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CONTRACTORS ON THE BATTLEFIELD: DISTINCTION MAKES A DIFFERENCE

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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APRIL 1999

APPENDIX A

CONTRACTORS ON THE BATTLEFIELD: DISTINCTION MAKES A DIFFERENCE

A Thesis

Presented to

The Judge Advocate General's School

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APRIL 1999

CONTRACTORS ON THE BATTLEFIELD: DISTINCTION MAKES A DIFFERENCE

ABSTRACT: This paper is a comprehensive effort to analyze how the law of war affects United States policy related to civilian support to military operations. The thesis contends that the United States should change its current policy regarding the status of civilians accompanying the force to comport better with the nature of modern operations and the mandates of the law of war. In support of the thesis, the author analyzes the law of war as it relates to the status of civilians, ultimately arguing for the extension of international law into non-conflict Military Operations Other Than War. The author contends that the United States should use the standard set forth in the 1977 Additional Protocol I to the Geneva Conventions of 1949, as the basis for a new policy regarding civilian status. Finally, the author establishes a conduct-based test for the determination of civilian status and proposes specific revisions to the current U.S. Department of Defense policy regarding the status of civilian augmentees accompanying U.S. military forces into active theaters of operations.

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I. Bosnia, Winter 1999: Illustration of the Problem

It had been a difficult road for the 1st Cavalry Division (hereinafter 1st CAV). Since the announcement in late spring 1998 that 1st CAV would succeed 1st Armored Division as the force covering Operation Joint Forge,[1] nearly every day produced challenges.

The military challenges were obvious and myriad. Operational commanders speculated openly whether the shift in the Bosnian mission to continental U.S.-based (CONUS) units was the correct shift in strategy and, more specifically, was suited to the 1st CAV's capabilities and training. Troops struggled with the conversion from a go-to-war mission to performing peace operations, and wondered whether their scenario training on rules of engagement would carry the day. Judge advocates turned away from their *Manuals for*

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[1] *See* LAW AND MILITARY OPERATIONS IN THE BALKANS, 1995-1998, LESSONS LEARNED FOR JUDGE ADVOCATES, 42-51 (The Center for Law and Military Operations, 13 Nov. 1998) [hereinafter BOSNIA LESSONS LEARNED]. When the Dayton Peace Accord was signed on 14 Dec. 1995, the North Atlantic Treaty Organization (NATO) implemented a plan for insertion of a military force to enforce the peace agreement. On 16 December 1995, Operation Joint Endeavor, the largest military operation in NATO history, began with the deployment of the NATO-led Implementation Force (IFOR). IFOR completed its mission to enforce peace in December 1996, and was replaced by a smaller force called the Stabilization Force (SFOR). At this time the name of the mission was changed to Operation Joint Guard. The SFOR mission ended on 20 June 1998, when an even smaller force was inserted and Operation Joint Forge (OJF) began. No timeline exists for OJF. *Id.*

Courts-Martial and became subject matter experts on the Dayton Peace Accords.[2] They all wondered exactly what they would do and how long they would do it.

Like all good scuttlebutt,[3] issues such as these permeated the ranks and, like nearly all such issues that arose during the operation, were of concern to the division's senior leaders. Throughout the preparation for deployment in garrison and the week-long Mission Rehearsal Exercise (MRE)[4] conducted at the Joint Readiness Training Center[5] at Fort Polk, Louisiana in July 1999, 1st CAV personnel had planned and trained for seemingly every contingency. The Office of the Staff Judge Advocate (OSJA) personnel, for example, researched and planned for legal issues of great variety and scope. Invariably, one of the areas of greatest

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[2] *Id.* at 248-275. On 21 November 1995, Bosnia-Herzegovina, Croatia, and the Former Republic of Yugoslavia initialed the Dayton Peace Accords at Dayton, Ohio. Representatives of their governments formally signed the agreement on 14 December 1995 in Paris, France. *Id.* The base document of the agreement is known as the General Framework Agreement for Peace in Bosnia-Herzegovina (GFAP). The GFAP contains eleven articles and has eleven annexes. (reprinting the text of the base document and the Agreement on Military Aspects of the Peace Settlement).

[3] An old-parlance sea term referring to the gossip engaged in by the crew as they congregated around the scuttlebutt, the cask aboard ship containing the day's fresh water supply. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 776 (7th ed. 1965).

[4] An MRE is a full-scale training exercise in which a training scenario geared to an upcoming deployment is used to prepare the unit for deployment. In recent cases, units have been trained using a Bosnia-type scenario and replicated training environment that requires the training unit to adjust its focus and mode of operations to comply with a low-intensity or peace enforcement environment. *See generally* BOSNIA LESSONS LEARNED, *supra* note 1, at 63 (discussing training in preparation for deployment).

[5] The Joint Readiness Training Center is a Combat Training Center located at Fort Polk, Louisiana which specializes in training joint, brigade-sized task forces in low and mid-intensity conflict operations. Recently, JRTC has been used to train CONUS-based units for deployment to the Balkan Theater of operations. *See generally* TACKLING THE CONTINGENCY DEPLOYMENT: A JUDGE ADVOCATE'S GUIDE TO THE JOINT READINESS TRAINING CENTER (Center for Law and Military Operations, 24 Dec. 1996) (discussing training at JRTC).

concern—and the area they knew least about—was issues related to civilians accompanying the force.[6]

Of course, rules of engagement (ROE), and contract and fiscal law issues remained the most frequent and prominent sources of business for legal personnel.[7] Through effective preparation, including hours spent with the Center for Law and Military Operations (CLAMO), the lessons learned organization for the Army's Judge Advocate General's Corps and the United States Marine Corps, judge advocates had a firm grasp on the types of issues likely to arise. The civilians accompanying military forces in Bosnia, especially civilian contractors brought in as augmentees, however, continued to be a source of confusion—on both military and legal issues.

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[6] For purposes of this thesis, Department of Defense and Department of the Army Civilian Employees, and contracted employees of the United States Government (regardless of their country of origin e.g. third country national or host country nationals) will be referred to as "civilian augmentees." Where it is necessary to differentiate between them, such as in the policy with respect to using civilian augmentees, they will be so identified by category. Though the issue of status has sometimes been considered in correlation with who signs the civilian's paycheck (whether the civilian is an employee of the federal government, like the Department of Army or Department of Defense, or an employee of a contractor hired by the federal government) this thesis submits that it has become a "distinction without a difference," and will not be relevant under the policy proposed later.

[7] According to information received and retained by the Center for Law and Military Operations [CLAMO], The Judge Advocates General's School, Charlottesville, Va. Interview with Major John W. Miller II, Deputy Director, CLAMO, in Charlottesville, Va. (1 Sept. 1998).

On New Years' Eve 1999, the staff realized its worst fears regarding civilian augmentees. As had been the case since the beginning of Operation Joint Endeavor in 1995, the civilian employees of Green & Williams, a U.S. corporation hired under the Logistics Civilian Augmentation Program (LOGCAP),[8] gathered for a year-end holiday party. These parties had become the bane of each successive commander's existence. Though this commander was quite accustomed to the rigors of commanding one of the premier divisions of the U.S. Army, commanding such a joint,[9] combined[10] task force was an even tougher task (further

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[8] LOGCAP is designed to be a force multiplier by providing logistics support for the deployed force. *See* U.S. DEP'T OF ARMY, REG. 700-137, THE LOGISTICAL CIVILIAN AUGMENTATION PROGRAM (16 Dec. 1985) [hereinafter AR 700-137, LOGCAP]. LOGCAP is a cost-plus-award contract negotiated and administered by the U.S. Army Corps of Engineers. LOGCAP contractors include a set of contractors whose services during operations are pre-planned. These contractors work under two types of contracts. First is the Army Materiel Command (AMC) Support Contract, an umbrella contract funded by the Department of the Army. This contract focuses on prioritized contingency planning for augmentation logistics and engineering/construction services as determined by the commanders-in-chief (CINCs) and Army service component commanders (ASCCs). It is managed through AMC and its logistics support elements (LSEs). The second type of LOGCAP contracts are pre-arranged theater contracts that are arranged before operations and integrated into support plans for anticipated contingencies. They are negotiated by contracting officers of the ASSC and subordinate elements under the control and technical supervision of a principal assistant responsible for contracting (PARC). These contractors may be United States, host-nation, or third-party nationals, and are typically hired from within the area of operations. *Id. See* Joe A. Fortner & Ron Jaeckle, *Institutionalizing Contractors on the Battlefield*, 30 ARMY LOGISTICIAN, Issue 6, (Nov.-Dec. 1998). *See also* White Paper, Contractors on the Battlefield, U.S. Army Training and Doctrine Command (TRADOC), Fort Monroe, Va. (19 Feb. 1998) [hereinafter White Paper] (providing the framework for TRADOC to develop capstone contractor doctrine).

[9] *See* JOINT CHIEFS OF STAFF, JOINT PUB 1-02, DEP'T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (23 Mar. 1994) [hereinafter JOINT PUB 1-02]. The term "joint" refers to "activities, operations, organizations, etc., in which elements of more than one service of the same nation participate." *Id.* at 195. In the three phases of military operations in the Balkans, for example, the Army, Navy, Air Force, and Marine Corps all contributed troops and assets. Different and joint commands at all levels and echelons were involved also, including: European Command (EUCOM), United States Army, Europe (USAREUR), Southern Command (SOUTHCOM), Land Forces Central Europe (LANDCENT), and others. *See also* BOSNIA LESSONS LEARNED, *supra* note 1, at 44-52.

[10] "Combined" refers to military forces "between two or more forces or agencies of two or more allies." *See* JOINT PUB 1-02, *supra* note 9, at 76. During the three phases of operations in the Balkans, for example, the Multi-National Division-North (MND-N) included troops from at least 12 different nations. *See also* BOSNIA LESSONS LEARNED, *supra* note 1, at 60.

complicated by the presence of civilians). Despite the mandates of General Order Number 1 (GO1)[11] and the commander's requests that the civilian augmentees comply voluntarily with its restrictions in order to ease growing animus between military troops and their sometimes-freewheeling civilians, Green & Williams continued to hold such events.

Events such as these, Green & Williams argued, were necessary to boost the sagging morale of the civilian work force, many of whom had not necessarily "volunteered" per se, for duty in what the military described as a "hostile fire pay zone."[12] Indeed, while the Department of Defense (DOD) Directive dealing with the deployment of civilian employees[13] authorized the deployment of civilian personnel who registered objections to deployment as long as those persons were removed from the theater of operations as soon as

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[11] *See* JOINT PUB 1-02, *supra* note 9, at 155. A general order is a "permanent instruction, issued in that form, that applies to all members of the command, as compared with special orders, which affect only individuals or small groups. General orders are usually concerned with matters of policy or administration." Though such orders are numbered in succession, a "general order 1" is usually a prohibition on certain activities (such as the consumption of alcohol) deemed harmful to the mission during a deployment or within a designated area of operations. During Operation Balkan Endeavor, for example, the first GO 1 was promulgated 28 December 1995 and contained prohibitions on the consumption of alcohol, gambling, weapons and other munitions, war trophies, and currency exchange. Almost immediately, however, due to the presence of coalition troops, civilians accompanying military forces, and local customs, problems in scope and enforcement of the order materialized. Over the next two years, therefore, the order and its progeny were amended or excepted on at least seven occasions. *See* BOSNIA LESSONS LEARNED, *supra* note 1, at 175-178, 386-397.

[12] *See* Foreign Service Act, Pub. L. No. 96-465, § 2311, 97 Stat. 121(1980) [Foreign Service Act] (providing civilian employees of the U.S. government a danger pay allowance on the basis of wartime conditions that threaten physical harm or imminent danger to the health or well-being of Emergency-Essential employees).

