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Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces

W. Hays Parks*

 This paper summarizes an informal Power Point presentation offered at the Third Meeting of Experts on "direct participation in hostilities," Geneva, October 25, 2005. The views expressed herein are the personal views of the author, and may not necessarily reflect an official position of the Department of Defense or any other agency of the United States Government, nor of the International Committee of the Red Cross or the TMC Asser Institute.

The Coalition war effort in Iraq that began in March 2003 brought to the forefront the issue of the degree to which civilians and, in particular, civilian contractors today may form part of fielded military forces, and the roles they may play. As the Coalition moved from the major combat operations phase into a role as the Occupying Power on or about May 1, 2003, the role of civilian contractors increased dramatically. It has caused the U.S. Department of Defense to take a long and hard look at the situation and issues raised. I would not be so bold as to suggest that we have all the answers. My presentation is intended to offer some law of war considerations as they relate to our expert meetings.

As I will show, the history of civilians accompanying the military in armed conflict is long. It has not abated. Department of Defense civilians, civilian contractors, and other non-military personnel (such as American Red Cross employees) served in crucial combat support and combat service support functions in build up, deployment and sustainment of U.S. and Coalition military forces for the air, maritime and land campaigns against Iraq in the liberation of Kuwait in 1991.[1] Outsourcing accelerated in the United States and other nations with the end of the Cold War. Governments sought a "peace dividend" as the need for large standing military forces diminished.[2]

Before and following the 1991 conflict, there was interest in improving the "teeth to tail" ratio of uniformed combat arms personnel over combat support and combat service support. The United States Congress mandated increased reliance upon outsourcing within the Department of Defense in lieu of uniformed military forces.[3] To a degree, this was part of a general trend of transformation of many government services. In the U.S. military, it is a part of a major transformation process referred to as a revolution in military affairs (RMA), necessitated in part by increasing reliance upon more sophisticated weapons, communications and logistics systems.

The new emphasis on outsourcing was field-tested in part in the Contingency Logistics Support Contract (LOGCAP) for support to U.S. military forces engaged in the peace operations that began in the Balkans in 1993, where LOGCAP personnel performed combat service support missions.[4] Law of war consequences were not fully considered, as U.S. forces initially were peacekeepers rather than parties to an international armed conflict. Contractor support continued without change during

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[1] See Department of Defense, *Final Report to Congress: Conduct of the Persian Gulf War* (April 1992), Appendix N, pp. 599-604.

[2] Peter W. Singer, in *Corporate Warriors* (2003), at p. 259, note 73, states "One of fifty Americans deployed to the [Persian] Gulf in 1990 [for Operations DESERT SHIELD and DESERT STORM] was a privately employed civilian. By the time of the Bosnia deployment in 1995-1996, the ratio was down to 1 in 10."

[3] For example, the 1996 DOD Authorization Act directed DOD to convert 10,000 uniformed positions into civilian jobs by 30 September 1997; *see* P.L. 104-106, § 1032, 110 Stat. 186.

[4] The term "combat service support" refers to a level of communications, logistics, maintenance and similar support being provided rather than necessarily referring to support during combat operations.

NATO's 1999 operations against Serbian forces in Kosovo and the regime of Slobodan Milosevic in Belgrade. Given its limitation to an air campaign, the issue of civilians taking a direct part in hostilities was never tested.

Contracting and personnel officials viewed the Balkans experience as a template for future operations – again, without bearing in mind possible law of war implications. This situation was not unique to the Department of Defense. The Department of State relies upon private security contractors for personal security details and protection of U.S. embassies and missions abroad. Such peacetime reliance continued into the armed conflicts in Afghanistan and Iraq without full appreciation for potential law of war issues.

Following twelve years of United Nations-imposed sanctions and enforcement operations, major combat operations between Coalition and Iraqi forces resumed on March 20, 2003. As was the case during Coalition operations in Afghanistan following the al Qa'eda attack on the United States on September 11, 2001, civilian contractors played a significant support role, maintaining, servicing and in some cases operating highly technical equipment. War-fighting was left in the hands of combat arms forces (infantry, artillery, armor, combat aviation, and naval forces), but contractors supported their efforts in a variety of roles. On a linear battlefield, their risks were limited.

