510, para. 1669.

¹⁸ Article 4(A)(4) Third Geneva Convention.

¹⁹ *CIHL, supra* n. 3, p. 13.

²⁰ FM on Contractors, *supra* n. 7, para. 1-21.

²¹ *Ibid.*, p. 6-1, para. 6-2.

In a conflict zone, the types of supply contractors who might be accompanying and providing for the welfare of the armed forces include drivers, engineers, cooks, security guards, etc. Most of these jobs do not require or involve DPH.

The US Field Manual on Contractors notes that the POW status of contractors accompanying the armed forces is recognized both by Additional Protocol I and by Article 13 of the Hague Regulations, but it states that ‘During armed conflict with nations that are not signatories to these treaties, the status of contractors may be less clear.’²²

Questions for discussion

- Ø What is the legal status of individual contractors accompanying armed forces during armed conflicts with states that are not party to Additional Protocol I?
- Ø Is there an absolute requirement for their physical presence in the zone of hostilities? Could individual contractors who provide remote support for the military, such as intelligence analysts working outside the zones of hostilities, could be considered as (virtually) ‘accompanying’ the armed forces?
- Ø If individual contractors accompanying the armed forces take a DPH, do they at all times remain as civilians?

2.2.1. *Consequences of DPH for "Civilians accompanying Armed Forces"?*

Civilians who are authorized to accompany the armed forces, such as supply contractors, are entitled to POW status if captured,²³ providing they are properly accredited, as expressed by an identity card. They are entitled to the benefit of the doubt about that status, which shall be accorded to them from the time of their capture. The fact that they have directly taken part in hostilities should not affect their POW status under international humanitarian law as DPH is not per se an offence under that law, but they could potentially be tried for that offence by a state if it is an offence under its national law and if there is jurisdiction under domestic law.

²² Ibid., p. 4-13, para. 4-53.

²³ Art. 4(A)(4) Third Geneva Convention of 1949. See also US Department of Defense Instruction, Number 3020.41, ‘Contractor Personnel Authorized to Accompany the U.S. Armed Forces, October 3, 2005, p. 6.

Questions for discussion

- Ø If individual contractors accompanying the armed forces take a DPH, do they lose their POW status?

3. QUESTIONS RAISED IN NON-INTERNATIONAL ARMED CONFLICT

3.1. Criteria for 'Membership in Armed Forces' Under IHL/NIAC

There have been many examples of individual contractors working for armed opposition groups. Peter Singer reports that in Africa, private military firms have reportedly worked for rebels in Senegal, Namibia, Angola, Burundi and Sudan.²⁴

Questions for discussion

- Ø Could individual contractors employed by PMCs to provide services to rebels be considered as 'members' of these rebel groups?
- Ø If one considers the process of becoming a member of a group as one of incorporation into it or joining it, whether voluntarily or coercively, then could individual contractors collectively providing a service to rebels be considered as members of those groups, absent some positive act of incorporation?

3.2. Can Private Companies Qualify as Armed Groups (Party to NIAC)?

Even if a PMC provides direct military support to a rebel group during an armed conflict, it is a private company organized along corporate lines rather than an armed group organized on military lines, but on the other hand, it might be possible that it could be both at the same time. Mercenaries and other groups fighting for money, for example, in West Africa combine both criteria. While the PMC is not usually itself considered as a party to an armed conflict, but is regarded as providing support to a party, this is no different than any resistance group, militia, volunteer group in an international armed conflict. On the other hand, it is significant to note that the discipline of the subcontractors is enforced through the company; it is company that exercises command, not the Party to which the group is providing support.

²⁴ P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca and London, Cornell University Press 2003) p.11.

Questions for discussion

- Ø Could private military companies, particularly ones providing direct military support, themselves be considered as an armed group which is party to a non-international armed conflict?
- Ø If you had a situation where a PMC was paid by a government in exile to carry out a military coup which turned into a prolonged armed conflict, and it was the only armed force operating for the government in waiting, could the PMC in such circumstances be considered as an armed group and a party to an internal armed conflict (armed forces of the exile government)? Could a PMC engaged by a state and acting as its only armed force be considered as an armed group? Or could the members of the group constitute the armed group, rather than the company?