[13] *See* U.S. DEP'T OF DEFENSE, DIR. 1404.10, EMERGENCY ESSENTIAL DOD U.S. CITIZEN CIVILIAN EMPLOYEES (10 April 1992) [hereinafter DOD DIR. 1404.10]. As noted above, this Directive governs the deployment of civilian employees of the Department of Defense and does not apply to contractors such as the fictitious Green & Williams used here.

replacements could be secured,[14] Green & Williams had no such luxury with its employees. The contractor simply had to find employees willing to deploy and attempt to keep them as happy as they needed to be to remain productive in these austere, and sometimes dangerous, environments.[15]

Further, company officials were quick to point out to the commander (an Army major general) and his command attorney (an Army lieutenant colonel designated the Staff Judge Advocate (SJA)), they were not subject to the GO 1, nor were they forbidden under the contract to hold such events. The crux of the matter they offered, perhaps more directly than the commander liked, was that this was just another of many important matters that was not

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[14] *See* Foreign Service Act, Pub. L. No. 96-465, § 2311, 97 Stat. 121(1980). *See also* Major James E. Althouse, *Contractors on the Battlefield: What Doctrine Says and Doesn't Say*, ARMY LOGISTICIAN 17 (Nov.-Dec. 1998) (discussing a 1993 research study performed by the Rand Corporation for the United States Army indicating that military commanders expressed a strong desire to gain some type of legal authority over civilians in order to compel them either to deploy as originally intended or remain on station until they are relieved properly and that commanders in the field desire to gain disciplinary authority over civilians accompanying U.S. military forces, similar to the situation referred to in this opening hypothetical). *See also See* Roger Allen Brown, John Schank, Carl Dahlman and Leslie Lewis, *Assessing the Potential for Using Reserves in OOTW,* RAND, MR-796-OSD, 1997 [hereinafter RAND Study].

[15] *See* U.S. DEP'T OF DEFENSE, DIR. 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING CRISES (6 Dec. 1990) [hereinafter DOD DIR. 3020.37]. The operative point here is that while many policies and procedures, such as the DOD Directive cited above, provide for the deployment of Government civilians, little such guidance is available to address the preparation for and deployment of civilian contractor personnel. *See also* Althouse, *supra* note 14, at 16.

addressed sufficiently under the contract. They told him bluntly: "If you did not want us to do these things, you should have put such provisions in the contract."[16]

To this point, luckily, the fallout from these omissions and the festivities that resulted therefrom were minor; at least from the legal perspective. Troops in uniform continued to resent that their civilian counterparts were paid better, lived better, and could consume alcohol. As soldiers are wont to do, however, they kept a stiff upper lip and did their duty. The civilians also, for the most part, did their jobs and stayed out of trouble. Thus far, the entire chain of command felt fortunate that no serious mishaps had occurred.

This trend soon changed. Shortly after the party ended and most revelers had returned to their makeshift quarters, a trio of civilian augmentees, emboldened by a few hours worth of strong local beer and the region's favored plum brandy, hopped into the sport utility vehicle

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[16] One issue that was not unclear, however, was the inapplicability of GO 1 to such employees, whose relationship with the government was governed completely by the terms of the contract. *See* BOSNIA LESSONS LEARNED, *supra* note 1, at 175. *See also* Memorandum from Colonel Malcolm H. Squires, Jr., Judge Advocate, U.S. Army Europe, subject: Status of Contractor Employees in Hungary, Croatia, and Bosnia Herzegovina (28 Dec. 1995) (on file with the author) [hereinafter Squires' Memo].

(SUV) provided by the U.S. government, and headed south from the intermediate staging base (ISB)[17] they called home.

Still wearing the uniforms provided by the Army and carrying the sidearms they had requested for their personal protection (also provided by the U.S. Government pursuant to regulations authorizing the arming of civilians for personal protection purposes),[18] they approached the only area in the region where real hostilities, from a strictly military perspective at least, still existed: the Kosovo Province in Southern Serbia. Unfortunately for all parties concerned, this was the wrong place for them to be and the wrong time to be there.

Within minutes of crossing into the region they approached a disabled vehicle blocking the only remaining serviceable road. As they slowed to view the vehicle and to explore

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[17] Intermediate staging base is an area in which units assemble prior to deployment into an active theater of operations. Final preparations, such as equipment maintenance are usually performed here. In the Balkan theater of operations, for example, USAREUR and V Corps personnel supported Task Force Eagle from the ISB in Tazar, Hungary. *See* BOSNIA LESSONS LEARNED, *supra* note 1, at 45.

[18] *See* DOD DIR. 1404.10, *supra* note 13, para. 9(h) (authorizing issuance of a weapon for personal defense on request by the employee, if approved by the component commander, theater commander, or other authorized official). The Army has developed a new regulation, U.S. DEP'T OF ARMY, REG. 715-16, CONTRACTOR DEPLOYMENT GUIDE, para. 5-3 (27 Feb. 1998) [hereinafter AR 715-16] (stating that weapons may be issued to a contractor on the authority of the theater commander, that those weapons must be military type-classified standard "A," that they must be used for self-defense, and that they must be distributed only in accordance with the policy of the contractor's parent company). The contractor does not have to accept the weapon. The issue of arming contractor employees is also addressed in the White Paper, *supra* note 8, which contains requirements similar to AR 715-16. *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 100-xx, CONTRACTORS ON THE BATTLEFIELD (18 Feb. 1999) [hereinafter FM 100-xx] (this FM, capstone doctrine once approved, leaves the matter completely unresolved, citing unsettled law).

possible avenues around it, they were startled by a strange whistle overhead. In an instant, they recognized it as the sound of an 81-millimeter mortar round falling perilously close. In another beat they heard torrents of automatic gunfire all around them. The driver slammed on the brakes and the three hit the floor of the vehicle, miraculously avoiding the hundreds of rounds of 7.62 millimeter ammunition pounding the SUV. After a few seconds, which seemed to them like hours, the shooting stopped and they raised their heads to assess the situation.

Serbian Army regulars swarmed them. Their reflexes slowed by copious amounts of alcohol and still almost paralyzed by fear, two of the three occupants were pulled from the vehicle by the Serbs and thrown to the ground. Their captors bound their hands, applied blindfolds, and stuffed rags into their mouths.

The third—not so physically impaired but lacking severely in judgment and protected by a still-locked door—was able to un-holster his Colt .45. His rear-seat window rolled tight to shield against the bitter cold, he indiscriminately squeezed off three rounds. One shattered the lone pane of safety glass remaining intact and found its mark, striking one of his would-be captors squarely in the face, killing him instantly. The result was predictable: return fire shredded the forty-five-year-old retired Army master sergeant and reduced what remained of the SUV to a crumpled mess.

Within an hour, the Serbs imprisoned their captives in a dark, dank basement. They informed the Americans that they were charged as murderers, would be interrogated and tortured if necessary, and after this, would likely be executed. At first the Americans attempted to reason with the Serb officer, claiming that they were mere civilians who had taken a wrong turn during a joyride. Incredulous, the Serb responded that few civilians, even in his war-torn country, wore uniforms, carried weapons, and roamed areas known for hostilities—and were not considered combatants.

He had a point, they admitted somberly to themselves but, not completely lacking in fortitude, recalled the law of war classes they had received from the 1st CAV Operational Law Judge Advocate. They offered their names, positions, and social security numbers,[19] offered to show their military-issued identification cards,[20] and asserted that they held special

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[19] *See* Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW], *reprinted in* U.S. DEP'T OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956) [hereinafter DA PAM 27-1]. Article 17 provides that "every prisoner of war, when questioned on the subject, is bound to provide only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information." *Id.*

[20] *See* U.S. DEP'T OF DEFENSE, INSTR. 1001.1, IDENTITY CARDS REQUIRED BY THE GENEVA CONVENTIONS (30 Jan. 1974) [hereinafter DOD INSTR. 1001.1]. This instruction, similar to provisions contained within the Lieber Code (article 13), the Annex to Hague IV, and the GPW (article 4(a)4), requires that persons authorized such should be provided identity cards to establish their authority to be in the theater of operations in the event of capture. *Id.* United States identity cards are issued on U.S. DEP'T OF DEFENSE, DD FORM 489, GENEVA CONVENTION IDENTITY CARD FOR CIVILIANS WHO ACCOMPANY THE ARMED FORCES (Aug. 90). *Id.*

status as United Nations personnel considered experts on mission.[21] When that elicited no response, recalling the notations on their identification cards, they requested prisoner of war (POW) status under the Geneva Conventions.[22]

By the following day, Kosovo Liberation Army (KLA) operatives throughout the formerly autonomous province were able to spread word of the situation to several countrymen working in conjunction with U.S. civil affairs[23] personnel. By noon that day, the SJA, along with the commander and other selected members of the staff, gathered to watch news coverage of the event. Serbian officials described the murder of their soldier and displayed the uniformed body of one of the perpetrators, identifying him as an U.S. soldier.

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[21] *See* Convention on the Privileges and Immunities of the United Nations, Article VI, §22, 23, February 1946, 1 U.N.T.S. 15, [hereinafter UN Convention on Privileges and Immunities] (providing that experts (other than officials of the UN) performing missions for the UN shall be afforded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions). One of the enumerated privileges and immunities in section 22(a) is the immunity from personal arrest or detention and from seizure of their personal baggage. *Id.* §22. Though other such privileges and immunities are included within these sections, the upshot of the protections is a freedom from seizure in the manner described here. *Id.* §23.

[22] *See* GPW, *supra* note 19, art. 4. Because this is not, however, a situation rising to the level of international armed conflict, such protections would likely not apply. Applying international law is one of the main issues to be considered in this thesis. Indeed, the well-recognized failure of international law to cover Military Operations Other Than War (or MOOTW) is the subject of much discussion below. *See also infra* Section VII.

[23] Commonly referred to as the "Division G-5," the civil affairs officer is a special staff member to the commander and is responsible for coordinating interaction between U.S. military forces and the local populace. The civil affairs mission is to support the commander's relationship with civil authorities and civilian populace, promote mission legitimacy, and enhance military effectiveness. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 41-10, CIVIL AFFAIRS (11 Jan. 1993) [hereinafter FM 41-10]. *See also* BOSNIA LESSONS LEARNED, *supra* note 1, at 134-139 (providing for real world examples of the types of activities performed by civil affairs personnel in MOOTW).

As the division staff watched and discussed the situation the general demanded, "SJA, they are civilians. How could they be shot at like that? What is their status? Does the law of war apply? Are they POWs? What the hell am I supposed to do?"

"If this was war, sir," the SJA responded, "or what we lawyers call international armed conflict, the problem might be easier to solve. The law of war would apply in full force, as would our policy regarding status of civilian augmentees. In essence, we would likely consider them combatants—they would be legitimate targets of the enemy, but upon capture, they could demand that they receive protections as POWs. We could then request their release."[24]

"That's what we did during the Persian Gulf War. But the fact remains that this is a peacekeeping operation, and that complicates the issue. The law of war does not apply and their status as targets or POWs is therefore uncertain. Our policy does not really provide

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[24] *See* GPW, *supra* note 19, art. 4(A)4,conferring prisoner of war status upon

> persons who accompany the armed forces without actually being members thereof, such as civilian members of aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model. *Id.*

good guidance. Because of this, my people and I are going to have to do a good bit of research and analysis."

The SJA was well aware of issues which had arisen involving contractors—entry and taxation issues under the Status of Forces Agreement (SOFA), and the ever-present criminal jurisdiction problem.[25] Arising now, he realized were legal issues not contemplated and obviously unresolved. What was the status of these civilians under international law? Were they targets? Were they POWs? Were they experts on mission? What if this military operation other than war (MOOTW) turned into pitched battle? He knew that the current policy handled each of these situations differently. The policy was clearer in cases of armed conflict but in MOOTW, where status was determined on a case-by-case, mission-specific basis, it was anything but clear. What was becoming very clear to him, however, was that these policies needed to be re-examined.