The defeat of Iraqi military forces following six weeks of battle found the Coalition shifting to the role of Occupying Power. Article 43 of the Annex to the 1907 Hague Convention IV is specific in the responsibilities of an Occupying Power:

> *The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.*

Belligerent occupation imposes upon the Occupying Power authority to govern, but also a responsibility to care for the civilian population. This includes maintaining the national infrastructure. It requires providing public services, such as electricity, water, sanitation, roads and law enforcement and fire protection; depending on the circumstances, it may necessitate or merit restoration, such as economic maintenance and recovery; governing, including restoration of public education and health services; medical care and food for the civilian population; and security to provide all of the above.

Iraq brought many challenges. Saddam Hussein's reign had spent considerable money and labor on building palaces for Saddam around Iraq while neglecting services critical to survival of the civilian population, particularly for the majority non-Sunni population. The rapid defeat and dissolution of Iraqi forces had effects on the nature of the occupation. Manpower and expertise had to be found quickly in order to provide emergency repair and maintenance of critical infrastructure – electricity, water, medical care, security and food, among other things. Until Iraqi expertise could be identified and hired, contracts were let to foreign corporations and civilian contractors for this

manpower and expertise. Had Iraqis been available for security and services related to rebuilding and maintaining the infrastructure, there would have been less demand for foreign outsourcing. Had there been a benign occupation, as was the case in Japan following World War II, outsourcing would have been less an issue than it became once resistance by former Ba'athists and others, including criminal elements and foreign fighters, began.

Belligerent occupation by democracies in modern history has been a responsibility relinquished by military commanders to civilian control, and to civilian employees, as a model of restricted exercise of military power. In the 1918 Allied administration of the Rhineland and in the Allied occupation of Germany following World War II, transformation of the occupation from military to civilian control was rapid and substantial.[5] This practice was followed in Iraq.

On May 10, 2003, Ambassador Paul L. Bremer was appointed to administer a new organization called the Coalition Provisional Authority (CPA). Provided broad authority for policy making and budgeting in rebuilding Iraq, Ambassador Bremer would report to the President through the Secretary of Defense. The military commander's mission was to defeat the then-nascent insurgency, while the CPA assumed authority for contracting for reconstruction and development of Iraqi security. This division of occupation authority has been criticized as a "grave systemic flaw."[6] It is not within my remit to agree or disagree with this assessment. The CPA decision has been highlighted as an element in the restoration of Iraq, including the dependence on contractors and private security contractors.

The division of authority nonetheless resulted in two stovepipe organizations – one fighting, one administering the occupation, reconstruction, and movement to democracy. Contract funding and authorization varied.

This history is broader than the meaning of what constitutes taking a "direct part in hostilities." It is offered for an appreciation of the overall picture. The experience prompted the Department of Defense to reassess and update the role of outsourcing vis-à-vis use of uniformed military forces. There were other reasons for a reassessment, including statutory changes that necessitated determining precisely what roles could be performed by the private sector.

It was at this point in time that the law of war became a part of the process. There were two main questions:

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[5] See, for example, Ernst Fraenkel, *Military Occupation and the Rule of Law: Occupational Government of the Rhineland 1918-1923* (1944), at 10; and Earl F. Ziemke, *The U.S. Army in the Occupation of Germany 1944-1946* (1975), at 404.

[6] Bing West, *No True Glory: A Frontline Account of the Battle for Fallujah* (2005), at 21-22, 319.

- To what extent should current military duties be outsourced to civilian contractors? As part thereof, what military and Department of Defense civilian positions are "inherently governmental" and therefore not to be contracted?

- At what point would a position converted from military to civilian (or civilian contractor) be regarded as taking a "direct part in hostilities," using the phrase contained in Article 51, ¶ 3 of the 1977 Additional Protocol I, and the subject of our consideration?[7] It was important to examine the issue not only from a U.S. standpoint, but also from that of a potential adversary. Thus while it might be argued that a government may hire a civilian contractor to (e.g.) service a combat aircraft on the flight line in a theater of operations, an enemy sniper might regard that civilian as taking a direct part in hostilities and subject to lawful attack.