3.3 If PMCs Can Be Considered as Armed Groups, to What Extent Can Individual Contractors Be Considered as Members of such Groups?

Questions for discussion

- Ø To the extent that a PMC could in some cases perhaps be considered as an armed group, could the individual contractors who would take a DPH be members of that group?
- Ø If so, how would their membership be constituted? By virtue of the contract or their functional involvement?
- Ø Would they only be members of the group for the duration of their contract or their actual involvement?

4. DETERMINING THE CLEAR CUT CASES OF PARTICIPATION AND NON-PARTICIPATION

4.1 Could the Following Be Considered as Clear Cut Cases of Participation?

- Ø Direct attacks on military objectives?
- Ø Defence of military objectives
- Ø Human shields

- Ø Operations to rescue captured civilian hostages or military personnel within enemy territory²⁵
- Ø Operation of weapons systems²⁶
- Ø Loading and maintenance of weapons systems – remotely and in the zone of hostilities
- Ø Computer network attack
- Ø Driving ammunition trucks to supply troops during hostilities
- Ø Force protection – actions taken to prevent or mitigate hostile actions against personnel, facilities and critical information?²⁷
- Ø Tactical level planning of the conduct of the hostilities
- Ø Other

4.2 Acts Definitely Not Involving DPH

Can the following acts be ruled out as constituting DPH?

- Ø Personal self-defence²⁸
- Ø Acts merely supporting the war effort
- Ø Other

5. GREY AREA ACTS

Some activities engaged in by individual contractors give rise to questions:

²⁵ The Summary Report of the 2004 meeting gives as examples of DPH: ‘attacking or defending military objectives; human shields; operations to rescue civilian hostages or military personnel’, *supra* n. 9, p. 11.

²⁶ The German Military Manual, for example, states that ‘Combatants are persons who take a direct part in hostilities (Art. 3 HagueReg; Art. 43 para 2 AP I), i.e. participate in the use of a weapon or a weapon-system in an indispensable function.’ *Humanitarian Law in Armed Conflict – Manual*, August 1992 (DSK VV207320067) (Federal Ministry of Defense of the Republic of Germany), VR II 3, chapter 3, para. 301.

²⁷ The FM on Contractors stipulates that while contractor employees themselves require force protection, they cannot be required to perform force protection and cannot take an active part in hostilities but retain the inherent right of self-defence. ‘Because of their civilian background, they may possess neither the training nor expertise to actively participate in force protection measures, and the rules of warfare preclude them from doing so except in self-defense.’ *Supra*, n. 7, p. 6-1, para. 6.3.

²⁸ According to the UK Military Manual: ‘Non-combatant members of the armed forces are, however, legally permitted to defend themselves against acts of violence which are directed against them and, for this purpose, the use of firearms may be justified.’ UK Military Manual, *supra* n. 8, p. 38, para. 4.2.3.

- Ø Some types of defensive use of force, such as protection of a military objective and defense of civilians
- Ø Some types of intelligence gathering and analysis particularly remote
- Ø What criteria should be used for determining DPH in grey areas? Essential contribution? Criticality?

6. THE TEMPORAL RANGE OF DIRECT PARTICIPATION BY CIVILIANS

As some of the tasks involving DPH might be engaged in on a continuing basis by the civilian employee or individual contractor who is employed in a particular job, it becomes critical to establish what is the temporal range of participation in these cases. If a civilian is employed by the armed forces to operate a weapons system on an ongoing basis during an armed conflict or engage in a series of computer network attacks, he could be regarded as participating in hostilities on an ongoing basis in the same way as a member of an armed opposition group during a non-international armed conflict. One could argue that he only 'opts out' to the extent that he goes home after work and is free on the weekends. Even if he is not a member of the armed forces, or of an armed group, he is equally a continuing military threat, at least during 'office hours'.