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[25] Situations such as these arose frequently in the Balkan Theater of Operations, where the status of U.S. forces, civilian employees of the U.S. government, government contractors and their employees in foreign countries was debated at length. Generally speaking, the status of such persons is determined in accord with applicable status of forces agreements and related international agreements, as well as international law. In the Balkans, however, several different agreements were in effect. In Hungary, for example, the Partnership for Peace (PFP) Status of Forces Agreement (SOFA) was the controlling authority and, in Article I, paragraph 1(a) thereof, referred to civilians accompanying the force as only those "who are in the employ of an armed force of that country. . ." *See* BOSNIA LESSONS LEARNED, *supra* note 1, at 275. Thus, significant use by the U.S. forces of commercial contracts in Hungary was not envisioned in the PFP SOFA and contract employees had no status under it. Contrast this situation with those in Croatia and Bosnia-Herzegovina, where the status of U.S. government contractors was covered by the SOFAs negotiated as part of the General Framework Agreement for Peace (GFAP, or Dayton Accords). BOSNIA LESSONS LEARNED, *supra* note 1, at 253. It is noteworthy, however, that each of these SOFAs was different in content and the status of one contract employee might be different in each of the three locations described. *See generally* Squires' Memo, *supra* note 16.

As he approached the pair of GP-medium tents that served as home and office for his legal section, the major who headed his operational law section greeted him. The "Chief, OpLaw," had just returned from a game of basketball at the makeshift gym. Today he looked even older than his thinning hair usually made him appear. The news was not good, he reported—upon hearing the news, the rest of the civilian augmentees, especially contractor personnel, were packing to depart. They hadn't signed on to get shot at; they balked, and were going home. "But that's not all," the major continued, "Serb radio is calling the CG a war criminal for putting civilians out there as combatants." The judge advocates looked at each other with the same two thoughts in mind: "How are we going to fix this. . . and who's going to tell the old man?"

II. Introduction and Diagnosis

The foregoing factual predicate for this paper is fictitious. It is also lengthy, but necessarily so, as it is intended to provide a contextual basis for the legal analysis which will follow. The military scenario, on the other hand, is realistic—and reflects of the types of operations U.S. forces are conducting with increasing frequency. While the Army has not yet had to deal with the specific legal dilemma presented, the hypothetical is intended to illustrate how easily such a situation might arise.

The hypothetical also illustrates the vast legal differences between different types of operations. The SJA's preliminary communications to the commander, for instance, highlight what will become a central theme: that the law applicable to different operational environments may compel different operational responses. In other words, one policy may not fit all—a policy for deploying civilians into an active theater of combat operations may need to be very different from the policy that covers use of civilian augmentees in MOOTW.

A. A Recent Phenomenon?

Though the current magnitude of civilian involvement in military operations is unprecedented,[26] the concept of "civilians on the battlefield"[27] or "civilians accompanying the force"[28] is not a new one. Indeed, civilians have played a role in military operations for

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[26] "Increased reliance on the support of contractor personnel, largely through the LOGCAP, necessitated an emphasis on the status of such personnel . . ." *See* BOSNIA LESSONS LEARNED, *supra* note 1, at 151.

[27] For purposes of this thesis, the term "civilians on the battlefield" shall refer to all non-military persons that accompany a military force into an active theater of operations. As will been seen throughout the paper, civilians have accompanied military forces for many years in many capacities. The thesis will examine this history, analyze the law that has developed in response to this phenomenon and propose a method to deal more effectively with it in the future.

[28] In terms of traditional combat operations, the term "civilians accompanying the force" refers to individuals "who accompany the armed forces without being members thereof," located in the field or on contingency operations. *See* GPW, *supra* note 15, art. 4(A)4. More recently, however, the context of the term has grown to include others. As Major Brian Brady points out, the term has been expanded to include also contractor employees who assimilate to the United States Armed Forces, during peacetime, and as members of the "civilian component" under treaty. Brian H. Brady, Notice Provisions for United States Citizen Contractor

many years. Civilian contractors played a role in military operations as far back as the 16th century, when military commanders realized that their armies required provisions beyond those that they could pillage from their defeated enemies. They, therefore, employed sutlers, who were paid to bring supplies out to the armies.[29]

The U.S. Army has used contracted civilian logistical support since the Revolutionary War, when it relied heavily on civilians contracted to transport troops and supplies.[30] Both the Union Army and the Confederacy depended on civilian logistical and communications support during the Civil War, and in virtually every military operation this century, U.S. forces have used contract support to augment the logistical mission.[31]

Much of this support was general and indirect in nature, as civilians merely transported military supplies to a designated location and returned to their daily lives.[32] In modern operations, however, it has become increasingly common for civilians to actually accompany

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Employees Serving with the United States Armed Forces in the Field: Time to Reflect Their Assimilated Status in Government Contracts? 6-7 (1995) (unpublished LL.M. thesis, The Judge Advocate General's School) (on file with The Judge Advocate General's School).

[29] *See* Althouse, *supra* note 14, at 14.

[30] *Id.*

[31] *Id.*

[32] *Id.*

military forces, where they have served as members of the combat service support team,[33] or even closer to the "action" in combat support functions.[34] It is estimated, for example, that during World War II and the Vietnam War, one civilian supported every six soldiers.[35] The

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[33] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS (14 June 1993) [hereinafter FM 100-5, OPERATIONS]. The focus of logistics at the tactical level of war, the synchronization of essential functions, activities, and tasks necessary to sustain soldiers and their weapons systems in an area of operations; includes but is not limited to that support rendered by service support troops to arm, fuel, fix, move, and sustain their soldiers and equipment. *Id.* at 12-3.

[34] *See* DEP'T OF ARMY, FIELD MANUAL 71-100, DIVISION OPERATIONS (1 June 1990) [hereinafter FM 71-100, DIVISION OPERATIONS]. Combat support operations are essential to the application of superior combat power at the decisive time and place. Combat support assets consist of combat aviation, field artillery, air defense, engineer support, communications, intelligence and electronic warfare, and military police. *Id.* at A-17.

[35] *See* Katherine Peters, *Civilians at War*, GOV'T EXECUTIVE 19 (July 1996). This thesis argues for the extension of international law into MOOTW, and further recommends adoption of a new U.S. policy regarding the status of civilians in active theaters of operation. A crucial element in this argument is the principle of distinction which, in essence, is the obligation incumbent upon military forces to distinguish civilians from combatants. Based primarily this principle, the policy suggests that the deployment of civilians and their status should be different in operations involving or very likely involving conflict—in such cases we should minimize the number of civilians in theater to better comply with the obligation to distinguish. In operations not likely to result in conflict, we may deploy more civilians, perhaps because we could not expect large-scale mobilization of Reserve forces. The numbers cited above appear to provide historical precedent for such a theory. In recent operations involving conflict, such as the Gulf War, the ratio of civilians to troops is very low. In operations such as Bosnia, the ratio was very high.

ratio fell to one civilian for every fifty troops in the Persian Gulf War,[36] but increased again to one for every ten troops in Bosnia.[37]

B. Increased Role of Civilians In Modern Operations

As evidenced by the numbers of civilians deployed to the Balkan Theater of Operations, military drawdowns (or "rightsizing" as it is now called) have necessitated increasing reliance upon the services that these unique non-military augmentees perform.[38] Indeed, the

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[36] The U.S. employed both civilian employees and contract civilian employees as part of its transportation system, at the forward depot level repair and intermediate maintenance activities, and as weapons systems technical representatives. They worked aboard Navy ships, at Air Force bases, and with virtually every Army unit. By late February 1991, U.S. Government civilians in heater numbered 4500, with many more contractor employees also in theater. Many roles have been transferred to the civilian sector from the military, the report concludes, because of force reductions, realignments, and civilianization efforts. *See* U.S. DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS, Appendix N, Civilian Support, 490 (1992): *See also* UNITED STATES GOVERNMENT, OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (27 Mar. 1996) (stating that a significant reason why the Army relies upon independent contractors is to avoid competition with the private sector); AR 700-137, LOGCAP, *supra* note 8, para. 2-6 (which references that force reductions increase military reliance on contractors).

[37] Peters, *supra* note 35, at 19.

[38] *See* BOSNIA LESSONS LEARNED, *supra* note 1, at 151. For example, the 1996 DOD Authorization Act directed the DOD to convert 10,000 uniformed positions into civilian jobs by 30 September 1997. *See* Department of Defense Authorization Act, Pub. L. 104-106, §1032, 105 Stat. 186 (1996). Legislation such as this, as well as many other indicators, suggest that the use of civilian of civilian augmentees is a trend that will continue, if not increase. *For purposes of this thesis, this dynamic has been accepted as a given and the thesis, therefore, will focus not on the decision to employ civilians in active theaters of operations, but how the law of war impacts on this trend.*

The operative point is that operational commanders will seldom make the decision to deploy augmentees, and will more likely than not inherit a force package or structure that includes civilians. Operational commanders will have sway, however, in decisions as to the placement, training, equipping, and utilization of

very nature of these operations—non-combat, usually long in duration, and with an increased emphasis on the support function—makes them more amenable to civilian augmentation. This, coupled with the rapidly changing nature of modern military operations—including their increasingly complex, joint, and multinational nature— has elevated the issue of civilian status to new importance.[39] The issues related to such civilians and their status grow even more complex with the continuing transition to MOOTW.[40]

This paper is a comprehensive effort to analyze how the law of war may drastically affect policy related to civilian support to military operations.[41] Difficulty in even defining what is meant by the term "military operations," illustrates the complexity of the matter. One may

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civilian augmentees in theater. Since that is the arena in which commanders and judge advocates will have influence, that will be the focus.

[39] The impetus for this thesis, in fact, flowed from the interest of the senior leadership of The Judge Advocate General's Corps in this subject. The subject has also generated great interest in the Army and other services as a whole, including the Army Training and Doctrine Command [hereinafter TRADOC] at Fort Monroe, Virginia and the Army Materiel Command [hereinafter AMC], headquartered at Fort Monmouth, New Jersey. *See* Electronic Mail Message, from Colonel David E. Graham, Chief, International and Operational Law Division, Office of the Judge Advocate General, USA, to The Judge Advocate General, USA, subject: Course Offerings (3 Mar. 1998) (copy on file with author); Electronic Mail Message, Associate General Counsel, Operations Law, Defense Logistics Agency, subject: Contractors and Civilians Deployed, (3 Mar. 1999) (copy on file with author). Interview with Colonel John Long, Defense Logistics Agency, Fort Monmouth, New Jersey, in Charlottesville, Virginia (5 Mar. 1999).

[40] *See* FM 100-5, OPERATIONS, *supra* note 33, at 13-4 to 13-8 (listing noncombatant evacuation operations, civil disturbance operations, humanitarian assistance, disaster relief, security assistance, nation assistance or peace building, counterdrug operations, counterterrorism operations, peacekeeping, peace enforcement, shows of force, attacks, raids, and support for insurgencies and counter insurgencies, as types of MOOTW) and Glossary-6 (defining operations other than war as "military activities during peacetime that do not necessarily involve armed clashes between two organized forces."); JOINT PUB 1-02, *supra* note 9.

[41] For our purposes, the "battlefield," or "theater of operations" will include areas of operations including low, mid, and high-intensity conflict. It also includes peacekeeping, peace enforcement, and other similar non-traditional operations being performed by U.S. forces.

define operations in traditional, law of war international armed conflict terms, often referred to as common article 2 conflicts.[42] One may also define them as internal armed conflict, usually called common article 3 conflict.[43] Lastly, military operations may refer to military forces performing MOOTW missions such as peacekeeping[44] or peace enforcement,[45] which usually do not fall within the definition of conflict.