Throughout this process, the focus was on the general military transformation then underway rather than regard on-going Iraqi operations – particularly those being performed by the CPA – as a template for policy development. The correctness of this focus was reconfirmed, given the so-called Iraqi resistance's intentional targeting of foreign civilians and civilian objects, including the offices of the United Nations, the International Committee of the Red Cross, and other private organizations.

Department of Defense policy had to be developed consistent with domestic law and U.S. international law obligations, including the law of war. With regard to the latter, a general guide was the law of war principle of *distinction*, obligating each government to distinguish between the civilian population and combatants.[8] However, this general principle is not absolute, but must be read in light of State practice and other treaty law, particularly with regard to civilians accompanying the armed forces in the field. The lawfulness of civilians accompanying the armed forces in the field long has been recognized in the law of war, beginning with U.S. Army General Orders No. 100 of 1863, also known as The Lieber Code,[9] continuing to Article 4A(4) and (5) of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War. Thus a crucial question became the one with which we have been seized: At what point would a civilian accompanying U.S. forces be regarded as taking a direct part in hostilities, and therefore subject to lawful attack? There also were government and command responsibility issues.

Development of Department of Defense policy involved a phalanx of lawyers representing a variety of fields of expertise – acquisition law, personnel law, military justice, international law (law of war, status of forces agreements, and other areas). It necessitated review of existing statutory and treaty law as well as relevant regulations. From a law of war standpoint, State practice was essential in suggesting not only how

[7] Article 51, ¶ 3 states: "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities." Although the United States is not party to Additional Protocol I, this phrase is regarded as a useful general threshold for the point at which a civilian loses his or her immunity from direct attack.

[8] Article 48, Additional Protocol I.

[9] Article 50.

governments had employed civilians in previous conflicts, but also how enemy governments had treated civilians accompanying the armed forces when captured.

This research and education process was critical. As one expert has stated, "In the revolution in military affairs [RMA], it is not enough to be aware of an emerging RMA. A military must be responsive to its implications." Lawyers involved in the development of policy must participate in identifying emerging trends and effects the law of war may have on the trend, or any possible effect a trend may have on the law of war.

The research and education process necessitated learning more about current trends in outsourcing the military. Fortunately, several scholarly works on the issue of outsourcing the military have been produced in recent years.[10] Lawyers and others involved in the decision-making process relating to outsourcing would be remiss without this background knowledge. These works and others identified several important trends:

- The practice of outsourcing the military is global rather than unique to recent U.S. operations in Afghanistan and Iraq. Governments historically have relied upon civilians and civilian contractors, and increasingly are turning to outsourcing of duties previously regarded as exclusively military.[11]

- Governments are not alone in looking to contractors. Non-government organizations (NGO) increasingly have had to seek the assistance of private security contractors for protection. As one source noted:

> NGOs should consider the privatization of security for humanitarian purposes. Since the core dilemma humanitarians face is the ability of predators to prey on civilians and NGO staff as well, and since nations and the … [United Nations] are increasingly hesitant to furnish the necessary means to provide security, it is worth exploring whether in the face of the privatization of assistance, the privatization of security is also appropriate.[12]

- Use of private military companies may offer a solution for United Nations (UN) peacekeeping operations. The UN has been plagued by delay or inaction in responding to crises with properly trained and disciplined military forces as governments have been reluctant or unable to contribute their forces for controversial, open-ended commitments. The quality of UN peacekeeping forces has varied from very good to very

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[10] David Shearer, *Private Armies and Military Intervention* (Adelphi Paper 316, 1998); Singer, *Corporate Warriors*, *supra* n. 2; and Deborah Avant, *The Market for Force* (2005).

[11] In particular, see Singer, *Corporate Warriors*, *id*., at 19-39.