The advantage of lifting the civilian's protection for the duration of his employment in a position requiring or involving his direct participation in a position is that his status becomes much clearer and decision-making much easier. The difficulty is that many civilians who may not even be aware of the danger to which they are exposing themselves would become military objectives for an extended period of time. If an individual is not actually aware that he is taking DPH, can he be assumed to have formed the necessary *mens rea* to do so?²⁹

Limiting the loss of protection to those periods when the civilian employee or individual contractor is involved in a positive act of participation would mean far greater protection for the individual civilians who from time to time engage in DPH, but the civilians would nevertheless be unprotected for that limited period.

²⁹ Summary Report, *supra* n. 9, p. 11.

The problem is that the increased reliance on both civilian employees and private subcontractors to perform many essential military functions has created a category of individuals whose jobs may require them to act contrary to national law in some cases insomuch as it involves their DPH and to expose themselves to attack without giving them the privileges of combatancy. Obviously, IHL recognizes only two categories: combatants and civilians. Even if the civilian employees and individual contractors could be considered as members of an armed group under IHL during international armed conflict, the armed forces consider and treat them as civilians. While it is not unlawful under international humanitarian law for an individual to take a direct part in hostilities, so the state would not be complicit in any international crime by hiring or permitting civilians to take DPH, the question is whether PMCs can be hired by a government to conduct hostilities for a state without becoming its irregular 'armed forces'. Is it acceptable or legal to have a situation where there are a large and growing number of people³⁰ whose job requires them to behave as combatants but without enjoying any of the benefits of combatancy? Such people have fought for states throughout the centuries (including mercenaries and privateers) and have always been regarded as legitimized by the state on whose behalf they were acting. That is the very purpose of combatancy and its extension to all groups fighting on the state's behalf.

As to how to address the problem, one way would be by regarding them as combatants based on the assumption that those individuals who are functionally required to take a DPH thereby become part of the armed forces even if only on a temporary basis. This would not appear to pose any problems under Article 43 of Additional Protocol I. Of course, this would only affect individual contractors or civilian employees who are hired by governments, and not those acting for non-state parties.

Questions for discussion

- Ø Should civilian employees whose job requires them to take a DPH be treated in the same way as members of armed groups in NIAC, that is, as losing their protection

³⁰ The FM on Contractors states: 'Recent reductions in military structure, coupled with high mission requirements and the unlikely prospect of full mobilization, mean that to reach a minimum of required levels of support, deployed military forces will often have to be significantly augmented with contractor support. As these trends continue, the future battlefield will require ever increasing numbers of often critically important contractor employees.' *Supra* n. 7, Preface.

from attack so long as they engage in that function or are acting on behalf of a party to the conflict?

- Ø Or should they be subject to direct attack only while on active duty, a so-called 'nine to five' rule?
- Ø Or should they lose their protection only when they prepare for, engage in and carry out an attack or the acts that make possible an attack?
- Ø Is it possible to develop a rule that could be applied across the board to all individual contractors and civilian employees?
- Ø Should all civilians who take a direct part in hostilities and who are not members of organized armed groups be treated in the same way?
- Ø Under Art. 1 Hague IV Regulations would it be possible to envisage individual contractors as constituting some type of reserve force or voluntary militia, membership of which could be constituted only for the duration of a particular contract?
- Ø Should individual contractors or civilian employees who are required to take a DPH be integrated into the military or given combatant status for the duration of this participation³¹ or as long as they act on behalf of the armed forces?
- Ø How would you deal with the resulting imbalance in status between government and non-government individual contractors?

³¹ This would probably have to be seen as ongoing rather than limited. With respect to guerrillas, the *Commentary* on Additional Protocol I states that: '...it does not allow this combatant to have the status of a combatant while he is in action, and the status of a civilian at other times. It does not recognize combatant status "on demand".' *Commentary, supra* n. 5, p. 516, para. 1678. The argument applies equally with respect to subcontractors or civilian employees.