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Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees

Expert Paper submitted by

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Over the past decade, many military affairs analysts have touted the advent of a "revolution in military affairs." Although generally framed in the context of those technological advances that make possible four-dimensional, network-centric warfare, it is the dramatic civilianization of conflict that may prove normatively more revolutionary.

In no conflict has the civilian footprint supporting military operations been larger than in Iraq. This paper begins by examining civilian employee and private contractor involvement in Operation Iraqi Freedom (OIF) as a case study in the contemporary nature of such participation. It then assesses the possibility of either *de jure* or *de facto* integration of civilians into the armed forces. Concluding that integration will be rare, the article turns to the issue of when it is that civilians can be classified as "directly participating in hostilities," thereby becoming both lawful targets of attack and prosecutable for their actions. Finally, it concludes with an analysis of various scenarios involving civilian participation.

Civilians and the War in Iraq

Estimates of the number of government civilian employees and contractor personnel present in Iraq range from 20-30,000, making civilian workers the second largest contingent in-country.[1] These figures do not include the thousands of non-military personnel who support OIF from outside the country.

The scope of conflict-related activities which civilians perform today is unprecedented. Of greatest importance is their centrality to the complex logistics system that supports the Coalition armies. For instance, civilian contract employees drive the nearly 700 trucks that deliver supplies daily to the 60 military bases across Iraq.[2] They also provide most of the combat service support (e.g., feeding troops and maintaining billeting facilities).

Closer to the fight, civilians maintain complex weapons systems such as the F-117 Nighthawk fighter, B-2 Spirit bomber, M1 Abrams tank, and TOW missile system, and "fly" the Global Hawk and Predator unmanned aerial vehicles (UAV). Civilians also conduct intelligence collection (especially with remote sensors) and analysis, although often from outside the area of operations. Contractors and government civilians have even interrogated prisoners of war and other detainees, regrettably participating in the now-infamous abuse incidents.[3] By September 2004, investigators had referred six cases of alleged contractor abuse to the Department of Justice for possible prosecution.[4]

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[1] Far outnumbering the United Kingdom's 8,361 troops as of 26 August 2004. GlobalSecurity.org, *Non-US Forces in Iraq, at* http://www.globalsecurity.org/military/ops/iraq_orbat_coalition.htm.

[2] James Glanz, *For Truckers in Iraq, "It's All About Money,"* INTERNATIONAL HERALD TRIBUNE, Sept. 28, 2004, at 1.

[3] *See* formal investigations of detainee abuse: MG Antonio M. Taguba, Article 15-6 Investigation of the 800th Military Police Brigade, n.d., *at* http://www.npr.org/iraq/2004/prison_abuse_report.pdf; LTG Anthony T. Jones, Article 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade, and MG George R. Fay, Article 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, n.d., *at* http://news.findlaw.com/nytimes/docs/dod/fay82504rpt.pdf.

[4] The alleged participation in torture of detainees has generated a class-action suit in the US District Court against the companies involved, principally Titan Corporation and CACI International, for their role in the alleged torture, rape, and summary execution of detainees. Saleh et al. v. Titan Corp, et al. (2d Am. Compl.), Case No. 04 CV 1143 R (NLS) (S.D. Ca.), *at* http://www.ccr-ny.org/v2/legal/docs/Saleh%20v%20Titan%20Corp%20Second%20Amended%20Complaint.pdf. An attempt to

Private security companies (PSCs) have even been protecting employees and facilities of the US government, other governments, and private companies.[5] PSCs (over 50 operate in Iraq) range in size from a few individuals to large firms. Global Risks, for example, employs 1,100 personnel, including 500 Ghurka and 500 Fijian troops, thereby making it one of the larger "military" contingents in Iraq.[6] Contractors provided personal security for Coalition Provisional Authority (CPA) Administrator L. Paul Bremer, as they currently do for senior civilians and distinguished visitors. They also guard non-military facilities at the Baghdad airport and inside the Green Zone, protect convoys, and shoulder the lion's share of training for the New Iraqi Army, paramilitary forces, and law enforcement organizations.[7]

Secretary of Defense Rumsfeld has asserted that PSCs in Iraq "provide only defensive services,"[8] but some of their activities appear indistinguishable from military operations.[9] Consider an incident in April 2003 during which employees of Blackwater USA engaged in an intense battle with insurgents who were attacking the CPA headquarters in Najaf. Thousands of rounds or ammunition and hundreds of 40mm grenades were expended in the firefight, and the company used its own helicopters to resupply employees during the battle.[10]

And contractors, particularly those in the security sector, do not come cheap.[11] By July 2004, Kellogg, Brown & Root (Halliburton) alone had been awarded $11.4 billion in contracts

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ban the practice of using private contractors in military interrogations was defeated in the US Senate. *See* debate at 150 CONG. REC. S6831, 108th Cong, 2d Sess., June 16, 2004.

[5] *See generally* Letter from Secretary of Defense Donald Rumsfeld to Representative Ike Skelton, with attachments, (May 4, 2004), *at* http://www.house.gov/skelton/5-4-04_Rumsfeld_letter_on_contractors.pdf. Coalition Provisional Authority Order 17, Status of the Coalition Provisional Authority, MNF - Iraq**,** Certain Missions and Personnel in Iraq (as revised 27 June, 2004), defines PSCs as "non-Iraqi legal entities or individuals not normally resident in Iraq, including their non-Iraqi employees and subcontractors not normally resident in Iraq, that provide security services to foreign liaison missions and their personnel, diplomatic and consular missions and their personnel, the MNF and its personnel, international consultants and other contractors." CPA/ORD/27 June 2004/17, *at* http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf. On the topic generally, see P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 521 (2004).

[6] P.W. Singer, *Warriors for Hire in Iraq*, SALON.COM, April 14, 2004, *at* http://archive.salon.com/news/feature/2004/04/15/warriors/print.html.

[7] And contractors are often used at home to free up military personnel for combat overseas. Currently, 4,300 private security contractor employees guard some 50 US Army installations in the United States pursuant to contracts worth well in excess of $1billion. T. Christian Miller, *Army Turns to Private Guards*, L.A. TIMES, Aug. 12, 2004, at 1.

[8] Rumsfeld Letter, *supra* note 5. A CPA order and memorandum limited contractors and other non-military security personnel to possession of "small arms and defensive weapons…including pistols, shotguns, and rifles firing ammunition up to an including 7.62mm and Defensive Weapons including crew-served machine guns, non-lethal weapons and riot control agents." CPA Memorandum 5, Implementation of Weapons Control Order No. 3, CPA/MEM/22 Aug. 2003/5, *at* http://www.cpa-iraq.org/regulations/20030822_CPAMEMO_5_Implementation_of_Weapons_Control_with_Annex_A.pdf; CPA Order 3 (revised and amended), Weapons Control, CPA/ORD/31 Dec. 2003/3, *at* http://www.cpa-iraq.org/regulations/20031231_CPAORD3_REV__AMD_.pdf.

[9] An attempt to prohibit "contractors from participating in most combat operations except in cases of self-defense, and … prevent U.S. moneys from being used to pay contractors for those purposes" was defeated in the Senate. *See* debate at 150 CONG. REC. S6693, 108th Cong, 2d Sess. June 14, 2004.

[10] Dana Priest, *Private Guards Repel Attack on U.S. Headquarters*, WASHINGTON POST, April 6, 2004, at 1.

[11] Aegis Defense Services, as an example, is charging $430 million to guard Iraqi oil installations over three years. Jeremy Lovell, *Private Affair*, HERALD SUN (Melbourne), Sept. 25, 2004, at 84. Private military companies are earning an estimated $100 billion a year in government contracts. Jim Krane, *Private Army Grows Around American Mission in Iraq*, The Day.com, Oct. 30, 2003, *at* www.theday.com/eng/web/.

for Iraq and Afghanistan.[12] In light of the number of contractors and contract values, critics have taken to calling the Pentagon-contractor relationship a "coalition of the billing."[13]

The financial rewards for individual civilians serving in Iraq can be substantial. Senior PSC personnel regularly earn in the $20,000 a month range, sometimes more.[14] Blue-collar workers pull in approximately $80-100,000 annually.[15] The pay is so good relative to military salaries that the US Special Forces are experiencing a "brain drain," as well-trained troops depart for more lucrative positions with civilian contractors.[16]

But, at the same time, the risks can be deadly. Recall the dramatic April 2004 incident in Fallujah, during which crowds dragged the bodies of four Blackwater employees through the streets in scenes reminiscent of Mogadishu circa 1993. And by September 2004, just one fire, Kellogg, Brown & Root, has suffered 46 employee deaths.[17] Overall, contractors have experienced more casualties than any Coalition contingent except the US, over a 100 by August 2004.[18] Sadly, by September 2004, in excess of 140 foreign hostages have also been seized, the vast majority civilians; 26 were later murdered.

There are evident practical problems with the use of contractors or civilian government employees in an area of combat operations. For instance, PSC activities are limited by the terms of the respective contract, thereby limiting the flexibility of military commanders in responding to evolving situations. Indeed, contractors may simply refuse to perform contractual functions, preferring contract penalties or termination to the assumption of risks incident to compliance. The decision of numerous companies to withdraw from Iraq in the face of the deteriorating security situation, especially in the wake of hostage takings, is illustrative.

Further, PSC employees may lack adequate training or be of questionable background. Backwater, as an illustration, has admitted that 30% of its employees do not have military training. Additionally, it hired 30 Chilean soldiers in February 2003, most reportedly with ties to the Pinochet regime.[19] Not surprisingly, professional military personnel have expressed concern about armed civilians operating in close proximity to combat operations. Many worry that misconduct by civilian contractors may cause reprisals against uniformed forces. They also question the rules of engagement civilians operate under.[20] Most fundamentally, the presence of armed civilian groups operating independently, even if only "defensively," violates the unified command and control principle of warfare.