[12] Janice Stein, Michael Bryans and Bruce Jones, *Mean Times: Humanitarian Action in Complex Political Emergencies – Stark Choices, Cruel Dilemmas* (1999), as cited in Singer, *Corporate Warriors*, *id*., at 184. *See also* Singer, "Should humanitarians use private military services?," *Humanitarian Affairs Review* (Summer 2004), at 14-17.

bad. Misconduct by some UN peacekeeping forces, including rape, child prostitution and human rights abuses, has increased. It has been suggested that a private military company – assumedly better trained and more disciplined – might be deployed faster and for substantially less cost than military forces provided by governments.[13]

4 Trends reported in these scholarly works show that civilian contractors, private military companies or private security contractors increasingly are being employed by governments (ministries of foreign affairs, military departments, and other government agencies), non-government organizations, private industry, and the United Nations.

In consideration of the role of civilians and contractors accompanying the military, several problems were identified. First, categories of duties performed by the military are far from static. For example, there are three general categories of military duties: combat arms, combat support, and combat service support. Consider the role of a U.S. Air Force military policeman. If the individual is performing base law enforcement duties, he (or she) is in a combat service support role. If he is guarding enemy prisoners of war, he is in a combat support role. If he is engaged in air base defense, he is in a combat arms role. Military duties do not always and consistently fall into neat boxes.

Similarly, it was discovered that each category of specialists – such as personnel law, acquisition law, law of war, and military doctrine writers – use different terminology even when speaking the same language. Where the law of war refers to combatants, non-combatants, civilians who accompany the force, and civilians, personnel and acquisition law practitioners refer to emergency-essential (civilian) personnel, civilian contractors, and positions "inherently government." It was necessary to ensure each group was represented in the policy development process while finding common ground for our efforts.

From a law of war standpoint, one of the first things that had to be accomplished was addressing various military, historical and legal myths, such as:

4 All wars are international armed conflicts.
4 All wars are fought on linear battlefields.
4 Parallel with this: Civilians provide only logistics and combat service support, well behind friendly lines.
4 Conversely, all wars are fought on non-linear battlefields.
4 Civilians accompanying military forces may not be armed.
4 The law of war prohibits a civilian from "taking a direct part in hostilities."
4 A civilian accompanying the armed forces who takes a direct part in hostilities is an unprivileged belligerent if captured.

None of these is correct.

[13] Singer, *supra* n. 2, at 53-57, 183.

An understanding of State practice – what laymen refer to as "history" – aids in clarifying most of these issues. History shows that civilians have played a variety of roles in support of military forces, including taking a direct part in hostilities. For example:

4 A display in the Norwegian Armed Forces Museum in Oslo, referring to its armies between the 17th and 18th centuries, states: "The old hired [meaning contracted military] armies were communities of their own. The troops were followed by scores of civilian contractors, wives, children, men and prostitutes. They were just as numerous as the troops, and were essential to keep an army going."

4 During the 18th Century U.S. war for independence, Great Britain hired between 15,000 and 20,000 Hessian "German auxiliaries" to fight on its behalf. The Hessians fought for their British masters for seven years until defeated by the colonial military forces of General George Washington at Trenton on December 26, 1776.

4 The Nineteenth Century U.S. Army employed civilian trappers as foragers, scouts and fighters in it various campaigns. One of the more famous was Kit Carson (1809-1868), who served and/or fought in the Fremont expeditions (1842-1845), the Bear-Flag rebellion (1846), the Mexican-American War (1846), the U.S. Civil War (1861-1863), and various wars against the Navajo (1863-1864). While the concept of punishment of unprivileged belligerents was codified in the 1863 U.S. Army General Orders No. 100, one of two law of war documents prepared by Francis Lieber, a clear distinction was drawn between a private citizen illegally engaging in unauthorized attacks and a civilian accompanying the military and fighting alongside them.