None of these subjects will be discussed in sheer academic fashion or in the abstract. Indeed, as demonstrated, all discussion will include, and be supplemented by, current issues and lessons learned from continuing multinational military operations—from the Persian

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[42] *See, e.g.,* GPW, *supra* note 19, art. 2. The term "common article" refers to a finite number of articles that are identical in all four of the 1949 Geneva Conventions. Normally such common articles relate to the scope of application and obligations of the parties under these treaties. Some of the common articles are identically numbered and contain virtually verbatim provisions. In this case, common article 2 refers to a state of international armed conflict involving two or more sovereign states: "The present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." This "test" is today the customary international law standard for determining when all law of war provisions become bonding on combatants. *See* International Criminal Tribunal for the Former Yugoslavia, Prosecutor Against Dusan Tadic, Case No. IT-94-I-T, Decision on the Defense Motion on the Jurisdiction of the Tribunal at 25-26 (10 Aug. 1995) [hereinafter Decision on Jurisdiction] (copy on file with author).

[43] *See* GPW, *supra* note 19, art. 3. Common article 3 establishes the "internal armed conflict" standard that applies minimal law of war-type protections to internal struggles that rise to the level of conflict, without conflict between two states. As such, common article 3 establishes minimum standards of treatment for non-combatants during any conflict.

[44] *See* JOINT PUB 1-02, *supra* note 9 (defining peacekeeping as "military operations undertaken with the consent of all major parties to a dispute, designed to monitor and facilitate implementation of an agreement (ceasefire, truce, or other such agreement) and support diplomatic efforts to reach a long-term political settlement").

[45] *See* JOINT PUB 1-02, *supra* note 9 (defining peace enforcement as: "Application of military force, or the threat of its use, normally pursuant to international authorization, to compel compliance with resolutions or sanctions designed to maintain or restore peace and order").

Gulf War, Operation Uphold Democracy in Haiti, Operation Restore Hope in Somalia and, especially, Operations Joint Endeavor, Joint Guard, and Joint Forge in the Balkans. Unprecedented numbers of civilian and contract employees have operated and are operating in the Balkans (hence the situs of the opening hypothetical), evidencing a trend that is likely to continue, if not increase.[46]

III. Thesis Statement:

The current U.S. policy regarding the status of civilians accompanying the force, which essentially treats all civilians as combatants or quasi-combatants and therefore lawful targets, and which fails to draw an effective distinction between conflict and MOOTW operations, should be changed to comport better with the nature of modern operations and the mandates of the law of war. The U.S. should use the standards set forth in the 1977 Additional Protocol I to the Geneva Conventions of 1949 (GPI) as the basis of a new U.S. policy that identifies to the maximum extent feasible exactly which of those functions performed by civilians in active theaters of operations constitute "taking direct part in hostilities."[47] Adopting this standard as set forth by GPI, does not undermine United States' objections to

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[46] *See* BOSNIA LESSONS LEARNED, *supra* note 1, at 151.

certain GPI provisions. Rather, it enhances the United States' adherence to the principle of distinction, and the United States' consistent objections that other GPI provisions erode this principle. This approach provides more definite guidance as to the status of civilian participants in *ALL* military operations. It will therefore assist judge advocates, planners, and commanders at all levels—strategic, operational, and tactical—to decide how the deploy and use civilian augmentees.

A. Advantages to be Gained from This Approach

Though the policy is bifurcated, it applies apply across the spectrum of conflict and remains consistent with current guidance on applying the law of war,[48] which requires that U.S. forces apply the principles of the law of war in all operations. The policy would, therefore, serve several valuable purposes. First, it would inform civilians deploying into

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[47] The 1977 Protocols Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflict, art. 51(3), (12 Dec. 1977) 16 I.L.M. 1391 [hereinafter GPI].

[48] CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996) [hereinafter JCS INSTR. 5810.01]. Pursuant to this instruction, U.S. forces are directed to apply certain principles of the law of war, whatever the nature of the military operation being performed. The practical effect of this guidance is the application of the law of war by U.S. forces, whether involved in international armed conflict or conflict short thereof. Though this policy provides for potentially consistent application by U.S. forces throughout the spectrum of operations, it is problematic because it fails to state with specificity which such principles will be applied. For expansion on the policy, including guidance on which principles should be applied, *see* a series of practice notes by Major Geoffrey S. Corn in the June, July, August, October, and November 1998 editions of The Army Lawyer.

certain theaters as to their exact status and the likely consequences thereof.[49] Second, it would give civilian officials, military planners, and commanders a clear picture of the status of civilian augmentees. It would allow commanders to analyze the legal consequences of where to place civilian augmentees, whether they should be armed, what they should wear, how or if they should be trained, and what levels of security or force protection they must employ on behalf of civilian augmentees.

Third, it would assist those charged with negotiating agreements with civilian contractors. Government contracting officers, for example, might argue that civilians performing aircraft maintenance functions far forward are "taking direct part in hostilities," and should therefore be subject to the same restrictions that apply to uniformed members of the force—such as GO1 in the opening hypothetical. Inherent in this process are command responsibilities: if the operational commander uses augmentees in such a fashion that he assumes responsibility for training them in the law of war (and perhaps individual responsibility for their commission of war crimes), this enhances greatly his argument that he must have greater disciplinary control over them to enforce this obligation.

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[49] *See* Althouse, *supra* note 14, at 16 ("When civilians are uprooted from their usual places of business and sent overseas to live and work while facing adverse conditions and possible death on a daily basis, they would like to know what to expect. They would also like to be taken care of.").

B. The Roadmap

In furtherance of this thesis, I will chart the following course. Part IV traces the development of international law as it relates to civilians. This background will provide historical and legal perspective on the status of civilians in military operations. It will examine civilian status during international armed conflict, to include traditional analyses under the law of war and, particularly, the customary international law principle of *distinction.*[50] This analysis will include how the principle of distinction impacts on targeting these unique members of the force.

Part V describes why the nature of modern operations, the principle of distinction, and the law of war require such a bright line rule. Part VI then discusses how this international law analysis, based primarily upon the underlying principle of distinction, has been extended into the realm of internal armed conflict. This extension, initially through the unexpected adoption of common article 3 is, in the opinion of many scholars, one of the most significant

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[50] *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987) [hereinafter COMMENTARY] (referring to the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities). *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 136 (9 July 1956) [hereinafter FM 27-10].

and useful developments in international law.[51] The analysis of this increasing trend toward applying law of war principles in such conflicts will demonstrate that, while the provisions of common article 3 are very limited in scope, subsequent developments in international law have expanded the application of the articles' principles greatly. This expansion has made these principles applicable to purely internal or mixed conflicts, thereby extending the concept of distinction and its implications on civilians, into internal conflicts.

Part VII analyzes how the principles made applicable to both types of conflict may be extended to apply to MOOTW, to include analysis of why a singular approach, such as that employed currently, is inconsistent with the contemporary range of military operations. This section analyzes how the law of war, expanded to cover obligations of parties in internal conflicts, impacts the legitimacy of the deployment of civilian augmentees during MOOTW. Specifically considered is whether the principle of distinction is applicable during MOOTW and, if so, to what degree commanders must consider it in the planning and execution of such

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[51] *See generally* GEOFFREY BEST, WAR AND LAW SINCE 1945, 168-176 (1994). Mr. Best suggests two aspects of the Diplomatic Conference and resultant common article 3 were especially noteworthy. The first is the goal of extending international humanitarian law into internal conflict. This was significant, according to Best, because the experiences from 1939-1945 had shown how easily High Contracting Parties to the Conventions could avoid their legal responsibilities under the law of war by claiming that the wars they were fighting were not international ones to which the law was relevant. *Id.* at 168. The second notable aspect was the manner in which the dilemma was solved. Most states were unwilling to extend the law for fear that this intrusion would remove their ability to deal with insurgents, thereby creating little chance for full-scale application of international humanitarian law to internal conflicts. *Id.* at 170. The solution, according to Best, was provided by the French, who suggested that the better course was to apply not the whole of the new Conventions to these conflicts, but only a few, basic provisions. The effect, notes Best, was the de facto birth of human rights law, without the word ever being used. *Id.* at 174.

operations. It also considers carefully, and is consistent with, new capstone Army doctrine on contractors on the battlefield.

The last parts of the thesis, parts VIII, IX, and Appendix A, make specific suggestions for improvement of current policy and the U.S. law of war manual.[52] The recommended policy includes a matrix of specific activities that may be, or are currently being, performed by civilians in active theaters of operations. This matrix identifies whether each particular function should be considered taking direct part in hostilities, and therefore provides all parties concerned with specific guidance as to that civilian's status.

In sum, the thesis articulates why a bifurcated policy, which draws a clear line of demarcation between utilization of civilian augmentees during war versus MOOTW, is required by the law of war. This line of demarcation, based upon the declaration of a "hostile force," will be beneficial to current U.S. policies emphasizing the utilization of augmentees and compatible with the nature of these operations.[53]

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[52] *See generally* FM 27-10, *supra* note 50.

[53] *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (1 Oct.1994) (classified SECRET but including an unclassified portion, Enclosure A, intended for wide distribution) [hereinafter SROE]. Under the SROE, a "hostile force" is defined as "any force or terrorist unit (civilian, paramilitary, or military) with or without national designation, that has committed a hostile act, demonstrated hostile intent, *or has been declared hostile.*" *Id.* (emphasis added).

According to the recommended policy, when a hostile force is declared the use of civilian augmentees should be kept to an absolute minimum. Those that are used are more likely to be considered taking part in hostilities. When no hostile force has been declared, however, as in peacekeeping operations, wider discretion will be allowed in the use of civilian augmentees, and many are less likely (depending on their functions, of course), to be considered taking direct part in hostilities.

Under paragraph 6 of Enclosure A of the SROE:

> Once a force is declared hostile by appropriate authority, US units need not observe a hostile act or a demonstration of hostile intent before engaging that force. The responsibility for exercising the right and obligation of national self-defense and declaring a force hostile is a matter of the utmost importance demanding considerable judgment of command. *Id.*

Under the SROE, therefore, it is this declaration of an opposing force, which may be fired upon by virtue of their status as members of that force alone, which creates a *de facto* combat situation. This justifies the choice of this declaration as the clear dividing line between combat operations and MOOTW. As with any recommendation for the adoption or implementation of policy, some gray areas may remain. My thoughts are not rigid or set in stone. Rather, they are intended to stimulate discussion of the rapidly evolving law of war, especially as it relates to our current operational environments. It is intended to give judge advocates and operational commanders, currently burdened with enormous political, legal and social responsibilities, a frame of reference for making decisions regarding the use of civilian augmentees in military operations. It is noteworthy as well to point out that I am not unmindful of the sphere of influence of individual military commanders: policy decisions regarding force composition, especially the current trend of eliminating military billets in favor of contract employees, are often imposed upon commanders tasked to accomplish a given mission. Should a commander deploy with augmentees, then, this policy may assist in tactical decisions regarding their placement and utilization.

C. Emphasis on Practicality and Pragmatism

Feedback provided by judge advocates and commanders in the field illustrates that current guidance related to status issues is too broad and too vague. The goal is that this suggestion for policy and categorizing of functions will help judge advocates and commanders—such as those in the hypothetical opening this paper—by providing a clearer picture of the role, status, and uses of civilian augmentees.

D. This Paper Draws the Following General Conclusions:

1) The current and traditional analysis of the status of civilians under the law of war[54] remains binding and viable, and provides sufficient protection of civilians during international armed conflict. That analysis, based primarily on GPI, expansively defines "civilian" and affords such individuals immunity from attack.[55] GPI restricts greatly the

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[54] *See generally* FM 27-10, *supra* note 50. *See also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCC].