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[12] As of July 2004. The Center for Public Integrity, *Post-War Contractors Ranked by Total Contract Value in Iraq and Afghanistan*, *at* http://www.publicintegrity.org/wow/resources.aspx?act=total. A regularly updated listing of contracts regarding Iraq and Afghanistan is maintained by the organization at http://www.publicintegrity.org/wow/bio.aspx?act=pro.

[13] Tom Engelhardt, *Everything's Private*, MotherJones.com. Nov. 4, 2003, *at* www.motherjones.com/news/daily mojo/2003/11/we_601_02.a.html.

[14] Neil King & Yochi Dreazen, *Amid Chaos in Iraq, Tiny Security Firm Found Opportunity*, WALL STREET JOURNAL, Aug. 13, 2004, at 1.

[15] Russell Gold, *The Temps of War: Blue-Collar Workers Ship Out for Iraq*, WALL STREET JOURNAL, Feb. 5, 2004, at 1.

[16] Pauline Jelenik, *Many Elite Soldiers Leave for Better Pay*, GUARDIAN UNLIMITED, July 21, 2004, *at* http://www.guardian.co.uk/worldlatest/story/0%2C1280%2C-4334099%2C00.html.

[17] James Glanz, *For Truckers in Iraq, "It's All About Money,"* INTERNATIONAL HERALD TRIBUNE, Sept. 28, 2004, at 1.

[18] Renae Merle, *Iraq Deaths Create Subculture of Loss*, WASH. POST, July 31, 2004, at A1.

[19] Singer, Warrior, *supra* note 6.

[20] Borzou Daragahi, *In Iraq, Private Firms Lighten Load on U.S. Troops*, PITTSBURGH POST-GAZETTE, Sept. 28, 2003, *at* http://www.post-gazette.com/pg/03271/226368.stm..

Problematically, civilians are far less accountable than their military counterparts. Consider US mechanisms for handling misconduct. Government civilian employees are subject to civil service disciplinary measures, but the system is administrative, not judicial. Contractors are even less accountable, for the contracting officer rather than the commander exercises "supervisory" control over them. In the event of misconduct, he or she may impose pecuniary penalties on the firm, but has no authority vis-à-vis the employee. Rather, discipline is the company's responsibility.[21] This absence of genuine command and control over contract personnel invites abuses. Tellingly, some US judge advocates have reportedly charged that contractors were used during interrogations of detainees in Iraq to keep aggressive techniques quiet. [22]

Of course, when civilians commit crimes, penal sanctions should be imposed. However, status of forces and related agreements often determine whether the country in which a civilian commits a crime has jurisdiction.[23] In Iraq, civilian government employees and government contractor personnel enjoyed immunity from prosecution during the occupation. As occupation ended, Ambassador Bremer issued CPA Order 17 (revised), which grants continued immunity from Iraqi jurisdiction to civilians of the Multinational Force and "international consultants" provided to the Iraqi Transitional Government by other States. Contractor personnel enjoy immunity "with respect to acts performed by them pursuant to the terms and conditions of a contract or any sub-contract thereto," although the "sending State" may waive said immunity.[24]

To fill the jurisdictional vacuum, some States have established domestic criminal jurisdiction over their civilians on the battlefield. US legislation, for instance, includes the Military Extraterritorial Jurisdiction Act, which subjects individuals employed by the US military abroad, whether directly or as contractors, to federal jurisdiction.[25]

What accounts for the explosion of contractor personnel and civilian government employees on or near the battlefield? Cost is one factor. In the aftermath of the Cold War, most governments sought to realize the "peace dividend" by drawing down legacy armies sized and equipped to fight a global conflict.[26] But the dividend never materialized; on the contrary, many States found their security environment complicated by the demise of (stabilizing) bipolarity and the emergence of new threats like transnational terrorism and internal unrest. Yet, for domestic political reasons, downsizing was a process that usually proved irreversible.

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[21] *See* Rumsfeld Letter, *supra* note 5.

[22] This assertion has been denied by a Pentagon spokesperson. Joshua Chaffin, *Contract Interrogators Hired to Avoid Supervision*, LONDON FINANCIAL TIMES, May 21, 2004, at 9.

[23] *See generally* THE HANDBOOK OF THE LAW OF VISITING FORCES (Dieter Fleck ed. 2001).

[24] CPA Order 17, Status of Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, secs. 2 & 4, CPA/ORD/27 June 2004/17, *at* http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf. Pursuant to Article 26(C) of the Law of Administration for the State of Iraq for the Transitional Period (TAL – Transitional Administrative Law), "[t]he laws, regulations, orders, and directives issued by the Coalition Provisional Authority…shall remain in force until rescinded or amended by legislation duly enacted and having the force of law." March 8, 2004, *at* http://www.cpa-iraq.org/government/TAL.html. The UN Security Council endorsed the transitional arrangements as set forth in the TAL in S.C. Res. 1546 (2004).

[25] Military Extraterritorial Jurisdiction Act, 10 U.S.C. 3261 (2000). This Statute was primarily designed to address crimes by contractors against US military personnel and their dependents abroad. Also providing possible jurisdiction is the US War Crimes Act [18 U.S.C. 2441 (2004)] and the federal torture statute, [18 U.S.C. 2340A (2000)].

[26] In the United States, the size of the military dropped to its present 1.4 million from 2.1 million in 1990.

In light of this dilemma, the use of civilians in support roles proved especially appealing because it freed up military personnel to perform combat missions. In this way, armed forces avoided a straight-line relationship between reduced numbers and reduced combat effectiveness. In the US, the consequent civilianization was labeled "Transformation."

Civilians are also typically less costly than their military counterparts. Although salaries may exceed those of uniformed personnel, overhead pales by comparison. Civilians, especially contractors, perform discrete tasks rather than operate within a system in which they are expected to acquire the skills and experience necessary to advance through the ranks. Therefore, they can devote a much greater percentage of their time to the core undertaking, without having to also complete training and education or provide the same to others. Further, the military does not have to fund frequent transfers to acquire the experiential base necessary for assumption of greater responsibility, nor compensate for efficiency loss while new personnel learn their jobs. Perhaps most significant is the fact that civilians do not require the extensive support structure that many militaries provide their uniformed personnel (e.g., commissaries, housing, dining halls, recreational and fitness facilities, hospitals, off-duty education, etc.).

An additional motivator is that the technology of modern warfare often exceeds the ability of militaries to train their personnel. This phenomenon has two facets. First, while some technology is so complex that only highly trained individuals can operate it, most military personnel lack the aptitude or length of service to develop the requisite skills. Second, some hi-tech military equipment exists in small numbers in the inventory. Thus, the training thereon is extraordinarily expensive because it benefits from no economies of scale. Both dynamics have led to "package deals" in which the military purchases not only the weapon system, but also contracts for training and maintenance support, and, in some cases, even operation of the system.

In Iraq, the dynamic impelling the widespread use of civilians is simple. With US forces deployed to the Balkans, Afghanistan, and elsewhere, the number of troops available for combat, occupation, and transition duties in Iraq has been limited. At the same time, the security situation in Iraq has stretched combat troops to the breaking point.[27] It should, therefore, come as little surprise that duties usually shouldered by uniformed troops, such as guarding convoys or airports, have been outsourced. Furthermore, in light of the unstable security situation, reconstruction projects have created additional security burdens that cannot be met by military forces.

Legal Consequences of Civilian Participation in Conflict

It is not the purpose here to exhaustively explore the legal consequences of civilian government employee or private contractor participation in hostilities. Rather, the intent is to consider when they attach. However, a brief review of consequences will place the subsequent discussion in context.[28]

Most significantly, pursuant to Article 51.3 of the 1977 Protocol Additional I, civilians enjoy immunity from attack during international armed conflict "unless and for such time as they

[27] Ambassador L. Paul Bremer has opined that the size of the US occupation force was too small. Robin Wright and Thomas E. Hicks, *Bremer Criticizes Troop Levels*, WASH. POST, Oct. 5, 2004, at A1.

[28] *See generally* Jean-Francois Queguiner, *Direct Participation in Hostilities Under International Humanitarian Law*, Harvard International Humanitarian Law Research Initiative Working Paper (Nov. 2003), *at* http://www.ihlresearch.org/ihl/pdfs/briefing3297.pdf.

take a *direct part in hostilities*."[29] Those who do directly participate may be legally targeted and their injury or death does not bear on such conduct of hostility issues as proportionality or precautions in attack.[30] Civilian direct participants are labeled either "unlawful combatants" or "unprivileged belligerents."[31]

Secondly, those who participate in hostilities without the status of lawful combatant do not benefit from prisoners of war protections, particularly those of the Third Geneva Convention.[32] While combatants may loose such protections (e.g., by failure to wear a uniform),[33] civilians who participate directly in hostilities generally lack them in the first place.[34]

Finally, civilians who directly participate may be punished for their actions because they lack the "combatant privilege" to use force against lawful targets. Currently contentious is the issue of whether mere direct participation, without more, is a war crime.

Consider the case of David Hicks, the Australian detainee being tried before a Guantanamo Military Commission for, *inter alia*, "attempted murder (specifically, of "American, British, Canadian, Australian, Afghan, and other Coalition forces") by an unprivileged belligerent."[35] This Charge is somewhat curious. In humanitarian law, combatants enjoy no general protection from attack,[36] so attacking them cannot be a war crime (absent more).