4 Employing civilians and having civilians take a direct part in hostilities did not change in the Twentieth Century. For example, in 1941 civilian contractors were employed in construction of the U.S. naval base on Wake Island. Of 1,603 American personnel, 1,150 were civilian contractors. As Japanese forces began their assault on Wake Island it in December 1941, the sailors and Marines turned to the civilian construction workers for support in the island's defense. Roughly half of the civilians joined in the unsuccessful defense of the island. All personnel captured – whether military or civilian – were treated as prisoners of war, whether the civilians had taken a direct part in hostilities or not.[14]

4 One of the most famous examples of civilian contractors taking a direct part in hostilities is the American Volunteer Group, an aviation group popularly known as the "Flying Tigers." Voluntarily-discharged former U.S. military personnel (pilots and ground support personnel), they were civilians under contract to Central Aircraft Manufacturing Company of China. They arrived in Rangoon on July 28, 1941, and flew

[14] See Gregory J. W. Urwin, "The Wake Island Militia," *Naval History* (November/December 1997), at 39-44. Ninety-eight civilians retained on the island to operate heavy construction equipment were murdered on October 8, 1943 by their captors as U.S. forces prepared to recapture the island. Their murder had nothing to do with whether or not they had taken a direct part in hostilities in the 1941 defense of the island. The Japanese commander, Rear Admiral Shigimatsu Sakaibara, was tried, convicted and executed after the war for his war crimes.

combat operations against the Japanese in Burma (now Myanmar) and China from December 20, 1941 to July 10, 1942, in support of British and American forces.

4 Unlike Europe, where resistance movements were composed of civilian volunteers, resistance movements in Burma, such as the Kachins, were hired by British and U.S. forces. Other indigenous persons were hired to aid in the construction of the 1,100-mile Burma (Ledo) Road between India and China used exclusively for movement of military supplies.

4 In 1907 a voluntary civilian women's organization, the Princess Royal's Volunteer Corps, also known as the First Aid Nursing Yeomanry, or F.A.N.Y., was formed in Great Britain. Its civilian members have served with distinction since then. In World War II, 1,500 F.A.N.Y. members (of a 3,200 female staff) served with the Special Operations Executive (SOE) around the world. They provided support to planning, intelligence, operations, logistics, research, security, cryptology, transport and administration. Thirty-seven parachuted clandestinely into Nazi-occupied France on armed missions in support of the resistance. Thirteen captured were murdered by their Nazi captors under the authority of Hitler's *Nacht und Nebel* (Night and Fog) decree. Following the Allied victory, those responsible were located and prosecuted.[15]

4 Another World War II British use of civilians to take a direct part in hostilities was "the Shetland Bus." These were Norwegian fishing boats manned by Norwegian refugees recruited by the British government for "dangerous work." In addition to a weekly wage higher than that paid a uniformed member of the British military, they were paid a bonus for each trip made to Norway to carry in or bring out British members of the military or members of the Norwegian resistance, or supplies for either. The boats and their crews were armed, although their weapons were concealed. The crews initially wore civilian clothing, but subsequently wore Norwegian naval uniforms obtained by the British. They remained civilians rather than members of the Royal Navy or Norwegian Navy, for all intents and purposes a private military company.[16]

4 In the course of the twelve-year (1948-1960) Malaya "Emergency," as it was characterized, the British Colonial Government hired Borneo headhunters as trackers to assist in hunting down units and members of the insurgent Malaya Communist Party (MCP). Armed with blowpipes with poisonous darts, they also were used successfully in attacks on MCP sentries. These Borneo headhunters were private contractors rather than members of the British forces.

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[15] The most famous case being the *Trial of Wolfgang Zeuss and others* (*The Natzweiler Trial*), V *War Crimes Trials* (1949). Three of the four Natzweiler victims were F.A.N.Y. *See also* Sarah Helm, *A Life in Secrets: The Story of Vera Atkins and the Lost Agents of SOE* (2005), which details the investigation of murders of the female S.O.E. agents. F.A.N.Y. personnel recognized that as members of a voluntary civilian organization rather than the military, their chances of claiming prisoner of war status was slim; Helm, p. 78.

[16] David Howarth, *The Shetland Bus* (1951), pp. 13, 16, 51, 61.

4 In the war between Eritrea and Ethiopia (1997-1998), the Government of Ethiopia hired a Russian private military company (PMC) operating Sukhoi-27 *Fitter* combat aircraft for operations against Eritrea. The Russian PMC provided the aircraft, aircrew, maintenance and support staff, and command and control personnel to plan the combat missions. The Ethiopian General Staff also hired a number of former Russian Army flag officers who directly assisted the General Staff in planning and executing Ethiopian military operations.[17]

4 Moving to more recent conflicts, the Coalition war in Afghanistan that began in September 2001 faced two foes – Afghan tribes loyal to the Taliban regime and foreign fighters belonging to al Qae'da. As one participant has commented, "You cannot buy an Afghan's loyalty, but you can rent it."[18] Tribes aligned with the Taliban regime were hired away to join either the Northern or Southern Alliance. In each case, these were civilian fighters hired to take a direct part in hostilities against tribes with which previously they had been allied. They, too, were private military companies.