[55] *See* GPI, *supra* note 47, art. 51.

circumstances under which civilians (even those accompanying the force)[56] may be legitimate targets,[57] by specifying that civilians shall not be the objects of attack (including indiscriminate attack) and shall receive other protections that will be discussed below.[58]

Aside from these targeting considerations and POW protections, GPI also provides guidance for determining when civilians lose their immunity from attack. Under Article 51(3) of GPI (which the United States has not ratified[59]—a position I will discuss later in this

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[56] *But see* W. Hays Parks, The Law of War Status of Civilian Employees 8 (1996) [hereinafter The Law of War Status of Civilian Employees] (copy on file with the author). Mr. Parks opines that civilians who accompany military forces into a theater of operations may do so, but are likely to be regarded by enemy forces as combatants and, as such, they are subject to attack or capture. Mr. Parks terms these civilians "quasi-combatants" and avers that, while they are in the theater of operations accompanying military forces they are not protected by the law of war prohibition on intentional attack of the civilian population or individual civilians. They are, however, entitled to prisoner of war status if captured. Further, he states, their presence on a military installation or in the vicinity of military forces does not violate the requirement of the principle of distinction, which mandates a nation to maintain reasonable separation between its military forces and its civilian population. *Id.*

[57] *See* GPI, *supra* note 47, art. 51(3). *See also* The Law of War Status of Civilian Employees, *supra* note 56, at 8. Mr. Parks points out that no change in the interpretation of the current law of war is required to describe the role of U.S. Army civilian personnel or contractor personnel in light of the corrections made by the U.S. Government in the 1980s and post-Desert Storm acknowledgment of the status of civilians accompanying military forces. *Id.*

[58] *See* GPI, *supra* note 47, art. 51(3).

[59] The United States position regarding GPI is set forth succinctly in a 1987 speech by Judge Abraham Sofaer. Those comments have been reduced to writing and are reported as *The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Adviser, United States Department of State*, January 22, 1987, 2 AM. U.J. INT'L L. & POL'Y, 415 at 460 [hereinafter *Remarks of Judge Abraham D. Sofaer*]. Noteworthy here is the fact that none of the official U.S. objections to GPI (cited by Sofaer) involve provisions relating to the protection of civilians, provisions that the U.S. apparently accepts as binding customary international law. *Id. See also* Conference of The American Red Cross—Washington College of Law Conference on International Humanitarian Law, 2 AM. U.J. INT'L L.& POL'Y 518 (1987), in which Mr. Michael Matheson, representative of the United States, sets forth the U.S. position on Additional Protocol I.

paper), "civilians shall enjoy the protections against dangers arising from military operations unless and for such time as they take a direct part in hostilities."[60] Defining what is "taking a direct part in hostilities" for purposes of determining the legality of using civilian augmentation, however, is one key issue that will be considered at length.[61]

The second critical law of war issue regarding the use of civilian augmentation is under what circumstances, if any, use of augmentees may be considered violative of the principle of distinction by the force relying upon them. If reliance on augmentees might be considered such a violation, the obligation to distinguish may provide a compelling legal basis for minimizing such utilization during conflict operations.

2) The United States need not modify its position on GPI. While the United States has not ratified GPI, it has agreed that the provisions that are relevant to this discussion operate as "customary international law."[62] To make U.S. policy more consistent with international humanitarian law, the United States should define those civilian augmentation functions it considers taking a direct part in hostilities, thereby ensuring compliance with the principle of

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[60] *See* GPI, *supra* note 47, art. 51(3).

[61] *See* COMMENTARY, *supra* note 50, at 619 (pointing out that there is no specific definition of "taking direct part in hostilities, " but there is a similar expression used in paragraph 2 of Article 43 (Armed Forces), "which suggests that the immunity afforded civilians is dependent upon their not participating in "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."). *See also* GPI, *supra* note 47, art. 43.

[62] *See* The Law of War Status of Civilian Employees, *supra* note 56, at 8.

distinction. The United States should then apply this standard, consistent with our law of war policy,[63] to all U.S. military operations, thereby changing our current policy regarding the status of civilians.

The current U.S. position, advanced by several prominent U.S. officials,[64] adheres to the analysis that all civilians accompanying the force are "combatants" or "quasi-combatants,"[65] regardless of the mission performed, rendering them valid targets, but providing them upon capture with protections as POWs. For reasons that will be explained below, the current policy therefore encourages misplaced reliance on the use of augmentees who, under the law of war, should not be considered combatants. This may lead to their use in ways that raise the prospect for violations of the principle of distinction.

3) Lastly, the U.S. should adopt a bifurcated policy with respect to the use and status of civilian augmentees. Such a policy must include comprehensive guidance on the use and

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[63] *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 Dec.1998) [hereinafter DOD DIR. 5100.77].

[64] To include W. Hays Parks, Special Assistant to The Judge Advocate General, U.S. Army, for Law of War Matters. *See* Policy Memorandum, U.S. Dep't of Army, subject: Contractors on the Battlefield (12 December 1997) [hereinafter DA Policy Memo, Contractors on the Battlefield] (reflecting the current United States Army position).

[65] *Id. See also* The Law of War Status of Civilian Employees, *supra* note 56, at 7.

status of civilian augmentees in both conflict and non-conflict operations. Indeed, the current U.S. position, set forth in a December 1997 Policy Memorandum,[66] acknowledges that:

> The full protections granted to prisoners of war under the Geneva (1949) and Hague (1907) Conventions apply only during international armed conflicts between signatories to these conventions. Accordingly, these conventions are generally inapplicable during MOOTW. Therefore, contractor employee protection during MOOTW will depend on the specific circumstances of an operation."[67]

This current method of applying protections—based partly upon obligations under customary international law, law by analogy (applying law of war principles to operations other than war pursuant to Department of Defense Directives 5100.77[68] and CJCS Instruction 5810.01),[69] and other mission-specific guidance—is insufficient. Clearer and more definitive guidance as to the status, both in terms of targeting issues and prisoner of war issues, is required before DOD deploys any of the civilians now routinely placed in active theaters of operations.

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[66] *See* The Law of War Status of Civilian Employees, *supra* note 56, at 7.

[67] *Id.*

[68] *See* DOD DIR. 5100.77, *supra* note 63.

[69] *See* JCS INSTR. 5810.01, *supra* note 48.

IV. The Development of International Law as it Relates to Civilians

Civilians have been involved in warfare in many ways for many years. They have fought as irregulars waging guerrilla warfare from the mountains of the Spanish Civil War,[70] to the jungles of Vietnam,[71] and within crowded cities like Mogadishu, Somalia.[72] More commonly, they have played indirect roles, acting as civilian factory workers in the military industrial complex—like "Rosie the Riveter" of World War II fame.[73] While civilians have performed these activities in war long before the Industrial Revolution, it was not until the mid-19th Century that international law began to carve out a special status for certain civilians supporting armed forces during warfare.[74]

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[70] Anthony Beevor, The Spanish Civil War (1985).

[71] Stanley Karnow, Vietnam: A History, The First Complete Account of Vietnam At War (1983).

[72] *See* Rick Atkinson, *Night of a Thousand Casualties: Battle Triggered the U.S. Decision to Withdraw From Somalia*, WASH. POST, Jan. 31, 1994, at A1.

[73] *See* VOL. 24, COMPTON'S ENCYCLOPEDIA, (1971 ed.). The participation of the American citizen in the domestic war effort was portrayed in many fashions. One of the more effective "campaigns" was the portrayal of the typical American housewife, "Rosie," tacking rivets in ammunition plants. *Id. See also* The Law of War Status of Civilian Employees, *supra* note 56, at 1.

[74] *Id. See also* DETRICK SCHINDLER & JIRI. TOMAN, THE LAWS OF ARMED CONFLICTS 3, A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS, VII (3d 1988) [hereinafter THE LAWS OF ARMED CONFLICTS 3]. The laws of war were the first part of international law to be codified. *Id.* Various factors led to this codification and ultimate development into international conventions in the second half of the 19th Century. First was the fact that the introduction of compulsory military service changed the nature of warfare. Large national armies took the place of the small professional forces that had been subject to rigid discipline. Consequently, wars were fought on a different scale by less well-trained troops than before. *Id* Second, the horrors of war, and above all, the number of victims, had greatly increased due to the enlargement of armies and the improvement of arms. *Id.* Indeed, this was the decisive factor in the foundation of the Red Cross and the subsequent adoption of the Geneva Convention of 1864. *Id.* This effort, in turn, gave rise to the formation and

A. The Lieber Code

> "Private citizens of an enemy nation are protected from intentional attack so long as they refrain from taking part in the hostilities."[75]

This quote summarizes the civilian protection principles contained in the 1863 U.S. Army General Orders No. 100.[76] Known commonly as the Lieber Code, the Code was, essentially, a legal reaction to the birth of modern warfare in the Americas.[77]

The impetus for the Lieber Code was the American Civil War. Early in the war, Americans realized that the Civil War would be long, requiring unprecedented numbers of men to fight.[78] It was also becoming obvious, especially to the Union Army, that most of the experienced, professional officers would be commanding Confederate forces.[79] Consequently, the less-experienced men commanding Union forces required instruction on

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adoption of further Conventions on the laws of war. Finally, the codification of the laws of war was largely coincidental with the codification of the private English Common Law on the European Continent during the same period. *Id.*

[75] *See* The Law of War Status of Civilian Employees, *supra* note 56, at 2.

[76] U.S. War Dep't Adjutant General Office, Orders No. 100, Instructions for the Government of the Armies of the United States in the Field (24 April 1863) [hereinafter Lieber Code] *reprinted in* THE LAWS OF ARMED CONFLICTS 3, *supra* note 74, at 3.

[77] *See* BEST, *supra* note 51, at 40-41.

[78] *Id.* at 41.

[79] *Id.*

how to conduct their forces during hostilities.[80] Perhaps more importantly, however, President Lincoln recognized that, because the war pitted Americans against their fellow citizens, the war must be fought in a way that would allow for reconciliation after it was over.[81] The U.S. Government, therefore, commissioned Franz Lieber, a widely recognized and respected German immigrant with international law experience, to codify the basic principles and accepted rules of war on land.[82]

For purposes of this thesis, three provisions of the Lieber Code are especially relevant. Article 21 of the Lieber Code provided essentially that the citizens of a hostile nation were the enemy and therefore were subject to the hardships of war.[83] Article 25 tempered this somewhat, providing that "in modern regular wars the protection of the inoffensive civilian of the hostile country is the norm."[84]

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[80] *Id.*

[81] *Id. See e.g.,* U.S. DEP'T OF ARMY, FIELD MANUAL 27-2, YOUR CONDUCT UNDER THE LAW OF WAR (23 Nov. 1984); U.S. DEP'T OF ARMY, TRAINING CIRCULAR 27-10-3, THE LAW OF WAR (12 Apr. 1985). It is noteworthy that this remains a basis for adherence to the law of war and is included in nearly every law of war briefing given to U.S. soldiers.

[82] *See* BEST, *supra* note 51, at 41.

[83] *See* THE LAWS OF ARMED CONFLICTS 3, *supra* note 74, at 7 (citing Article 21 providing "the citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.").

Most relevant, though, was Article 50 of the Lieber Code, which acknowledged the presence of civilians in the war effort and, in apparent recognition of their value to the forces they assisted, authorized the enemy to detain them under certain circumstances.[85] According to the Lieber Code, then, as the introductory quote illustrates, private citizens would be protected from enemy attack so long as they "refrain [ed] from taking part in hostilities."[86]

While this was clearly recognized that modern armies often used the support of civilian augmentees and considered them subject to capture and detention, the Lieber Code failed to address a larger issue: whether these civilians were considered "inoffensive" and therefore immune from attack, or, because of the role they played, were lawful objects of enemy attack.

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[84] *See* Lieber Code, *supra* note 76, art. 25; THE LAWS OF ARMED CONFLICTS 3, *supra* note 74, at 7.

[85] *See* Lieber Code, *supra* note 76, art. 50; THE LAWS OF ARMED CONFLICTS 3, *supra* note 74, at 11.

[86] *See* The Law of War Status of Civilian Employees, *supra* note 56, at 2.

B. The St. Petersburg Declaration

One of the most significant steps in the development of the law of war, and specifically in the development of the principle of distinction, was the St. Petersburg Declaration of 1868.[87] This Declaration was the first multilateral treaty to impose limitations on the use of weapons of war. As such, it codified the customary principle of prohibiting the use of weapons intended to cause unnecessary suffering, still valid today.[88] Indeed, in its preamble, the Declaration sets forth one of the classic statements of this critical principle of the law of war—"the progress of civilization should have the effect of alleviating as much as possible the calamities of war."[89]

Despite the fact that its original and specific intent was to outlaw certain types of incendiary ammunition, the Declaration has gained prominence for a purpose far beyond that

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[87] Declaration Renouncing The Use, In Times of War, of Explosive Projectiles Under 400 Grammes Weight, Signed at St. Petersburg, 29 November /11 December 1868 [hereinafter St. Petersburg Declaration], *reprinted in* THE LAWS OF ARMED CONFLICTS 3, *supra* note 74, at 101.