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[29] Protocol Additional (I) to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 51.3, Dec. 12, 1977, 1125 U.N.T.S. 3, 16 International Legal Materials 1391 (1977) [hereinafter Protocol I].

[30] The principle of proportionality prohibits attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" from the operation. Protocol I, *supra* note 29, art. 51.5(b). *See also* art. 57.2. Even if an attack is proportional, those who plan, decide on, or execute an attack must take precautions to further spare the civilian population. For instance, they must select that target causing the least harm to civilians among military objectives the attack on which will yield a similar military advantage. Protocol I, art. 57.

[31] "Unlawful combatant" is the better term because: 1) it preserves the distinction between combatants and civilians; and 2) the term belligerents generally refers to States which are Party to a conflict, not individuals. On the topic generally, see Knut Dormann, *The Legal Status of "Unlawful/Unprivileged Combatants,"* 85 INTERNATIONAL REVIEW OF THE RED CROSS 45 (2003); Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1025 (2004); K.W. Watkin, *Combatants, Unprivileged Belligerents and Conflicts in the 21st Century*, Harvard International Humanitarian Law Research Initiative Working Paper (June 2003), *at* http://www.ihlresearch.org/ihl/pdfs/Session2.pdf.

[32] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N. T.S. 135, esp. art. 4 (hereinafter GCIII).

[33] Protocol I, *supra* note 29, art. 43.4.

[34] An exception exists for certain persons who accompany the armed forces without being members thereof, certain crews of aircraft and vessels, and members of a *levee en masse*. The first two categories are discussed *infra*. A *levee en masse* occurs when "[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war." GCIII, *supra* note 32, art. 4A(6).

[35] US v. David Matthew Hicks, Military Commission, Charge Sheet (on-file with author). Although the accused is not a civilian employee or contractor, the case is instructive.

[36] No treaty (including the statutes governing international courts such as the International Criminal Court, International Criminal Tribunal for the Former Yugoslavia, and International Criminal Tribunal for Rwanda) suggests that targeting a combatant is unlawful. Rather, combatants are only protected from attack when they are *hors de combat* because they have surrendered [Regulations Respecting the Laws and Customs of War on Land, annex to Convention (No. IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 23, 36 Stat. 2277, 1 Bevans 631 (hereinafter HIVR); Protocol I, *supra* note 29, art. 41], are sick or wounded and not carrying on the fight [Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 12, 6 U.S.T. 3114, 75 U.N. T.S. 31 (hereinafter GCI); Geneva Convention for the

Perhaps, then, prosecution is based on Hick's alleged status as an unprivileged belligerent. Despite dated support for the assertion that being an unprivileged belligerent can constitute a war crime,[37] the better position is that only the acts underlying direct participation are punishable. If they amount to war crimes (e.g., killing civilians), the acts may be tried as such. Further, because civilians who directly participate lack combatant immunity, they may be convicted for offenses against the domestic law of a State that enjoys both subject matter and personal jurisdiction. This is the position proffered by leading scholars,[38] as well as that in operational guidance such as the United States Army's *Operational Law Handbook.*[39]

In non-international armed conflict, civilians who participate in armed conflict also forfeit certain protections. Common Article 3 to the four 1949 Geneva Conventions applies only to "persons taking no active part in hostilities,"[40] thereby depriving those who do of the limited protections therein. Although Protocol Additional II to the Geneva Conventions augments the

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Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 12, 6 U.S.T. 3217, 75 U.N. T.S. 85 (hereinafter GCII); Protocol I, *supra* note 29, arts. 10 & 42], are shipwrecked (GC II, art. 12; Protocol I, art. 10), or have parachuted from a disabled aircraft (Protocol I, art. 42.) They are also immune from attack when serving as *parlementaires* conducting negotiations with the enemy (HIVR, art. 32.) or as medical or religious personnel. (GCI, art. 24, 25; Protocol I, art. 15). Note that by Protocol Additional I, art. 43, the latter are not combatants.

[37] In the *Hostage Case*, a post-World war II war crimes trial, the Court held that "we think the rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the law of wars. Fighting is legitimate only for the combatant personnel of a country." "The Hostages Trial," XV Law Reports of Trials of War Criminals, United Nations Wartime Commission, (London, 1947-48), at 111. Many embracing this position also cite the US Supreme Court's decision in *Ex Parte Quirin*. There the Court held that

> those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission….This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war….

Ex parte Quirin, 317 U.S. 1, 36 (1942). The reasoning in both decisions is flawed, particularly to the extent that they apply analogies to spying, which is clearly not a violation of the law of war. See, e.g., the decision of the Dutch Special Court of Cassation in the 1949 *Flesche* case, "espionage…is a recognized means of warfare and therefore is neither an international delinquency on the part of the State employing the spy nor a war crime proper on the part of the individual concerned." Flesche (Holland, Special Court of Cassation, 1949) [1949] AD 266, 272. Commentators are in accord, as are the military manuals such as those of the U.S. Army and U.K. Forces. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 210, 213 (2004); Richard R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs*, 1952 *British Yearbook of International Law* 323, *reprinted in Military Law Review Bicentennial Issue* 487 (1975); Department of the Army Field Manual 27-10, The Law of Land Warfare, July 1956, para. 77 ("Resort to [espionage] involves no offense against international law"); U.K. Ministry of Defence, The Manual of the Law of Armed Conflict (2004), at para. 4.9.7 ("Spies are usually tried by civilian courts under the domestic legislation of the territory in which they are captured"). The Qurin decision has been criticized for its deviation from law of war principles by several top scholars and practitioners in the field. For instance, W. Hays Parks has noted that "*Quirin* is lacking with respect to some of its law of war scholarship." *Special Forces' Wear of Non-Standard Uniforms*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 493 (2003), at fn. 31.

[38] Dinstein, *supra* note 37, at 234; Baxter, *supra* note 37, generally; Julius Stone, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 567 (1954). See also, Derek Jinks, *The Declining Status of POW Status*, 45 HARVARD INTERNATIONAL LAW JOURNAL 367, 436-439, who takes an even more permissive view of the issue.

[39] "Unprivileged belligerents may include spies, saboteurs, or civilians who are participating directly in hostilities or who otherwise engage in unauthorized attacks or other combatant acts. Unprivileged belligerents are not entitled to prisoner of war status, and may prosecuted under the domestic law of the captor." U.S. ARMY, JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK (2004), at p. 23.

[40] Common Article 3(1) to the four Geneva Conventions of 1949, *supra* notes 32 & 36.

Common Article protections, Article 13.3 thereof deprives civilians of both the "general protection against dangers arising from military operations" and immunity from attack "for such time as they take a direct part in hostilities."[41]

The participation of civilian employees and private contractors in non-international armed conflict poses only marginally distinct legal issues from participation in international armed conflict. In the first place, rebel forces are unlikely to hire civilians or let contracts. Further, because rebel forces lack combatant immunity, violence they direct at their government opponents is wrongful per se regardless of the status of the victim. This being so, the central issue is whether the government civilian employee or government contractor harmed by the rebel was "taking an active part in the hostilities."[42] If not, the rebel will have committed a war crime; if so, only a domestic crime will have been committed. But one assesses participation using the same analysis as in international armed conflict. Therefore, the focus here shall on that genre of conflict.

The Legal Status of Civilians Involved in Armed Conflict

There are but two categories of individuals in an armed conflict, combatants and civilians. Combatants include members of a belligerent's armed forces and others who are directly participating in a conflict. As noted, the latter are labeled unlawful combatants or unprivileged belligerents; they are either civilians who have joined the conflict or members of a purported military organization who do not meet the requirements for lawful combatant status. Everyone else is a civilian, and as such enjoys immunity from attack.

Civilian Employees and Private Contractors as Lawful Combatants

If civilian employees and private contractors qualify as lawful combatants, the aforementioned legal consequences never befall them.[43] Thus, before turning to the notion of direct participation, it is necessary to query how civilians might acquire lawful combatant status. This is one of several issues the International Committee of the Red Cross has focused on during its ongoing direct participation project.[44] It is a red herring.[45]

Combatant and civilian status are opposite sides of the same coin. Article 50.1 of Protocol Additional I provides that "a civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and

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[41] Protocol Additional (II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, art. 13.3, 1125 U.N.T.S. 609, 16 International Legal Materials 1442 (1977). Although Common Article 3 employs the term "active" rather than "direct," the International Criminal Tribunal for Rwanda appropriately found the terms so similar that they should be treated synonymously. ICTR, Prosecutor v. Jean-Paul Akayesu, Case ICTR-96-4-T, Judgment, 2 Sept. 1998, at para. 629.

[42] Rome Statute of the International Criminal Court, July 17, 1998, art. 8.2(c) & (e)(i), UN Doc. A/CONF. 183/9*, 37 ILM 1002 (1998), corrected through Jan. 16, 2002, *at* http://www.icc-cpi.int/.

[43] Article 43.2 defines participation with reference to direct participation. "Members of the armed forces of a Party to a 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."

[44] The on-going multi-year project being conducted in collaboration with the Asser Institute began in 2003.

[45] US doctrine expressly rules out the possibility: "In all instances, contractor employees cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants." Joint Chiefs of Staff, Doctrine for Logistics Support of Joint Operations, Joint Publication 4-0, April 6, 2000, at V-1. *See also* US Army, Contractors on the Battlefield, Field Manual 100.21, Sept. 1999, para 1-21; US Army, Contractors Accompanying the Force, Army Regulation 715-9, Oct. 29, 1999.

in Article 43 of this Protocol." The relevant provisions of Article 4 exclude the following from civilian status:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
    (a) that of being commanded by a person responsible for his subordinates;
    (b) that of having a fixed distinctive sign recognizable at a distance;
    (c) that of carrying arms openly;
    (d) that of conducting their operations in accordance with the laws and customs of war.[46]

Article 43 provides that "the armed forces of a Party to a conflict consist 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 conflict." It also notes that a "paramilitary or armed law enforcement agency" may be incorporated into the armed forces; the party doing so is required to notify the opposing side of such incorporation.