There is no doubt that modern conflicts will follow the traditional pattern of uniformed forces of a government facing uniformed forces of an enemy government. But the battlefield never has been pristine, shorn of government-authorized civilians fighting on behalf of one side if not both. I have found no evidence that civilians authorized to accompany the armed forces who took a direct part in hostilities and were captured were denied prisoner of war status, much less classified as unprivileged belligerents. There is no doubt that they may be attacked for such time as they are taking a direct part in hostilities. But in an international armed conflict civilians authorized to accompany the armed forces do not relinquish their entitlement to prisoner of war status if captured.

In reviewing the law of war, the provisions have been consistent – civilians who accompany the armed forces in the field are entitled to prisoner of war status. Thus:

4 Article 50, U.S. Army General Orders No. 100 (1863): Citizens who accompany an army *for whatever purpose* … if captured, may be made prisoners of war…. [emphasis provided]

4 Article 13, Annex to Hague Convention IV (1907): Individuals who follow an army without directly belonging to it, such as … contractors, who fall into the enemy's hands … are entitled to be treated as prisoners of war….

4 Article 4, ¶A(4), Geneva Convention Relative to the Treatment of Prisoners of War (1949): Prisoners of war … [include] persons who accompany the armed forces without actually being members thereof, such as civilian members of aircraft crews … supply contractors….

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[17] Singer, *supra* n.2, at 11, 173.

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[18] Gary Schroen, *First In* (2005), at 359.

4 Article 4, ¶ A(5), Geneva Convention Relative to the Treatment of Prisoners of War: Members of crews … of the merchant marine and the crews of civil aircraft of the Parties to the conflict….

4 Article 85, Geneva Convention Relative to the Treatment of Prisoners of War (1949): Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.

4 Article 51, ¶ 3: Civilians are protected from attack "unless and for such time as they take a direct part in hostilities."

A review of State practice and law of war treaties leads to the following conclusions:

– Civilians may accompany the military in armed conflict.

– Civilians authorized to accompany the armed forces in armed conflict are entitled to prisoner of war status if captured.

– The law of war does not prohibit civilians accompanying the armed forces from taking a direct part in hostilities.

– Civilians accompanying the armed forces are subject to attack for such time as they take a direct part in hostilities, but do not relinquish their entitlement to prisoner of war status.

– Private civilians are subject to attack for such time as they take a direct part in hostilities.

– The classification of "unprivileged belligerent" historically has been reserved for private citizens (other than members of a *levee en masse*) who engage in unauthorized combatant acts.

Let me dwell on this last point briefly due to its significance to our discussion. Attendees at the first meeting of experts on the meaning of "taking a direct part in hostilities" were introduced to the hypothetical "Bob the truck driver." Hypothetical Bob was a civilian truck driver in a convoy of military trucks carrying military supplies and ammunition to military positions. The driver of the first truck in the convoy was a uniformed soldier. Bob was driving the ammunition-laden second truck, and was followed by a truck driven by a soldier, who in turn was followed by a military truck driven by another civilian, etc. The question was whether Bob was taking a direct part in hostilities and could be lawfully targeted.

I was not a participant in the first DPH meeting, but understand the debate over Bob was spirited. As reported to me, some argued Bob was taking a direct part in hostilities and therefore could be targeted. Others argued that as Bob was a civilian (whether regarded as taking a direct part in hostilities or not), he could not be targeted, but was at risk of injury or death as a result of direct attack of the truck he was driving.