[88] DIETER FLECK, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 18 (1995) [hereinafter HANDBOOK OF HUMANITARIAN LAW]. The principles of unnecessary suffering and military necessity are components of the principle of proportionality. The test for proportionality is derived from FM 27-10, paragraph 41, which in turn is derived from Articles 51 and 57 of GPI. Essentially, attacks are prohibited if they may be expected to cause loss of life or damage to property which would be excessive in relation to the direct and concrete military advantage gained. *See* FM 27-10, *supra* note 50.

[89] *See* FM 27-10, *supra* note 50. *See also*, THE LAWS OF ARMED CONFLICTS 3, *supra* note 74, at VII.

originally intended.[90] Its language indicating "that the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy,"[91] has been viewed subsequently as the basis for the concept of civilian immunity.[92] Unfortunately, the Declaration offered no further guidance on the subject, failing even to mention specifically terms such as "civilian" or "non-combatant." The effect of these omissions was to leave the concept open to interpretation. The most common interpretation was that the civilian populace was immune if uninvolved in conflict, but if they became involved, they put themselves at risk.[93]

Taken together, these two efforts began a period of great progress in the law of war. The Lieber Code, written from the soldier's perspective in the form of duties on the battlefield, and the St. Petersburg Declaration together laid the foundation for what came to be known as "Hague Law."[94] They (along with the subsequent Hague Regulations) reflected the lofty Enlightenment philosophies prevalent at the time: only armed enemies would be attacked,

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[90] *See* HANDBOOK OF HUMANITARIAN LAW, *supra* note 88, at 19.

[91] *Id.*

[92] *See* BEST, *supra* note 51, at 43. *See also* THE LAWS OF ARMED CONFLICTS 3, *supra* note 74, at 101.

[93] *See* BEST *supra* note 51, at 42.

[94] *See* THE HANDBOOK OF HUMANITARIAN LAW, *supra* note 88, at 18.

unarmed civilians and their property should be respected, and prisoners and the wounded should be treated humanely.[95]

The trend toward codification of rules for combatants started by Lieber continued to gain momentum in the last quarter of the 19th Century. Most significantly, Lieber's ideas, and the civilian immunity principle embodied in the St. Petersburg Declaration, though greatly simplified, became part of conventional international law when a set of Regulations Respecting the Laws and Customs of Laws of War on Land became part of The Hague Conventions of 1899.[96] These Hague Regulations, or Rules, as they were commonly known, have provided the basis for the regulation of land warfare since that time.[97]

While these first attempts at codification did take civilians into consideration, they remained concerned with the "methods and means" of warfare.[98] When civilians were

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[95] *See* BEST, *supra* note 51, at 41.

[96] *Id. See* Convention (II) with Respect to the Laws and Customs of War on Land, 29 July 1899, *reprinted in* THE LAWS OF ARMED CONFLICTS 3, *supra* note 74, at 63.

[97] *See* THE HANDBOOK OF HUMANITARIAN LAW, *supra* note88, at 20.

[98] *Id.* (observing that many of the early rules established in these conventions codify great principles of humanitarian law, by which the legality of all weapons and means of warfare are to be measured).

considered, it was primarily with respect to duties owed them in periods of occupation.[99] It was not until attempts to gain an "air war convention" after World War I (and later when civilians in general became strategic targets of mass bombing in World War II), that the subject of the immunity of the civilian population generally became a significant issue in the development of the law.[100]

The development, or lack thereof, of civilian protective measures at these early stages illustrates the nature of warfare at the time. Because of the relatively limited size and scope of the battlefield, now termed "battle space,"[101] seemingly low risk to either the civilian

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[99] *Id.* at 20 (noting: "the section of the Regulations dealing with the government of occupied territory is still considered important.").

[100] *See* BEST, *supra* note 51, at 41(where the author casts skepticism on the effectiveness of the Hague Regulations):

> Improved regulation of the means of fighting wars was not everyone's idea of a proper achievement for conferences summoned to advance the cause of peace. . .The question cries out for investigation: what sort and how much of an impact did the Hague Conventions make on the armed forces of the soi-distant civilized powers, their planning, and their training before 1914?. . . I wonder whether it amounted to much more than paperwork. *Id.*

[101] *See* FM 100-5, OPERATIONS, *supra* note 33, at 6-12, defining battle space as:

> a physical volume that expands or contracts in relation to the ability to acquire and engage the enemy. It includes the breadth, depth, and height in which the commander positions and moves assets over time. Battle space is not assigned to a commander and extends beyond the AO. . . Battle space includes the combat power of all friendly forces that can be brought to bear on the enemy, including joint and combined forces. It contains the three-dimensional view of the battlefield, which can later be depicted with operational graphics. Battle space also includes the operational dimensions of combat, including time, tempo, depth, and synchronization. *Id* at. 6-12,13.

The adoption of the term "battle space" is a relatively new doctrinal development. During the Cold War, U.S. Army doctrine stressed "a battlefield framework that fit the conduct of operations against the Warsaw

population at large or rear-echelon civilian augmentees, and the nature of warfare rendered the issue of civilians as targets insignificant. Though several measures were adopted throughout the 20th Century, it was not until the adoption of GPI in 1977 that the specific subject of civilians as targets was addressed comprehensively.[102]

Despite this lack of clarity as to civilian status, and perhaps due to the relative lack of dangers civilians faced, they continued to accompany military forces into battle. It was common for civilians to be ordered into such service, usually as a result of a military commander's need to augment logistics capability. When civilians did accompany forces

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Pact." *Id.* at 6-12. New warfighting doctrine changes this focus "from battlefield linearity (the old framework) to greater fluidity, and from set-piece battle to simultaneous operations throughout the depth of the battlefield." *Id* at 6-12.

[102] *See* COMMENTARY, *supra* note 50, art. 48 at 598:

> The basic rule of protection and distinction is confirmed in this article. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. *Id.*

This section of the Commentary also provides the background on the status of civilians as targets in the law of war to this point:

> Up to the First World War there was little need for the practical implementation of this customary rule as the population barely suffered from the use of weapons, unless it was actually in the combat zone itself. The few measures adopted by the Hague in 1899 and 1907 seemed sufficient: a prohibition to attack places which are not defended, the protection of certain buildings, the fate of the population in certain areas, etc. *Id.*

Article 48 provides: "In order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives." *Id* at 597.

into active theaters of operation, they were usually regarded as having risked their own safety by doing so.[103] They usually wore uniforms, not only to identify themselves to friendly forces, but also to allow them to claim POW status if captured by the enemy.[104] POW protections were usually conferred as required, primarily because of acceptance of the Lieber Code[105] and all other subsequent law of war treaties addressing POW status.[106]

C. The Hague Regulations

The codification of the laws of war reached its peak before World War I at the two Hague Peace Conferences of 1899 and 1907. These Conferences marked the most expansive effort to date on the codification of the law of war.[107] They also marked the first modern attempts to deal with the issue of civilian augmentees. The 1907 Hague Convention IV, Respecting

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[103] *Id.* at 598. *See* The Law of War Status of Civilian Employees, *supra* note 56, at 2-3.

[104] *See* The Law of War Status of Civilian Employees, *supra* note 56, at 3. The wearing of uniforms is no longer required as a pre-requisite for the granting of POW status. Pursuant to GPW Article 4(A)4, *supra* note 19, the possession of an Identification Card is the determinate factor. Ironically, as far back as the Lieber Code, there appear no indications that a uniform was actually required for POW status. However, this practice has long been U.S. custom, dating back to at least World War II.

[105] *See* Lieber Code, *supra* note 76, art. 50; *see also* The Law of War Status of Civilian Employees, *supra* note 56, at 3.

[106] The following treaties all addressed the issue of POW status: Hague Regulations 1899 and 1907, GPW 1929, 1949, and GPI. *See also* The Law of War Status of Civilian Employees, *supra* note 56, at 3.

[107] *See* THE LAWS OF ARMED CONFLICT 3, *supra* note 74, at VII.

the Laws and Customs of War on Land,[108] contained provisions very similar to those introduced in the Lieber Code. Article 13 of the Hague Rules provided that: "Individuals who follow an Army without directly belonging to it, such as . . . Contractors, who fall into the enemy's hands and whom the enemy thinks expedient to detain, are entitled to be treated as prisoners of war. . . ."[109]

1. Legitimate Civilians Versus Unprivileged Belligerents

These treaty provisions distinguished, upon capture, civilians legitimately accompanying the force from private citizens.[110] This distinction was vital because, if private citizens engaged in combat they could be considered *unprivileged belligerents*[111] and, if captured, could be punished for unauthorized behavior by either their own nation or by the enemy.[112] With the advent of the Hague Conventions, however, if a civilian was within the area of

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[108] Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, [hereinafter Hague IV] *reprinted in* DA PAM 27-1, *supra* note 19.

[109] *Id.* art. 13.

[110] *See* The Law of War Status of Civilian Employees, *supra* note 56, at 3.

[111] *See Ex Parte Quirin*, 317 U.S. 1, 31, 34, 36 (1942) (referring to saboteurs as having committed war crimes as opposed to calling spies, guerillas, and saboteurs unprivileged belligerents, as had been the case in the trial of Field Marshal Wilhelm List, the commander of German forces occupying the Balkans in early World War II). *See also*, WHITNEY HARRIS, TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG 485-88 (1954).

[112] *See* The Law of War Status of Civilian Employees, *supra* note 56, at 1.

military operations legitimately, he was entitled to POW status upon capture. Most nations generally adhered to these provisions during World War II, the Korean War, and Vietnam, as captured civilians were generally treated as prisoners of war.[113]

It is worthwhile to discuss here the importance of POW status and the rationale for an enemy to "extend" it to such civilians. Hague Article 13, cited above, (as well as subsequent similar treaty provisions) makes clear that certain civilians detained by an enemy force were "entitled" to be treated as POWs. It is more revealing, however, to focus not on the "protections" of POW status but instead on the language which permits their detention in the first place—for this reveals the true rationale for granting POW status to these individuals.

The phrase "whom the enemy thinks expedient to detain"[114] is really the first acknowledgment of the operational value of civilians accompanying the force, since it allows an enemy force to keep as prisoner those not belonging directly to the military force, but obviously playing a vital, albeit supporting military role.[115] This was a significant development in international law as it relates to civilians. For the first time, it created a

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[113] *Id.* at 3.

[114] Hague IV, *supra* note 108, art. 13. *See* Lieber Code, *supra* note 76, art. 50.

[115] *Id.*

second category of civilian—the "tainted" civilian who, because of his participation in the war effort, may be detained by the enemy.[116]

The significance of this rationale is that it undermines the common assumption that POW status was extended to these civilians as a "benefit" in return for their pre-capture status as "quasi-combatants." To the contrary, it was less a benefit to the captured civilian, than it was a right to the detaining power.[117] Thus, POW status did not automatically equate to status as a lawful target.

2. Status of Civilians as Targets

In many ways, however, the Hague Rules and their progeny ignored the real issue of the status of civilians as targets.[118] Aside from the foregoing provision regarding the POW status

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[116] *See* Lieber Code, *supra* note 76, art. 50.

[117] *See* Remarks of Judge Abraham D. Sofaer, *supra* note 59, at 466. Judge Sofaer makes specific reference to this concept, stating: "A fundamental premise of the Geneva Conventions has been that to earn the right to protections as military fighters, soldiers must distinguish themselves from civilians by wearing uniforms and carrying their weapons openly." *Id.* If this requirement may be viewed as the "quid" for POW status, it is clear that the civilian does not give it. Clearly then, the benefit in the detention of civilians as POW annures to the captor.