Subparagraph (1) of Article 4 addresses *de jure* combatant status, i.e., formal incorporation into the armed forces by a State, whereas (2) involves combatant status that derives from the nature and actions of a group. Article 43 encompasses both categories.

It is difficult to imagine a situation in which individual government civilian or contractor employees might qualify as formal members of the armed forces, regardless of the duties they perform. In the first place, most armed forces have set procedures for enlistment or conscription. An individual failing to comply with them cannot individually become a member thereof. Admittedly, some militaries have *de minimus* procedural prerequisites, sometimes even permitting individual to acquire "membership" by simply joining the fighting. However, the very fact that a civilian is separately employed in a government "civilian" post or works for a company with a contractual relationship to the government would by definition rule this possibility out. Moreover, if a State wished to formally draw individual civilians into the armed forces, it could readily do so. For instance, some countries require certain civilian employees in key positions to serve as reservists; this facilitates their rapid change of status in the event of armed conflict. Thus, vis-à-vis individual civilians, the fact that no formal recruitment has occurred is dispositive evidence of a State's understanding that the civilian in question does not enjoy Article 4(A)(1) status.

Might the *group* to which such civilians belong qualify as part of the armed forces? After all, many perform functions indistinguishable from those performed by military units, sometimes even units in the same armed force that employs or contracts them.

Again, logic would dictate otherwise. First, such groups coexist alongside, not within, the armed forces and are thereby distinguishable on that fact alone. It would be incongruent to suggest that a group with a clearly distinct civilian identity (conditions of employment, supervisory chain, disciplinary system, etc.) could somehow transmogrify into an element of the armed services merely because of the function it performs.

[46] This listing also appears in Article 13 of both Geneva Convention I on the Wounded and Sick on Land and Geneva Convention II on the Wounded, Sick, and Shipwrecked at Sea. Subparagraph (6) deals with the levee en masse and is irrelevant to this inquiry.

More significantly, recall the Article 43.3 proviso on incorporation of paramilitary and law enforcement forces, which confirms the requirement for States to affirmatively act to incorporate groups into the military before they acquire status. This makes it patent that non-incorporated paramilitary and law enforcement agencies are civilian in nature for the purposes of humanitarian law. Thus, any of their members who engage in hostile action against enemy forces prior to notification of incorporation are directly participating as civilians. For instance, paramilitary forces of the Central Intelligence Agency cannot be characterized as members of the armed forces absent incorporation and notification. To the extent that this is so for formal organized standing paramilitary and law enforcement entities of the government, it is even more so for other groups of government employees, private military companies, or other entities acting to maintain law and order or provide security.

Nor does Article 4(A)(1)'s "militia or volunteer corps forming part of the armed forces" verbiage offer an alternative route to membership. The official Commentary to the Third Geneva Convention notes the comment referred to groups that "although *part of the armed forces*, were quite distinct from the army as such."[47] This unambiguously suggests a requirement for formal affiliation with the armed forces beyond a mere term contract.

A further practical obstacle to *de jure* armed forces status is the requirement that the group in question meet four criteria. Specifically, the conditions set forth for militia forces in Article 4(A)(2), which mirror those contained in the 1899 and 1907 Hague Conventions,[48] also apply to components of the armed forces. Although this is a somewhat controversial position, and while textually it would appear they do not, the better position is that the conditions are implicit in the meaning of armed forces.[49] Simple logic supports this interpretation. For instance, the requirements to wear a uniform and carry arms openly serve to distinguish combatants from civilians, thereby enhancing protection for the latter. Suggesting that military personnel need not comply with them would fly in the face of this rationale.

Article 44.3 of Protocol Additional I further confirms the approach's validity when it (albeit relaxing the standards of combatancy in ways objectionable to some States[50]) states that to *retain* combatant status, a soldier must minimally carry arms openly during a military engagement and during such time as he is visible to the enemy in the deployment phase of an attack. The ICRC Commentary specifically opines that an individual who does not comply loses combatant status. In language paralleling the normative consequences of direct participation by civilians, it explains:

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[47] Jean Preux, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 52 (ICRC, 1960) [hereinafter GCIII Commentary].

[48] Art. 1, Regulations annexed to: Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899**,** (1907 Supp.) 1 AMERICAN JOURNAL OF INTERNATIONAL LAW 129 and HIVR, *supra* note 36.

[49] As has been noted, "it is generally assumed that these conditions were deemed, by the 1874 Brussels Conference and the 1899 and 1907 Hague Peace Conferences, to be inherent in the regular armed forces of States. Accordingly, it was considered unnecessary and redundant to spell them out in the Conventions." MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICT 234 (1982).

[50] The U.S. position on Protocol I provisions is authoritatively set out in Memorandum for Assistant General Counsel (International), Office of the Secretary of Defense, 1977 Protocols Additional to the geneva Conventions: Customary International Law Implications, May 8, 1986 (on-file with author). *See also* Michael J. Matheson**,** *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419 (1987).

> Thus criminal prosecution becomes possible, even for hostile acts which would not be punishable in other circumstances. In other words, such a prisoner can be made subject to the provisions of the ordinary penal code of the Party to the conflict which has captured him.[51]

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 would be a stretch to style them members of the armed forces.

In sum, it is highly unlikely that civilian government employees or private contractors, whether individually or as a group, would ever qualify for combatant status under Article 4A(1), particularly in light of Article 43.1 of Protocol Additional I. To do so, they would have to individually enlist (or be conscripted) or be formally incorporated as a group. Additionally, the requirements inferred from Article 4A(2) would usually act as a further bar to characterization as members of the armed forces, and thereby combatants.

But might civilian employees and private contractors be integrated *de facto* into the armed forces in the sense of Article 4A(2) and Article 43.1? [52] Article 4A(2) resulted from efforts at the 1949 Diplomatic Conference to address the partisan operations of the Second World War.[53] The four conditions included therein reflected a delicate balance between the concerns of Occupying Powers and the desires of occupied countries.[54]

In assessing the Article 4A(2) conditions, it must be borne in mind that they apply to groups, not individuals. Moreover, such groups cannot consist of government employees, except in the unusual circumstance that they become resistance fighters upon isolation from the government. Simple logic dictates that if paramilitary and law enforcement agencies must be formally incorporated, other groups of government employees cannot circumvent this requirement by complying with the less stringent requirements of 4A(2). The 4A(2) inquiry is thus limited to private contractors.

Before moving to the four express criteria, it is useful to examine the nature of the groups that might be affected thereby. As noted in the official Commentary, the threshold question is whether a group is "fighting on behalf of a Party to the conflict."[55] Although pre-20th century practice was that the sovereign had to formally authorize fighting units outside the armed forces, by the time of the 1899 and 1907 Hague Conferences, this traditional requirement had faded away. Instead, there needed merely to be a *de facto* relationship between the group and a Party to the conflict, one that makes it apparent for whom the group is fighting. That the relationship did not have to be formal is evident from the fact that such a criterion would have excluded some of the very World War II partisan groups which motivated inclusion of Article 4A(2) in the Geneva Conventions. The requirement is simply that the group be fighting in support of, in

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[51] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, para. 1719 (Yves Sandoz, Christophe Swinarki & Bruno Zimmerman eds., 1987) [hereinafter Protocols Commentary]. It does caveat this assertion with mention that "this is the view of the majority of the delegations."

[52] As noted, Article 43.1 relaxes the Geneva conditions by dispensing with the requirement to distinguish oneself from the civilian population in situations where doing so is not possible, so long as the individual carries arms openly while deploying to an engagement and during the battle. This relaxation, which is opposed most notably by the United States, cannot be said to reflect customary international law. *See* Memorandum and Matheson, *supra* note 50.

[53] The existing 1899/1907 Hague Regulations only embraced "militia and volunteer corps."

[54] GCIII Commentary, *supra* note 47, at 53.

[55] GCIII Commentary, *supra* note 47, at 57. *See also* Dinstein, *supra* note 37, at 39, *citing*, e.g., Military Prosecutor v. Kassem and Others (Israel, Military Court, 1969), 42 ILR 470.

concert with, or in a complementary fashion to the government forces (or the aims thereof if those forces have been vanquished).

To the extent a group is employed directly by, or under contract to, a Party to the conflict, this requirement should pose no obstacle to 4A(2) combatant status. More tenuous is the situation where a government contractor subcontracts the firm in question, a prevalent practice in Iraq today. For instance, the prime contractor may be under contract to rebuild infrastructure, but then subcontract security for its operations to a PSC. Alternatively, the prime contractor may have been awarded a broad contract that includes security of various government facilities in the contractual specifications. Yet, so long as the activities the sub-contractor engages in are integral to contract performance, they further the objectives of a Party to the conflict.

But consider the case of a PMC contracted by other than a Party to the conflict, for instance a private mining or drilling firm operating in the conflict zone. Maintaining security for such firms may necessitate engaging in combat operations with forces of one or more of the Parties, but such operations would not be on behalf of the other side. In other words, the determinative question is not whom are you fighting, but rather are you fighting in order that one side might prevail.[56] Contractors hired by a private entity to support one side in order to bolster the chances of the other might qualify; those hired for any other purpose would not. Obviously, the former is a fairly far-fetched scenario, one made even more implausible by limits on mercenaries.[57]

A second threshold requirement is independence from the armed forces. In crafting Article 4, the drafters adhered to the distinction contained in Article 1 of the 1907 Hague Regulations between "militia and volunteer corps forming part of the army and those which are independent"– hence, Article 4(A)(1) *and* 4(A)(2).