The debate over whether Bob the truck driver could be targeted is not new. To the best of my knowledge it began more than thirty years ago between two members of the U.S. delegation to the Diplomatic Conference – Waldemar (Wally) A. Solf and Richard (Dick) Fruchterman -- as the "direct participation in hostilities" provision and other Additional Protocol I language was under consideration. I witnessed their discussion of "Bob" on more than one occasion. I raised it anew in a meeting of Canadian, British, New Zealand and U.S. military law of war experts at Old Sarum in November 1989. If the debate at the 2003 "direct participation in hostilities" meeting is as it was reported to me, that discussion was as inconclusive as it was when Wally Solf and Dick Fruchterman raised the issue, and as inconclusive as the Old Sarum discussion. But the focus on the original debate between Wally Solf and Dick Fruchterman, and in the debate at Old Sarum, was solely on whether or not Bob the truck driver lawfully could be targeted. So, too, was consideration of the issue by government delegations at the 1974-1977 Diplomatic Conference. I have found no evidence that the status of Bob were he captured to have been a factor. Certainly there is nothing to suggest that Bob's status would be other than a prisoner of war, as articulated in Article 4, ¶ A(2), GPW.

This is mentioned because of the debate in some corners as to the "unprivileged belligerent" status issue raised in efforts against international terrorism since the al Qa'eda attack of September 11, 2001. Members of al Qa'eda captured by Coalition forces have been characterized as unprivileged belligerents, an historic classification for private citizens who engage in combatant activities not authorized by a government. Denial of combatant and prisoner of war status to private citizens – again, other than a *levee en masse* – has a very long history. It is separate and apart from the issue of when a civilian lawfully may be targeted as a result of acts regarded as taking a direct part in hostilities. The focus of our meetings of experts has been solely on ascertaining when a civilian may be regarded as taking a direct part in hostilities and lawfully targeted – whether a private citizen, a civilian employee of a government that is a State party to an armed conflict, or a civilian contractor hired by a State party to an armed conflict. Assessing whether Bob the truck driver is taking a direct part in hostilities and therefore may be the object of direct attack is separate and apart from his status if captured.

Within the U.S. Department of Defense, the meaning of the phrase "taking a direct part in hostilities" was considered primarily from the standpoint of the degree to which outsourcing might be done. Whether as a matter of policy it should be done was a separate issue.

A parallel law of war issue is consideration of *where* one is on the conflict spectrum when considering reliance upon civilians in lieu of uniformed military personnel.

The conflict spectrum is broad, ranging from peace through peace operations, internal conflict (which includes providing what the U.S. terms "foreign internal defense" assistance in training and providing other assistance to the military of a nation faced with an internal conflict), through pre-conflict (that is, the period of build up to participation in an international armed conflict, such as the U.S. and its Coalition partners experienced prior to the 1991 liberation of Kuwait), into international armed conflict, eventually returning to peace.

Clearly there are separate phases in an international armed conflict. Using recent terminology, the first phase involving uniformed forces of one government engaging the uniformed forces of another government is one of major combat operations. The issues we have discussed and the questionnaire we answered tended to focus on this phase.

If the military forces of one State party to the conflict defeat its opponent and formally occupies the territory of its former adversary, the belligerent occupation phase begins. As indicated earlier, the government assuming the role of Occupying Power assumes new responsibilities under both Hague and Geneva (GC) law. Civilians supporting the belligerent occupation and assisting the Occupying Power in the lawful discharge of its responsibilities may not be regarded as taking a direct part in hostilities in the same sense as they might have been during the major combat operations phase.

Once the belligerent occupation ends, there may be a transition phase in which the State party that previously was the Occupying Power retains forces at the request of the new government as part of stability operations. If there remains some instability as the new government takes hold and assumes its responsibilities, civilians supporting the remaining military forces may not be regarded as taking a direct part in hostilities in the same sense as they might have been during the major combat operations phase.

The phrase "direct part in hostilities" also is used Additional Protocol II.[19] This suggests attention should be paid to its original intent: it was to address the issue of the "farmer by day, guerrilla by night" and when he or she may be lawfully targeted as an exception to provisions in Additional Protocols I and II prohibiting making civilians the object of attack.[20] The road to clarity and specificity has proved challenging. There is no bright line. At the same time, the phrase as used in Additional Protocols I and II was intended only to address when a civilian lawfully may be the object of direct attack.