[118] *See* COMMENTARY, *supra* note 50, art. 48, at 598:

of certain civilian augmentees, which had little relevance to the status of civilians as lawful targets, the Hague Rules remained largely silent on the issue. They regulated the "means and methods" by which warfare could be conducted, but they contained no express provisions regarding targeting civilians.[119] In certain provisions regarding bombardment, the Rules apparently confirmed the St. Petersburg Declaration's long-standing principle of distinction—that deliberate attacks on civilians were unlawful—but since direct prohibition was not mentioned as such, the prohibitions were, at best, inferred.[120] Similar provisions, such as requirements to respect civilian and cultural property were incorporated as well, but they also fell short of rising to the level of explicitly prohibiting intentional attacks on the civilian population.[121]

Thus, under these provisions of the law of war the prohibition against targeting civilians legitimately accompanying the force was at best inferential. Furthermore, under customary

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> Up to the First World War there was little need for the practical implementation of this customary rule as the population barely suffered from the use of weapons, unless it was actually in the combat zone itself. The few measures adopted by the Hague in 1899 and 1907 seemed sufficient: a prohibition to attack places which are not defended, the protection of certain buildings, the fate of the population in certain areas, etc. *Id.*

[119] *See* BEST, *supra* note 51, at 50.

[120] HAGUE IV, *supra* note 108. Article 25, for example, provides that "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited." *Id.* art. 25. *See also* BEST, *supra* note 51, at 50.

[121] HAGUE IV, *supra* note 108. Article 27 requires that in sieges and bombardments, all necessary measures must be taken to spare civilian and cultural places. *Id. See* BEST, *supra* note 51, at 50. *See also* COMMENTARY, art. 48 and 51, *supra* note 50, at 598, 619.

international law, if civilians did take part in hostilities, they were likely to be categorized as unlawful belligerents and subject to punishment. They could, if captured, however, be detained by the enemy for the duration of the conflict and, if their conduct was limited to non-hostile actions, they could not be subjected to punishment by them. Instead, they would be afforded full protections (as they existed at the time) as POWs.

Once again, it was the limited nature of warfare that rendered these provisions adequate to meet the needs of the armed forces of the times. Civilians usually performed rear-area support operations, well removed from the lethality of current weapons.[122] The reality and expectation, therefore, that civilians would not be involved in warfare and the inference that civilians would not be targeted directly, remained valid. While the Hague Rules and subsequent Geneva Conventions acknowledged the potential military value of some augmentees by allowing a captor to detain them indefinitely upon capture, their status as targets remained largely a non-issue because of their lack of proximity to the "action."

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[122] *See* COMMENTARY, *supra* note 50, art. 48 at 598.

3. *The Dichotomy in Civilian Status: The "Red Herring" of POW Status*

This emphasis on POW status and corresponding lack of focus on targeting status highlights an important dichotomy between the two status issues with regard to civilian augmentees. Targeting considerations never have been, and still are not, dictated by POW status. From the earliest law of war codifications until the adoption of GPI, in fact, they operated completely independently of each other. In the early laws of war, as pointed out above, POW protections were afforded to civilians, usually as a means to distinguish them from unprivileged belligerents and to allow a captor to deprive an enemy of the use of such civilians. The scope and location of civilian activities in support of the military, however, did not require targeting considerations.

As significant as the recognition of the operational value of civilian augmentees may have seemed to be, in many ways it remains a "red herring" for targeting analysis purposes. As the Hague Regulations illustrate, though the value of civilian augmentees was recognized to a degree that authorized the enemy to detain them, the focus of the law of war as it related to civilians continued to remain on the POW status of augmentees, largely ignoring their status as targets.

Thus, while treaty provisions created the important distinction between civilians who accompany the force "without directly belonging thereto,"[123] and unprivileged belligerents, rules regarding civilians remained focused on a limited battlefield—both in terms of the weapons systems on that battlefield and the very limited numbers of civilians involved in operations.[124] It is reasonable to assume that treaty drafters anticipated neither the number of civilians eventually supporting military forces, nor the scope of their duties. They could not, for example, have envisioned a scenario in which either government civilian employees or contractors manned weapons systems in forward areas of the battlefield.[125] Lastly, they did not envision the advances in weaponry that would subject ever-increasing numbers of civilians, including those accompanying the force, to potential harm.[126]

These assumptions hardly remain valid. As one commentator observes:

> Perhaps the most complex and controversial issue today is contractor involvement in maintenance. As systems become more sophisticated, the need for technicians to be close by has never been greater. This puts civilian contractors at far greater risk of direct involvement in conflict. Because of the increased range of our adversaries' weapons and the disappearance of the

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[123] *See* Lieber Code, *supra* note 76, art. 50; Hague IV, *supra* note 108, art. 13; GCC, *supra* note 54, art. 4.

[124] *See* The Law of War Status of Civilian Employees, *supra* note 56, at 3.

[125] It is fair to say that drafters could not imagine a situation in which literally thousands of civilian and contract employees deployed with their nation's military forces. Nor could they have envisioned that these civilians would be tasked to perform services traditionally provided by uniformed person, such as aircraft and weapons system maintenance far forward. *Id.* at 6.

[126] *Id.* at 4.

linear battlefield, civilians working in theater are 'on the battlefield' more than ever before.[127]

D. The Geneva Conventions of 1929

World War I put the laudable efforts of the late nineteenth and early twentieth centuries to the test. The War featured new weaponry of unprecedented lethality and range, demonstrated quickly the limits of the existing law, and prompted its partial re-examination.[128]

While the advent of gas warfare contributed to horrors previously unfathomable, it was the introduction of new weapons delivery systems under the sea and through the air that most frightened legal scholars and humanitarian activists.[129] Where the law of war had previously been based on the precept that those trying to kill each other did so within sight of the enemy, the ever-increasing distance between weapon and target necessitated a change in focus.[130]

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[127] *See* Althouse, *supra* note 14, at 14.

[128] *See* THE HANDBOOK OF HUMANITARIAN LAW, *supra* note 88, at 20 (noting that perhaps the largest reaction to the recent developments in the law came from skeptics who, in response to the War's atrocities, observed that the advancements had little effect other than to provide enemies an objective means to criticize actions in the other trenches.). *See also* BEST, *supra* note 51, at 48-49.

[129] *See* BEST, *supra* note 51, at 48.

[130] *See* THE HANDBOOK OF HUMANITARIAN LAW, *supra* note 88, at 21.

Especially problematic were the advent of the submarine and the aircraft, both of which greatly extended the risks to civilians and civilian property.[131]

The advent of air warfare produced myriad concerns. Not only was the enemy's ability to strike extended as never before, it could do so with devastating force. Problematic also was the ability to strike not only at strategic military targets, but at the military and civilian industrial complex—potentially grinding the enemy effort to a halt. Perhaps most disconcerting, however, was the potential to target the civilian populace directly to break the will of the war effort.[132]

The Hague Regulations did contain restrictions on bombardment, confirming long-standing prohibitions on the deliberate attack of civilians in undefended places, through an implied invocation of the principle of distinction.[133] The Regulations also added provisions requiring respect for civilian and cultural property.[134] New weapons capabilities and the

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[131] *See* BEST, *supra* note 51, at 48-49. *See also* Horace B. Robertson Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, THE LAW OF MILITARY OPERATIONS 197, 212 (Michael N. Schmitt ed., 1988) (noting: "the advent of the submarine and aircraft and the measures adopted by the adversaries to counteract these new means of naval warfare changed the traditional law forever and irrevocably.").

[132] *See* BEST, *supra* note 51, at 50.

[133] Hague IV, *supra* note 108, art. 25; *see also* BEST, *supra* note 51, at 49.

[134] Hague IV, *supra* note 108, art. 27.

horrors of their employment, however, exposed the glaring inadequacies of these provisions.[135]

As a result of the horrors of the War, the International Committee of the Red Cross (which came out of the war with a notable increase in stature) forged ahead in its attempts to codify fundamental humanitarian principles.[136] Despite a failure to address comprehensively these civilian targeting issues, the 1929 Conventions did offer dramatic improvement in the scant POW protections contained in chapter 2 of the Hague Regulations.[137] One of the two 1929 Conventions greatly enlarged The Hague's minimal rules for the humane treatment of POWs.[138] More relevant for purposes of this thesis, however, was Article 81 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War, which reiterated the provisions of Hague IV extending POW status to civilians accompanying the force. Article 81 provided that:

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[135] *See* BEST, *supra* note 51, at 50.

[136] *Id.* at 52:

> "The ICRC and the national Red Cross societies came out of the war raised in reputation and regard, and the least controversial item of the post-war codification agenda was the forging, in 1929, of a further Geneva Convention to improve the protections of prisoners of war beyond the relatively brief specifications in chapter 2 of the Hague Regulations. *Id.*

[137] *Id.* at 52-53.

[138] Geneva Convention Relative to the Treatment of Prisoners of War, 27 July 1929 [hereinafter GPW 1929] *reprinted in* THE LAWS OF ARMED CONFLICTS 3, *supra* note 74, at 339.

> Persons who follow the armed forces without belonging directly thereto, such as. . .contractors, who fall into the hands of the enemy *and whom the latter think it fit to detain*, shall be entitled to be treated as prisoners of war, provided they are in possession of an authorization from the military authorities of the armed forces which they were following.[139]

Once again, the language of the law demonstrated the motivation for granting POW status—to allow a captor to deny the enemy the use of these civilians. Thus, this provision sheds virtually no light on whether these civilians could be the lawful object of intentional attack because, unlike regular combatants, extending POW status was not a benefit granted in exchange for being a target before capture, but a grant of detention authority given to the captor.[140]

Unfortunately, the Convention failed to clarify the targeting of civilians in general or civilian augmentees specifically. Though the ICRC was convinced that protections for civilians were required and had pushed for such reform since the end of World War I, its efforts remained unsuccessful. Its failures were not the result of a widespread failure to recognize the problem, though most states believed such protections an erstwhile goal, many also believed that considering such issues during the post-war period of optimism was an

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[139] *Id.* art. 81 (emphasis added).

[140] *See supra* note 117 and accompanying text.

admission that peace would not last.[141] The result of the Diplomatic Convention of 1929, therefore, was a mere resolution that they would study further whether a Convention for protecting civilians should be undertaken.[142]

To this point in time, international law continued to evolve in the protections afforded prisoners of war. While experts were obviously fully aware of the weapons that threatened civilians in active theaters of operation and the civilian populace in general, they nevertheless had not begun to tackle the very important issue of the targeting status of civilians accompanying the force, or contributing to the war effort at home.

E. The Post-World War II Period and The Challenge to Distinction

World War II, including such activities such as cryptology, the Manhattan Project, and even the Bob Hope "*Road Shows*" with the Uniformed Services Organization (USO), changed the landscape of civilian activity in the war effort.[143] The War also marked the entry

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[141] *See* Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 3-5 (Jean S. Pictet ed., 1958) [hereinafter GCC Commentary].

[142] *Id.* at 4.

[143] *See* The Law of War Status of Civilian Employees, *supra* note 56, at 4.

of a new type of civilian, the civil servant, into the war effort.[144] Perhaps more than any other single factor, however, the role of airpower in World War II precipitated consideration of when civilians supporting the war effort became the lawful objects of attack.[145]

The issue had, in fact, been the subject of much discussion in the aftermath of World War I, when proponents of air warfare asserted that air power could win wars more quickly by destroying the enemy's military industrial base, thereby avoiding the horrors of trench warfare.[146] In their view, any persons engaged in the war effort assumed the risk of being attacked merely by working in the war industry.[147] To the airpower proponent, then, such civilians became legitimate targets by working within or around a legitimate target, and their intentional injury or death did not, therefore, constitute violations of the law of war.[148]

While that conclusion was not explicitly prohibited by any law of war treaty (although it was arguably prohibited by the customary international law principle of distinction), it

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[144] *Id.* at 3-4.