Independence is measured based on the extent to which a group operates autonomously, for if it does not to some degree, it would be indistinguishable from Article 4(A)(1) militia and volunteer corps (i.e., it would form part of the military). Many contractors and subcontractors would run afoul of this provision in that they provide services specified by the armed forces; thus, they are not meaningfully independent. Of course, the degree of independence grows as one moves from contractor to subcontractor to firms without affiliation to a Party to the conflict. The Catch-22 is that the greater their independence in operational matters, the less likely contractors are to be acting on behalf of a Party.[58] But in the improbable event that a contractor operated with the requisite independence and on behalf of a Party to the conflict, it would need to meet the four explicit criteria set forth in Article 4A(2).

Subordination to a commander, the first criterion, excludes individuals acting alone or in small, unstructured groups. Consider Iraq. Some Coalition contractors, particularly the large

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[56] This begs the question of the group which is fighting for its own purposes in order to defeat one side, in the hope, for instance, that it will come to power upon expulsion of an occupying force, an interesting scenario which lies beyond the scope of this article.

[57] The contract firms in Iraq would not qualify for mercenary status. By Article 47.2 of Protocol Additional I, mercenaries are "specially recruited …to fight in a conflict," i.e., direct participation is their express purpose. They must also be motivated by private gain and promised compensation in excess of that received by the armed forces, be neither a national of a Party to the conflict nor a resident of territory a Party controls, not be a member of the armed forces of a Party, and not been sent by a non-Party as a member of its own armed forces. *See also* International Convention against the Recruitment, Use, Financing and Training of Mercenaries, art. 1, GA Res. 44/34, UN GAOR, 44th Sess., Supp. No. 49, at 306, UN Doc. A/44/49 (1989).

[58] Lest the discussion appear more significant than it is, this analysis only pertains to groups that would be characterized as directly participating in hostilities (see discussion below). If the contractor is not directly participating, and most do not, it is by definition it is not of the sort of group envisaged by 4A(2).

PSCs, might meet this criterion, for they are generally subject to some form of supervisory direction analogous to command.[59] It is not necessary that military personnel exercise command.[60] Rather, the question is the extent of accountability and authority wielded by the person in control. As noted in the official Commentary,

> the leader…is responsible for action taken on his orders as well as for action which he was unable to prevent. His competence must be considered in the same way as that of a military commander. Respect for this rule is moreover in itself a guarantee of the discipline which must prevail in volunteer corps and should provide reasonable assurance that the other conditions referred to below will be observed.[61]

As Yoram Dinstein has noted, "[l]awful combatants must act within a hierarchic framework, embedded in discipline, and subject to supervision by upper echelons of what is being done by subordinates in the field."[62] Arguably, some contractors could meet this standard. Most are organized and controlled along military lines, an unsurprising fact given that so many of their employees are ex-military. Whether their employees are sufficiently subject to a leader's discipline would be a case-specific determination. Of particular relevance is the degree to which they are subject to criminal prosecution for abuses of which superiors become aware. State practice demonstrates that a leader need not play a formal role in this process, for, in many militaries, soldiers who commit crimes are referred for prosecution to civilian judicial authorities. That said, to enforce "command" discipline, the leader should have this option available.

The second and third criteria require distinction from the civilian population. Although many contractors do carry arms openly, contractors generally do not wear distinctive attire that distinguishes them from civilians such as aid and relief workers.[63] On the contrary, as noted by a senior US Marine Corps officer with combat experience in Iraq, "many private US Armies that work there wear a bewildering and amusing hodge-podge of 'tough-guy' attire."[64]

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[59] "Command" is defined as "[t]he authority that a commander in the Armed Forces lawfully exercises over subordinates by virtue of rank or assignment. Command includes the authority and responsibility for effectively using available resources and for planning the employment of, organizing, directing, coordinating, and controlling military forces for the accomplishment of assigned missions. It also includes responsibility for health, welfare, morale, and discipline of assigned personnel." DEPARTMENT OF DEFENSE, DICTIONARY OF MILITARY AND ASSOCIATED TERMS, as amended by 09 June 2004, *at* http://www.dtic.mil/doctrine/jel/doddict/.

[60] GCIII Commentary, *supra* note 47, at 59.

[61] *Id.* at 59.

[62] Dinstein, *supra* note 37, at 39.

[63] And in Iraq the relaxed standards of Protocol Additional I, Article 43, do not apply as neither the United States nor Iraq are Party States. US Department of the Army regulations allow deployed government civilians to be issued BDUs (battle dress uniforms), NBC (nuclear, biological, chemical) equipment, Kevlar helmets, and load-bearing personal equipment when "necessary for their ready identification, comfort, protection, and safety." The uniforms have special insignia intended to identify the wearer as a civilian. Department of the Army, Pamphlet 690-47, DA Civilian Employee Deployment Guide (1 Nov. 1995), at para. 1-13. In the Air Force, that insignia is an "olive green triangular patch with US in the center on their left shoulder." Department of the Air Force, Instruction 36-801, Personnel, Uniforms For Civilian Employees (29 Apr. 1994), at para. 6.7.

[64] Along these lines, a Marine lieutenant in Iraq provided the following vignette:

> While we were waiting for the delegation of IZs (Iraqis) to arrive, the Ambassador and the generals went into a small room to chat…. I was hanging out outside…. The place was crawling with the Ambassador's and generals' PSDs (personal security detail). The generals'… are made up of Marines, but the Ambassador's is made up of private contractors. They all look exactly alike. Merrill low-top trail shoe-boots, REI or J. Peterman light weight safari pants, a muted single color t-shirt, highspeed chest rig/flack vest with lots of magazines, a couple little gadgets, an American flag Velcro patch, a Glock pistol, an M-4 with some ridiculous scope almost as big as the rifle, a battered baseball cap, the mandatory goatee, and the clear, spiraled fiber-optic cord running out of their ear. So they're all walking around, looking concerned at everyone, talking into their wrists, and oozing with seriousness. One of the guys starts shooting the shit

Adherence to the laws and customs of war comprises the fourth criterion. Iraq represents an interesting case study in this regard. Recall that the 4A(2) assessment is of the group, not the individual. There is no question that some Coalition contractor employees have egregiously violated the laws of war, particularly vis-à-vis detainee treatment. However, on the whole, firms have not engaged in systematic violations that would suggest a disregard for the law. In order to forfeit combatant status on this count, the company as a unit would have to engage in violations of humanitarian law.[65]

Taken together, the aforementioned criteria make it highly unlikely that private contractors could qualify for Article 4A(2) combatant status. This is unsurprising, for the provision was never meant to address them. On the contrary, it was specifically crafted to build on the Hague Regulations' reference to "militia and volunteer corps" through addition of resistance movements. The very independence of such groups distinguishes them from the regular armed forces; private contractors, by contrast, are typically dependent on the armed forces, if only for fiscal survival.

Civilians Employees and Private Contractors as Unlawful Combatants

If civilian employees and private contractors seldom, if ever, qualify for lawful combatant status, what are the limits on their participation in hostilities? In other words, when will their participation rise to the level of "direct" participation such that they not only are lawfully targetable, but also punishable for their participation.[66]

Unfortunately, the meaning of direct participation, whether in international or non-international armed conflict, is highly ambiguous. Articles 4A(4) and (5) of Third Geneva Convention constitute the only authoritative delineation of activities barred from characterization as direct participation. Recall that Article 50.1 of Protocol Additional I defines civilians by excluding those encompassed in subparagraphs 1-3 and 6 of Article 4A(2). Thus, individuals falling within the remaining two subparagraphs are by definition civilians, albeit ones entitled to POW status upon capture. They include:

> (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model. [67]

> with me. Nice guy from upstate New York. After a few minutes, he says, "So, who are those guys over there?" and points at a small group of PSD guys across the courtyard. I said, "I thought they were with you." He said…they weren't. I said, "well who are you with?" He said he was with the Ambassador. I said, "Well who do you work for?" He said, "Blackwater." I said, "Well, I think those guys work for triple canopy [slang for the CIA]…. "Who could they be here with?" He said he didn't know. I didn't either. So here we are in Iraq, in a courtyard full of mercenaries, but no one can figure out exactly who is working for who. And they all look so alike, there's no way to tell. Typical.

Correspondence in possession of author.

[65] Note that the requirement involves violations of humanitarian law, not the higher standard of war crimes.

[66] Assuming the actions had been privileged if conducted by a lawful combatant.

[67] This provision is based on article 81 of the 1929 Geneva Convention that in turn derived from Article 13 of the 1907 Hague Regulations. Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929**,** 118 LNTS 343; HIVR, *supra* note 36.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.[68]

The "such as" language demonstrates that the list is merely illustrative. Unfortunately, the official Commentary does not expound more fully on the matter beyond indicating "the text could therefore cover other categories of persons or services who might be called upon, in similar conditions, to follow the armed forces during any future conflicts."[69] But note that none of individuals cited are involved in any direct way with the application of force. Nor do the provisions distinguish between government employees and contractors. The sole relationship criterion is that they "accompany" the armed forces.