Research of the law of war and State practice suggests answers to several questions. Neither Article 51, ¶ 3 of Additional Protocol I nor Article 13, ¶ 3 of Additional Protocol II prohibits a civilian from taking a direct part in hostilities. If a civilian accompanies the armed forces, he or she may be subject to lawful direct attack for such time as her or she is taking a direct part in hostilities. As we have found in our discussions, there is no "bright line" as to when a civilian is taking a direct part in hostilities. As I have noted, the issue of whether a civilian may be regarded as taking a

[19] Article 13, ¶ 3.
[20] Artcle 51, ¶ 2, Additional Protocol I, and Article 13, ¶ 2, Additional Protocol II.

direct part in hostilities must be viewed not only from the standpoint of the government employing the civilian, but also how the civilian and his or her duties may be viewed by an enemy. Put another way, were a government to employ a civilian in a position or duty previously performed by a soldier, and an enemy sniper were to attack that individual, would the sniper be subject to prosecution for a war crime for making this civilian the object of a direct attack . More importantly, would the prosecution be able to sustain its burden of proof that a war crime had been committed?

Development of Department of Defense policy has been of value in gaining clarity. Several points became clear early in the deliberative process. No one is looking to substitute civilian employees or contractors in traditional war-fighting roles such as infantry, artillery, armor, combat engineers, flying combat aircraft, or command and control of naval vessels. To the extent outsourcing is under consideration, it is in support roles, often distant from the battlefield. In the ground forces, there is an appreciation that rear area security remains a military mission, even on a linear battlefield. Nonetheless various situations, abstract and real, presented opportunities for lively discussions amongst the various participants, particularly the lawyers.

Department of Defense policy development has centered on several documents. Two are directly germane to our discussion. The first states *when* work may be outsourced. It requires the use of the "least costly form of personnel consistent with military requirements and other needs of the Department [of Defense]," while identifying commercial activities that are exempt from private sector performance based on the readiness and management needs of the Department of Defense.

There are clear distinctions between what a government official or member of the military may do compared to a private sector contractor. There are differences as to what may be demanded of a military member and any civilian, whether a government employee or a private contractor. The draft directive acknowledges that in combat, only military forces provide the appropriate authorities and controls (command and discretionary decision authority), discipline, weapons, equipment, training and organization to execute combat missions on behalf of the government.

This document is approaching the final stage of drafting and coordination. Due to differences in roles and missions of the four U.S. military services, implementation responsibility is entrusted to each individual service.

The second document explains *how* work may be outsourced once the *when* has been decided. It provides greater elaboration of longstanding Department of Defense practices as to processing Department of Defense civilian employees and private sector contractors prior to their deployment into a theater of operations, to include law of war training. It prohibits a civilian (whether a Federal Government employee of private contractor) from possessing a privately-owned firearm or ammunition. A weapon for personal self defense may be issued either category of person only upon the express approval of the Combatant Commander and satisfaction that the person can handle the weapon safely and responsibly. It is my understanding that of the thousands of civilian

support personnel who worked in the theater of operations during the major combat operations phase of Operation IRAQI FREEDOM, only one received authorization to be issued a weapon. This directive also states that "Contracts shall be used cautiously … where major combat operations are on-going or imminent."

When read together, the approach taken in these two directives is conservative in its approach to outsourcing. Many duties that may be regarded as "taking a direct part in hostilities" are restricted due to necessities for their performance by uniformed military personnel.

Each directive is far more complex than this summary. This overview is intended solely to note that outsourcing on military duties is not a foregone thing, but a matter being taken quite seriously.

Finally, there is the issue of accountability. Sadly, there have been cases of contractor misconduct.[21] Ancillary to development of these new policies, existing jurisdictional authorities are being reviewed to ensure civilians who commit crimes – and, in particular, violate the law of war – can be brought to justice.

As I noted as I began, my presentation was intended primarily as an overview of my experience in working these issues over the past two years. As we have found in our meetings, examining what constitutes "direct part in hostilities" raises many questions without necessarily providing all the answers.

Thank you.

[21] An example can be found in Singer, *supra* n. 2, at 222.