In acknowledging the ambiguity inherent in the notion of direct participation, the International Committee of the Red Cross has noted:

> Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly.[70]

Thus, there is a participation continuum that runs from general support for the war effort to the conduct of combat operations. W. Hays Parks has profitably dissected this continuum into war effort (which is protected under both customary law and Protocol I), military effort such as military research by civilians (which he suggests is not protected under customary law, but is protected by the Protocol), and military operations (unprotected under either customary or treaty law). Conceived in this manner, Parks suggests that Protocol Additional I sets a fairly high threshold for direct participation.[71]

The Commentary appears to support the premise of a high threshold: "[d]irect participation in hostilities implies a *direct casual relationship* between the activity engaged in and the *harm done* to the enemy at the *time and place where the activity occurs*."[72] It also describes direct participation as "acts which by their nature and purpose are *intended to cause actual harm* to the personnel and equipment of the armed forces,"[73] and defines hostilities as "acts of war which are intended by their nature or purpose to *hit specifically* the personnel and the material of the armed forces of the adverse Party."[74] In much the same vein, the Commentary to Protocol II notes that in non-international armed conflict "[t]he notion of direct participation in hostilities implies that there is a sufficient casual relationship between the act of participation and its immediate consequences."[75]

Direct participation, therefore, seemingly requires "but for" causation (i.e., the consequences would not have occurred in the absence of the act), causal proximity (albeit not direct causation) to the foreseeable consequences of the act, and a *mens rea* of intent. In other words, the civilian must have engaged in an action that he or she knew would harm (or otherwise

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[68] The mention of more favorable treatment under international law is a reference to Article 6 of the XIth Hague Convention, which prohibited merchant seamen from being made prisoners of war. Very few countries are party to that treaty. Convention [No. XI] Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct. 18, 1907, 36 Stat. 2396, 1 Bevans 711.

[69] GCIII Commentary, *supra* note 47, at 64.

[70] Protocols Commentary, *supra* note 51, para. 1679.

[71] W. Hays Parks, *Air Law and the Law of War*, 32 AIR FORCE LAW REVIEW 1, 133 (1994).

[72] Protocols Commentary, *supra* note 51, para. 1679.

[73] *Id.*, para. 1942.

[74] *Id.*, para. 1679.

[75] *Id.*, para. 4787.

disadvantage) the enemy in a relatively direct and immediate way. The participation must have been part of the process by which a particular use of force was rendered possible, either through preparation or execution. It is not necessary that the individual foresaw the eventual result of the operation, but only that he or she knew their participation was indispensable to a discrete hostile act or series of related acts.[76]

Some have labeled this approach the "kill chain", i.e., if a particular activity is necessary to accomplish the "kill" in a specific situation, the activity is direct participation. The kill chain notion is overly restrictive in that it limits activities to those related to the application of deadly force; not all military operation seek to weaken the enemy in this fashion. However, most kill-chain activities would unquestionably qualify as direct participation; as such, the notion of a kill chain is a useful analytical construct when making direct participation assessments.

In the end, direct participation determinations are necessarily contextual, typically requiring a case-by-case analysis. But case-by-case determinations need not be eschewed. On the contrary, sometimes they more precisely balance military requirements and humanitarian ends than mechanical applications of set formulae. Moreover, armed forces have embraced them. The US Navy's *Commanders Handbook,* for example, states that "[c]ombatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information at the time."[77] Similarly, in the *Tadic* case, the International Criminal Tribunal for the Former Yugoslavia adopted a contextual framework: "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."[78]

Perhaps the best tack when analyzing a particular act is assessing the criticality of the act to the direct application of violence against the enemy. Consider intelligence. Rendering strategic level geopolitical estimates is certainly central to the war effort, but will have little bearing on specific combat missions. By contrast, tactical intelligence designed to locate and identify fleeting targets is the *sine qua non* of time-sensitive targeting; it is an integral component of the application of force against particular targets. Civilians providing strategic analysis would not be directly participating in hostilities, whereas those involved in the creation, analysis, and dissemination of tactical intelligence to the "shooter" generally would.

Many activities lie between the extremes. In such cases, the methodology that best approximates the underlying intent of the direct participation notion is to interpret the term liberally, i.e., in favor of finding direct participation. Recall that distinction is a seminal principle in humanitarian law.[79] An interpretation of direct participation that allows civilians to

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[76] Some have labeled this approach the "kill chain", i.e., if a particular activity is necessary to accomplish the "kill" in a specific situation, the activity is direct participation. The kill chain notion is overly restrictive in that it limits activities to those related to the application of deadly force; not all military operation seek to weaken the enemy in this fashion. However, most kill-chain activities would unquestionably qualify as direct participation; as such, the notion of a kill chain is a useful analytical construct when making direct participation assessments.

[77] U.S. Navy/Marine Corps/Coast Guard, The Commander's Handbook on the Law of Naval Operations (NWP 1-14M, MCWP 5-2.1, COMDTPUB P5800.7), para 11.3 (1995), reprinted in its annotated version as Volume 73 of the US Naval War College's International Law Studies series.

[78] ICTY, Prosecutor v. Dusko Tadic, Case ICTR IT-94-1, Opinion and Judgment, 7 May 1997, at para. 616. The issue was crimes against persons taking no direct part in hostilities

[79] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons,* [1996] ICJ Reports, para 78.

retain their immunity even though inextricably involved in the conduct of ongoing hostilities will engender disrespect for the law on the part of combatants endangered by their activities. Moreover, the liberal approach provides an incentive for civilians to remain as distant from the conflict as possible because they can thereby avoid being directly targeted and are less susceptible to being charged criminally for their acts of participation. While broadly interpreting the activities that subject civilians to attack might seem counter-intuitive from a humanitarian perspective, it actually enhances the protection of the civilian population as a whole by encouraging distance from hostile operations.[80]

The temporal aspects of direct participation also lack precision. Recall that Article 51.3 immunizes civilians from attack "unless and for such time as they take a direct part in hostilities." The Commentary on the provision notes that several delegations expressed their view that direct participation includes "preparations for combat and return from combat,"[81] but it further provides that "[o]nce he ceases to participate, the civilian regains his right to the protection…."[82] With regard to non-international armed conflict, Article 13.3 of Protocol II repeats the "unless and for such time" verbiage, while the Commentary thereon states that protection is denied "for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked."[83] Neither provision can be deemed to be customary international law.[84]

The "unless and for such time" clause has resulted in what has come to be known as the "revolving door" debate, popularly characterized by the image of the civilian who is a guerrilla by night and a farmer by day. Can it possibly be that those who directly participate in hostilities regain their civilian immunity whenever they successfully return from an operation even though they fully intend to subsequently recommence hostile action? This scenario is particularly ill fitting in the case of civilian employees and private contractors. For instance, is the requirement simply to return to duties that do not amount to direct participation? Or does the end of the duty day mark return from hostilities?

More significantly, the revolving door standard flies in the face of logic grounded in the realities of armed conflict. Military forces facing attacks from civilians who can acquire sanctuary simply by returning home, a known location where they may be best targetable, will soon conclude that their survival dictates ignoring the purported revolving door. And ignoring individual aspects of humanitarian law invites disrespect for that body of law more generally, thereby exposing the civilian population to increased danger. Furthermore, a revolving door heightens the likelihood of direct participation by civilians in that it lessens the risk to them of such participation.

The sole practical interpretation of direct participation's temporal aspect is one in which a civilian who participates in hostilities remains a valid military objective until unambiguously

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[80] One approach that does not hold water, but surfaces regularly in discussions on the subject, is basing direct participation determinations on whether military personnel typically perform a function that has been converted to civilian status. In the first place, soldiers often perform functions that would not constitute direct participation by civilians: cooking, medical treatment, providing personal legal advice, playing musical instruments, etc. Moreover, the functions typically performed by military personnel vary widely from military to military. Therefore, it is neither possible to convert a military position to a civilian billet and thereby immunize the function from attack, nor deem everyone filling such a position a direct participant in hostilities.

[81] Protocols Commentary, *supra* note 51, para. 1943.

[82] *Id.*, para. 1944.

[83] *Id.*, para. 4789.

[84] US unwillingness to take such a position is exemplified by Memorandum, *supra* note 50.

opting out through extended non-participation or an affirmative act of withdrawal. Although the difficulty of ascertaining when the unlawful combatant has withdrawn from further participation is marked, it is reasonable that he or she bear the risk that the other side is unaware of the withdrawal. After all, the unlawful combatant volitionally joined the fray without enjoying any privilege to do so.

A final issue is whether mere employment by a particular civilian entity or private contractor can constitute direct participation. Generally, it should not. Even assuming a firm that is retained solely for duties that would be direct participation, there would likely be employees therein who engage in other activities, like cooks or personnel managers. Of course, such individuals run a high risk of being incidentally injured in legitimate attacks on their colleagues who have become targetable by virtue of their direct participation.

Illustrative Scenarios

As noted, each instance of direct participation must be evaluated on its own merits. That said, it may be useful to briefly examine major categories of participation in hostilities, if only to engender further in-depth analysis.

Attacking Military Personnel and Military Objectives: Any attack by civilians on military personnel or military objectives constitutes direct participation so long as there is a nexus between the attack and the armed conflict. The nexus need not be a battle itself. For instance, combatants may be attacked anywhere they are found outside neutral territory. As an example, if a civilian attacks a combatant who is on leave at a resort because of his or her membership in the armed forces of a Party to the conflict, the civilian has directly participated in hostilities.

On the other hand, if the same civilian attacks the combatant out of motives unrelated to the conflict (e.g., to steal his money), the requisite nexus is absent. Similarly, civil disturbances would generally not qualify unless directed at the occupying force, for it is the motivation of the participants that determines the existence of a nexus. Obviously, though, soldiers have the right to use even deadly force in self-defense if they or others are threatened with death or serious bodily injury.

The means used to conduct the attack are relevant only to the extent they evidence motivation.[85] For example, use of a rocket-propelled grenade against soldiers in a military vehicle suggests direct participation, whereas using one's fists to batter a soldier in a bar would not. But perhaps the first incident is a murder related to a passenger's involvement in organized crime, whereas the latter is an attempt to kill a soldier as such. It is also usually irrelevant that the means of injury or destruction are delayed or indirect (e.g., remotely controlled explosive bombs, mines, booby-traps, and the like) so long as the ultimate aim is to directly affect the military capacity of one Party to the conflict.

Nor are the nature of the injuries caused generally dispositive. Of course, an individual who merely slaps a soldier can hardly be deemed to be directly participating. But when an act causes death or serious injury, or was intended to but failed, one must still ask why the attack occurred.

[85] This position is supported by the Commentary to Article 51.3 of Protocol Additional I: "It seems that the word 'hostilities' covers …situations in which he undertakes hostile acts without using a weapon." Protocols Commentary, *supra* note 51, para. 1943.

Finally, proximity of the act to the combat zone indicates direct participation, but is in no sense determinative. For instance, a devastating computer network may be launched from continents away. So too may air and missile attacks. Civilians who are an essential link in the conduct of specific missions from great distances are no less directly participating than their counterparts near the battlefront. Distance does not provide civilians sanctuary from which to directly participate.

The same general approach would apply to attacks on military objectives. It is the intent of the civilian that matters. Moreover, because military objectives are defined in part by whether their "total or *partial* destruction, *capture or neutralization*" yields a definite military advantage,[86] the hostile act need not be calculated to permanently damage the object. It is enough that the action diminishes its military utility. So long as that is the intent, the civilian has directly participated. This approach applies equally to dual-use facilities, i.e., objects with both a military and civilian use. If the civilian's action is intended to affect the former, it is direct participation; if the latter, it is not.

Reduced to basics, then, the *mens rea* of the civilian involved is the seminal factor in assessing whether an attack or other act against military personnel or military objects is direct participation. In this regard, direct participation would certainly also require some *actus reus;* a mere threat would not suffice. On the other hand, preparation for and deployment to the attack certainly qualify, for it would be unreasonable to expect the victim of the wrongful attack to sit idly by while the civilian finalized preparations and commenced the operation. Although the revolving door issue remains, surely the civilian can be engaged until making good his escape.[87] Again, it would be strange to require victims of a wrongful attack to break contact with their attackers following a strike.

Self-Defense, Defense of Others, and Defense of Property: A civilian government employee or private contractor defending military personnel or military objectives from enemy attack directly participates in hostilities. His or her actions are indistinguishable from the quintessential duties of combat personnel. Thus, for instance, civilians may not claim defense of others when they provide cover or assistance to military forces under attack, even in cases of ambush. Additionally, performing such functions frees up soldiers for other combat missions, thereby further contributing to hostile action. Unfortunately, the absence of agreement on what constitutes a military objective complicates matters. Nevertheless, the *principle* that guarding a military objective against enemy action amounts to direct participation remains.[88]

On the other hand, defending *any* personnel or property against looters or others (including lawful combatants) engaged in criminal activity or war crimes does not comprise direct participation. The trickiest scenario is defense of military objectives against attacks by civilians or other unlawful combatants. In these cases, the key is whether there is a direct nexus

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[86] Protocol I, *supra* note 29, art. 52.2.

[87] This is the position adopted in the Commentary to Article 51.3: "[T] word 'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it…." Protocols Commentary, *supra* note 51, para 1943.

[88] In the Central Command (CENTCOM) area of operations, contractors are prohibited from being armed by General Order No 1A. However, subordinate commanders may request an exception to the policy in order to arm government contractor employees either for personal protection or contracted security duties. Exceptions are not allowed "where the intent is to guard U.S. or Coalition MSRs [main supply route], military personnel, military facilities, or military property, including property destined for military use." Headquarters, Multi-National Corps – Iraq, Information Paper: Procedures to Obtain CENTCOM Authority to Arm Government Contractor Employees, July 29, 20904 (on file with author).

between the threat and the ongoing hostilities. If so, civilians must avoid becoming involved. Civilians may also always defend themselves (because they are not legitimate targets under humanitarian law).[89]

In such cases, the civilian is acting either to enforce the law or in common or international criminal law defense of persons and property. It would be absurd to hold that the law disallows defense against illegal actions by the victims thereof or by those who might come to their aid. After all, recall that law enforcement agencies are not part of the armed forces, an indication that law enforcement and other activities designed to maintain civil order during an armed conflict are appropriate. Of course, any lawful use of force must be necessary and proportionate. In a hostile combat environment, more force than would seem necessary in a benign peacetime environment might be justified. For instance, civilians may "shoot their way out" of a dangerous situation if reasonably necessary to ensure their safety.

Despite the right to defense against unlawful actions, the presence of civilians armed for defense in a war zone is highly problematic. The more armed civilians in an area, the more difficult it is for lawful combatants to distinguish between unlawful combatants and those who are merely armed for defensive purposes. This in turn endangers the civilian population by eroding the practical implementation of the principle of distinction. Soldiers may be more inclined to employ force against civilians who they feel pose a threat. Alternatively, soldiers may refrain from the use of force when it is appropriate, thereby assuming greater risk than necessary.

Rescue Operations: Operations to rescue military personnel would be direct participation in hostilities, an inevitable conclusion drawn from the fact that combat search and rescue (CSAR) is widely deemed a combat activity.[90] Similarly, rescuing prisoners of war is combat action that may only be undertaken by military personnel.

However, the widespread hostage taking in Iraq raises the question of rescuing military or civilian hostages. A hostage is an individual who has been unlawfully deprived of his or her liberty and faces "threat of death, injury or further detention in order to compel a third party to act or abstain to act" as a condition for the release of the hostage.[91] Geneva Convention IV, Article 34, prohibits taking civilians hostage, while Article 147 makes doing so a grave breach. Protocol Additional I similarly outlaws hostage taking as a grave breach.[92] Common Article 3 to the four Geneva Conventions prohibits seizing individuals who are "taking no part in the hostilities" during non-international armed conflict,[93] a prohibition echoed in Protocol Additional

[89] Article 31.1(c) of the Rome Statute (*supra* note 42) provides that there is no criminal responsibility when: "[t]he person acts to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected." *See also* Kordic and Cerkez, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Judgment, Feb. 26, 2001, paras. 449-451

[90] UK Manual, *supra* note 37, art. 12.69.

[91] See discussion of the elements of the offense of hostage taking under the ICC Statute in Knut Dormann, ELEMENTS OF WAR CRIMES UNDER THE ROME STATE OF THE INTERNATIONAL CRIMINAL COURT 124-27 (2002). The elements rely heavily on the 1979 International Convention against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11,081, 1316 UNTS 205.

[92] Protocol I, *supra* note 29, arts. 75.2(c) & 85.2.

[93] Common Article 3(1)(b), *supra* note 32 & 36.

II.[94] The Statutes of the International Criminal Tribunal for the Former Yugoslavia,[95] the International Criminal Tribunal for Rwanda,[96] and the International Criminal Court[97] characterize hostage taking as a war crime. Although the prohibition is usually understood as the taking of civilians, it logically extends to military personnel[98] who have been unlawfully deprived of their liberty, for instance through seizure by civilians who have no right to participate directly in hostilities.

Since virtually every act of hostage taking during an armed conflict is a war crime and also probably a violation of applicable domestic law, the rescue of hostages is a law enforcement and/or defense of others measure, not direct participation in hostilities. This interpretation corresponds to reality because most hostage rescue expertise resides in civilian law enforcement agencies.

Human Shields: The fact that individuals have been compelled to act as human shields does not render them direct participants in hostilities, even though it is undeniable that their presence may deter attack on a legitimate target. Rather, they remain protected civilians, and any likely harm to them must be factored into the requisite proportionality analysis when determining whether the attack may be executed.[99] This position tracks Article 51.8 of Protocol Additional I, which further bolsters their status as non-participants by providing that "any violation of these prohibitions [in this context, the obligation of States to separate civilians from military objectives] shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians [i.e., proportionality] . . . ."[100] .

It is sometimes claimed that voluntary shields are also not direct participants because "their actions do not pose a direct risk to opposing forces" and they are not "directly engaged in hostilities."[101] Such an assertion ignores the fact that the human shields are deliberately attempting to preserve a valid military objective for use by the enemy. In this sense, they are no

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[94] Protocol Additional (II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, art. 4.2(c), 1125 U.N.T.S. 609, 16 International Legal Materials 1442 (1977).

[95] Statute of the International Tribunal for the Former Yugoslavia**,** art. 2(h), May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159.

[96] Statute of the International Tribunal for Rwanda, art. 4(c), Nov. 8, 1994, S.C. Res. 955, U.N.SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598.

[97] Rome Statute, *supra* note 42, arts. 8.2(a)(viii) & (c)(iii).

[98] See discussion in Dinstein, *supra* note 37, at 227.

[99] The principle of proportionality prohibits attacks that "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Protocol I, *supra* note 29, arts. 51.5(a) & 57.2(a)(iii) & (b).

[100] It is also the position adopted in US joint doctrine. Joint Publication 3-60 specifically provides that

> Civilians may not be used as human shields in an attempt to protect, conceal, or render military objects immune from military operations. Neither may civilians be forced to leave their homes or shelters to disrupt the movement of an adversary. Joint force responsibilities during such situations are driven by the principle of proportionality as mentioned above. When an adversary employs illegal means to shield legitimate targets, the decision to attack should be reviewed by higher authority in light of military considerations, international law, and precedent

Joint Chiefs of Staff, Publication 3-60, Joint Doctrine for Targeting (Jan. 17, 2002), at A2-3.

[101] Human Rights Watch, International Humanitarian Law Issues in a Potential War with Iraq (Feb. 20, 2003), *at* http://www.hrw.org/backgrounder/arms/iraq0202003.htm.

different from point air defenses, which serve to protect the target rather than destroy in-bound aircraft.[102] Voluntary shielding is unquestionably direct participation.

Computer Network Attack and Other Forms of Electronic Warfare: Although electronic warfare does not involve kinetic force, it can be just as devastating to enemy forces as traditional warfare. Military equipment may be neutralized or destroyed, enemy troops may be injured or killed, command and control may be disrupted, logistics may be interfered with, intelligence may be altered or blocked, and so forth. Undeniably, in 21st century conflict, electronic warfare can be as integral to the conduct of hostilities as kinetic operations. Therefore, it makes little sense to distinguish direct from indirect participation on this basis. Rather, the key, as with most participation, is to ascertain the extent to which the electronic warfare in question factors into ongoing or immediately prospective operations.

It has been suggested that computer network attack (CNA) is not direct participation unless it "kills, injures, captures or damages." This assertion confuses the notion of "attack" with "participation." A computer network attack that does not result in these consequences is not an attack as that term is understood in humanitarian law,[103] but this fact has little to do with whether or not an individual is directly participating. On the contrary, many types of military operations do not involve an attack *strictu sensu*, but nevertheless are integral to the conduct of hostilities.[104]

Planning: Planning occurs at the strategic, operational, and tactical levels.[105] Civilian government employees are regularly involved in planning at the strategic level, which involves the setting of national security strategy, national military strategy, and national resource

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[102] In most cases, it will serve no valid military purpose to directly target the voluntary human shields. After all, the objective is the target they are shielding. However, the fact that they are directly participating means that their injury or death would not factor into the required proportionality calculation. Children who act as voluntary shields would be an exception to this rule, for as a general matter of law they lack the mental capacity to form the intent necessary to voluntarily shield military objectives.

[103] Michael N. Schmitt, *Wired Warfare: Computer Network Attack and International Law*, 84 INTERNATIONAL REVIEW OF THE RED CROSS 365, 375-378 (2002).

[104] E.g., collection of tactical intelligence.

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> *Tactical*: The level of war at which battles and engagements are planned and executed to accomplish military objectives assigned to tactical units or task forces. Activities at this level focus on the ordered arrangement and maneuver of combat elements in relation to each other and to the enemy to achieve combat objectives. See also operational level of war; strategic level of war.
> *Operational*: The level of war at which campaigns and major operations are planned, conducted, and sustained to accomplish strategic objectives within theaters or other operational areas. Activities at this level link tactics and strategy by establishing operational objectives needed to accomplish the strategic objectives, sequencing events to achieve the operational objectives, initiating actions, and applying resources to bring about and sustain these events. These activities imply a broader dimension of time or space than do tactics; they ensure the logistic and administrative support of tactical forces, and provide the means by which tactical successes are exploited to achieve strategic objectives. See also strategic level of war; tactical level of war.
> *Strategic*: The level of war at which a nation, often as a member of a group of nations, determines national or multinational (alliance or coalition) security objectives and guidance, and develops and uses national resources to accomplish these objectives. Activities at this level establish national and multinational military objectives; sequence initiatives; define limits and assess risks for the use of military and other instruments of national power; develop global plans or theater war plans to achieve these objectives; and provide military forces and other capabilities in accordance with strategic plans. See also operational level of war; tactical level of war.

DOD Dictionary, *supra* note 59.

allocation. Indeed, involvement in such planning is a core tenet of democratic control of the armed forces through balanced civil-military relations. A typical strategic level planning decision would involve, for instance, composition of a coalition of the willing.

By contrast, planning at the operational level entails decisions about the conduct of particular military campaigns or operations, whereas tactical planning encompasses individual battles or engagements. All tactical level planning, such as mission planning for aerial operations, amounts to direct participation because specific military operations could not occur but for that planning. The same is generally true of operational level planning regarding employment of forces, although operational level logistics planning is generally remote enough from the hostilities to avoid characterization as direct participation.

A recurring question involves civilian leaders who engage in military decision-making. If they qualify as combatants (for instance, by serving as the Commander of the armed forces), they are targetable as such. If they do not qualify, the question is whether or not they are directly participating in hostilities. The strategic/operational/tactical paradigm of decision-making serves as a useful starting point in this regard. In particular, civilian leaders who engage in tactical level planning or approval are directly participating and thereby legitimate targets.[106]

Intelligence: As suggested earlier, one distinguisher regarding intelligence operations is the level of war the intelligence is designed to affect. Gathering, analyzing, and disseminating tactical intelligence usually amounts to direct participation because the relationship between the intelligence and the immediate conduct of hostilities is close, whereas strategic intelligence would not be sufficiently related to the hostilities to render related activities direct participation. Operational level activities constitute the gray area.

It is essential to emphasize the situational nature of the determination. Technology now permits the gathering of tactically useful data from great distances, often by satellite or airborne platform. Few would suggest that involvement in the launch or control of reconnaissance satellites is direct participation. However, as that data is processed, analyzed, and disseminated to troops in the field, the likelihood of civilian involvement being characterized as direct participation grows.

Lastly, detainee interrogations often result in the development of time-sensitive tactical and operational level intelligence. To the extent civilian government employees or private contractors participate in interrogations designed to elicit such information, as in Iraq, they are directly participating in hostilities.

Logistics and Support: Most logistics and support functions would not constitute direct participation. For instance, driving supply convoy trucks or feeding and housing troops are legitimate activities for civilian employees and private contractors. However, immediate battlefield logistics functions (e.g., directly supplying troops engaged in combat with ammunition) would be direct participation. After all, resupply during a fire fight, or the lack thereof, may well determine the victor. The battle involving contractors in Najaf cited earlier forcefully illustrates this point.

Maintenance or Operation: The operation of a weapons system by a civilian is unambiguously direct participation. So too is operation of any non-weapons system, or

[106] *See generally* Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law* 17 YALE JOURNAL OF INTERNATIONAL LAW 609-685 (1992).

component thereof, that is integral to ongoing or imminent hostilities, such as an unarmed UAV used to locate fleeting targets.[107]

Maintenance is increasingly being outsourced to contractors. Depot maintenance of military equipment, i.e., maintenance conducted away from the battle zone, is relatively remote from the hostilities and clearly not direct participation. Similarly, routine, regularly scheduled maintenance on equipment, even near the front, does not impact in any direct way on specific operations.

On the other hand, preparing equipment for battle has a direct impact on the course of battle. Thus, activities such as fueling aircraft, loading weapons, conducting pre-flight checks, performing life-support functions, and locally repairing minor battle damage would meet the direct participation threshold. Between these two extremes, as with all other cases cited above, the analysis must be case-specific.

Providing Training and Military Advice: In Iraq, much of the generalized military advice (for instance, on structuring the New Iraqi Army and other military and law enforcement forces) and most of the training has been outsourced to private firms. Such training and advice has little immediate impact on military operations. On the other hand, if civilians are providing advice on the conduct of actual military operations at the tactical level, then they are directly participating because the flow of hostilities is greatly determined by their input. At the operational level, the evaluation of such advice would have to be conducted on a case-by-case basis. To the extent it involves the deployment of forces into combat for specific operations, it is likely to amount to direct participation. By contrast, merely offering general advice on military matters in the area of operations would not. The distinguisher is the extent of nexus to, and impact on, specific combat operations.

Reconstruction: Many of the government civilians and private contractors in Iraq during the occupation engaged in reconstruction efforts. Reconstruction of civilian or dual-use facilities is designed to benefit the civilian population, not to improve the military wherewithal of a Party to the conflict. In fact, in the case of Iraq, there are multiple UN Security Council Resolutions that encourage reconstruction efforts.[108] The suggestion that such efforts amount to direct participation is unconvincing.

Even general construction or reconstruction of military facilities would be permissible because there is no immediate impact on on-going military operations. However, construction that directly relates to immediate combat operations might well amount to direct participation. For instance, workers who conduct rapid-runway repair following an attack in order to launch aircraft are directly participating because but for their efforts, no further missions are possible

Concluding Observations

[107] A US Army Judge Advocate General School publication states that "the contract technical adviser that spends each day working with members of an armed force to make a weapon system more effective...is integrated with [the] force, [and taking an] active role in hostilities, [and therefore] may be targeted." Protecting Human Rights During Military Operations, 48TH Graduate Course Deskbook (International & Operational Law Department, The Judge Advocate General's School, United States Army, 2000), at 15-3, cited in Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 AIR FORCE LAW REVIEW 1, 31 (2001).

[108] E.g., UN S.C. Res. 1483 (2003) & UN S.C. Res. 1511 (2003). *See discussion in* Michael N. Schmitt & Charles H.B. Garraway, *Occupation Policy in Iraq and International Law*, 9 YEARBOOK OF INTERNATIONAL PEACEKEEPING 27 (2004).

Participation by civilian government employees and private contractors in armed conflict is growing exponentially, with no end in sight. Therefore, it is imperative that agreement be reached on the terms of reference for such participation. In doing so, it is necessary to balance military good sense, State practice, and humanitarian concerns. Unfortunately, the increasing tendency of States to rely on civilians (for reasons that are paradoxically very sensible) creates a confusing and dangerous environment for military forces engaged in combat. It also places the civilian population at great risk. Hopefully, time remains to establish reasonable normative lines of demarcation, ones that protect civilians and enhance military operations, but which States can accept.