[145] W. Hays Parks, The Protection of Civilians from Air Warfare (unpublished manuscript) (1997) (copy on file with the author).

[146] *Id.*

[147] *Id.* at 36.

[148] *Id.*

illustrates clearly the dangers associated with failing to identify adequately who is a civilian and therefore entitled to the benefit of distinction. The intentional targeting during World War II, by all parties, of the enemy war industry and civilian populations took that logic to its extreme, blurring greatly the distinction between civilian and military, endangering the entire concept of distinction.[149]

This trend reached its zenith, or nadir, in 1942 when the British Royal Air Force announced that the "primary object" of its bombing campaigns was German civilian industrial workers. They also recommended destroying city centers in German industrial towns.[150] When the British carried through on these pronouncements, and the U.S. waged similar campaigns in both Germany and Japan, the distinction between unlawful civilian and lawful military targets had practically ceased to exist.[151]

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[149] *Id.*

[150] *Id.* A 14 February 1942 Royal Air Force (RAF) Directive declared that the primary object of Bomber Command operations was to be focused on the "morale of the enemy civil population and in particular, of the industrial workers." This was followed by a 30 March 1942 memorandum by Lord Cherwell to Prime Minister Winston Churchill that recommended the destruction of city centers of German industrial towns, apparently with the intent to destroy not only industry, but to render citizens homeless. *Id. See also* SIR FRANKLIN WEBSTER & NOBLE FRANKLAND, THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY 1939-1945 (London: HMSO, 1961).

[151] *See* Protection of Civilians from Air Warfare, *supra* note 145, at 37.

This is not to say that the law of war or the principle of distinction itself had disappeared. Fully aware of its existence and effect, the proponents of these strategies were careful to insist that they were attacking only legitimate military objectives rather than the civilian population, and that injuries to civilians or civilian property were collateral damage.[152] It was clear, however, that these activities were rendering accepted principles meaningless in practice and that the international community needed to make major revisions in the fundamental definitions underlying the principle of distinction.[153]

1. The Geneva Conventions of 1949

The Geneva Conventions of 1949 were the "legal" response to the developments of World War II.[154] The 1949 Conventions reflected a shift away from the weapons and

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[152] *Id.* This concept of operation was first validated in 1928 by RAF Air Marshal Trenchard. In subsequent writings in subsequent years, the idea was extended to workers in railway stations, docks, "petrol installations," transportation workers, and, ultimately, all "civilians enrolled in the passive defence—the fire fighters, the fire watchers, the rescue parties, and the demolition squads. Lest we think this harsh, its advocates urged that these persons were subject to attack "only whilst on the job, and not in their homes." *Id.* at 36 (citing BOMBING VINDICATED (London: Geoffrey Bles, 1944)).

[153] *Id.*

[154] The four Geneva Conventions of 1949 are: Geneva Convention for the Protection of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War [hereinafter GPW], *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of

targeting focus of the Hague tradition, ostensibly in favor of protections for noncombatants.[155] Unfortunately for civilians, however, the 1949 Conventions did not address the very acts that precipitated attempts at reforms. The horrors of air bombardment and the targeting of civilian industrial centers were not addressed by the 1949 Civilians Convention.[156] Rather, the bulk of the protections offered to civilians in the 1949 Convention concerned civilians traveling or residing in areas that fell into enemy hands.[157]

Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287. *See* BEST, *supra* note 51, at 115.

[155] The Commentary to the 1949 Conventions, in fact, opens with a section entitled "Gaps in the protection afforded to civilians." GCC Commentary, *supra* note 141, at 3-5. Here the Commentators affirm that, when the Second World War broke out, civilians were not provided with effective protection under any convention or treaty. While they admit that certain Hague Regulations applied to civilians, they likewise admit that these provisions were confined to civilian issues in occupation. The reason for this lack of convention protection of civilians, they explain, lies in the fact that until World War I, it was a cardinal principle of the law of war that military operations must be confined to the armed forces and that the civilian population had to enjoy complete immunity. In many respects, this immunity was a result of the nature of warfare and civilians' lack of proximity to it. *Id.* at 4. At the outset of the Diplomatic Conference of 1947, ICRC President Max Huber spoke of extending protections to civilians, saying: "War, as it becomes more and more total, annuls the differences which formerly existed between armies and civilian populations in regard to exposure to injury and danger." *Id.* at 5. Ironically, the Convention did little to fill this gap.

[156] According to the Commentary, in fact, "The Convention does not, strictly speaking, introduce any innovation in this [civilian protection] sphere of international law. It does not put forth any new ideas. But it reaffirms and ensures, by a series of detailed provisions, the general acceptance of the principle of respect for the human person in the very midst of war—a principle on which too many cases of unfair treatment during the Second World War appeared to have cast doubt." *Id.* at 9. Therefore, according to its drafters, this new Convention on the protection of civilians corresponds to "the fundamental aspirations of the peoples of the world" and defines "the essential rules for that protection to which every human being is entitled." *Id.*

[157] The focus of this Convention is clear from the Commentary thereon:

> "The wounded and prisoners of war are human beings who have become harmless, and the State's obligations towards them are not a serious hindrance to its conduct of hostilities; on the other hand civilians have not in most cases been rendered harmless, and the steps taken in their behalf may be a serious hindrance to the conduct of war."

Id. at 5.

Indeed, the issue of bombardment was largely ignored, taking a political backseat to these other two categories of civilian protections, which received the bulk of the new Convention's focus.[158] The reasons for this were two-fold: first, the victims were not there to object, and second, the proponents of the largest-scale bombing (the U.K. and U.S.) were understandably reticent to debate, publicly and internationally, the legality of their tactics. As the Official Commentary points out:

> From a general humanitarian point of view, no one of these categories of civilian suffering could be said to need attention more or less urgently than the others. Political circumstances however directed that only the first two—enemy aliens and civilians under enemy occupation—should be given much of the new Convention's protection. It was, above all, as sufferers from enemy military occupation that the majority of the European states represented at the 1947-49 conferences felt an urge to make new law for the protection of civilians. The most conspicuous sufferers from bombing, Germany and Japan, were unable to put their case, while the bombing specialists, the USA and UK, had every reason for their case not to be put. [159]

While such an omission may have been understandable had there been a major, post-war examination of the methods and means of warfare, no such undertaking occurred.

As an example of the emphasis of the Convention, Part II entitled "General Protection of Populations Against Certain Consequences of War" contains no provisions regarding civilian augmentees or civilians engaged in the war effort generally, nor does any other section of the Convention. Furthermore, no provision defines the term "civilian," nor does any provision explicitly prohibit the intentional attack of civilians.

[158] *See* BEST, *supra* note 51, at 115.

[159] *See* GCC Commentary, *supra* note 141, at 3-5; *see also* COMMENTARY, art. 48, *supra* note 50, at 598.

Despite these obvious omissions, there were notable relevant additions in the 1949 Conventions. Article 4 of the POW Convention recognized the increased role of civilians in the war effort and better defined which civilians accompanying the force were entitled to POW status:

> Persons who accompany the armed forces without actually being members thereof, such as civilian members of *military aircraft crews. . . supply contractors, members of labor 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.[160]

While this list was clearly not an exhaustive one, it certainly was evident of the drafter's intent to expand the list of persons qualifying for POW status.[161] As with all prior treatments of this issue, however, the motive for the provision remained the same, and the drafters failed to address the key issue of status of civilian augmentees as targets.

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[160] *See* GPW, *supra* note 19, art. 4(A)(4) (emphasis added and indicates new material).

[161] International Committee of the Red Cross, Commentary to the Geneva Convention Relative to the Protection of Civilian Persons in the Time of War (Jean S. Pictet ed., 1960) [hereinafter Pictet].

2. The Post-Convention Restrictive Definition of "Civilian"

Despite these 1949 treaty developments, the ICRC remained unconvinced that the newly adopted Conventions sufficiently protected the civilian population.[162] In 1956, it drafted a set of rules aimed primarily at protecting the civilian population from indiscriminate warfare.[163] The Draft Rules were approved the following year at the 1957 worldwide International Conference of the Red Cross and submitted to governments worldwide for examination. Unfortunately, there was little interest shown in them and no further action was taken.[164]

Nevertheless, the Draft Rules influenced later attempts to define and to develop the law of war as it related to targeting civilians, and to a large extent, its provisions are today considered customary international law.[165] The first noteworthy aspect of the Rules was their

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[162] *See* THE LAWS OF ARMED CONFLICT 3, *supra* note 74, at 251.

[163] *See* The 1956 Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War [hereinafter 1956 Draft Rules], *reprinted in* THE LAWS OF ARMED CONFLICT 3, *supra* note 74, at 251-57.

[164] *Id.*

[165] *Id. See* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 65 (1990) [hereinafter Parks: Air War].

attempted application to both international and internal armed conflicts.[166] With this attempt, the ICRC expressed clearly that it recognized the dangers to civilians of internal conflicts.[167]

Perhaps the most significant aspect of the Draft Rules was the definition of "civilian." The Rules defined the civilian population in the negative, as anyone not belonging to the armed forces. Persons who did not belong to the armed forces, however, but nonetheless took part in fighting, lost their status as civilians.[168] This was the first definition of "civilian" offered by a law of war treaty.

In two very important respects, this definition, in combination with rules prohibiting attack without distinction,[169] set the stage for GPI. Not only did it affirm the principle of

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[166] Article 2 of the 1956 Draft Rules provided that the rules would apply (a) "In the event of declared war or any other armed conflict, even if the state of war is not recognized by one of the Parties to the conflict; and (b) In the event of an armed conflict not of an international character." *See* THE LAWS OF ARMED CONFLICTS 3, *supra* note 74, at 252.

[167] *See* Parks: Air War, *supra* note 165, at 67.

[168] *See* THE LAWS OF ARMED CONFLICTS 3, *supra* note 74, art. 4, at 253.

[169] *See* THE LAWS OF ARMED CONFLICT 3, *supra* note 74, at 253. Article 6 prohibited direct attacks against the civilian population, and the attack of dwellings, installations or means of transportation under the exclusive use or occupation of civilians. *Id.*

Article 10 prohibited attack without distinction, providing that: "it is forbidden to attack without distinction, as a single objective, an area including several military objectives at a distance from one another where elements of the civilian population, or dwellings, are situated between the said military objectives." *Id.* at 254.

Article 11 provided:

distinction and apply it to both parties to a conflict (for example, the party bombing *and* the party relying on civilians), but it also expressed the view that the principle of distinction should be applied to *all* conflicts, clearly acknowledging the importance of this customary international law principle.

3. *The Vietnam Era: United Nations and ICRC Efforts*

The mid-1960s sparked a new interest in the laws of war. Though much of the world remained focused on the Cold War and the dangers of thermo-nuclear conflict, the ICRC remained steadfast in its efforts to improve the law of war, especially as it related to the protection of civilians.[170] Its efforts met with relatively few successes, however, until the late 1960s and early 1970s, when the United Nations joined forces with the ICRC and became involved for the first time in the effort to protect victims of war.[171] Their joint efforts continued and expanded the trend established by the Hague Regulations and Geneva

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> The Parties to the conflict shall, so far as possible, take all necessary steps to protect the civilian population subject to their authority from the dangers to which they would be exposed in an attack—in particular by removing them from the vicinity of military objectives and from threatened areas. Similarly, the Parties to the conflict shall, so far as possible, avoid the permanent presence of armed forces, military materiel, mobile military establishments or installations, in towns or other places with a large civilian population. *Id.* at 254.

[170] *See* THE LAWS OF ARMED CONFLICT 3, *supra* note 74, at ix.

[171] *Id.*

Conventions, culminating in the passage of two key United Nations General Assembly Resolutions.[172]

United Nations General Assembly Resolution 2444,[173] passed in 1968, prohibited attacks against the civilian populace as a whole, and, for the first time ever, specifically mandated a distinction between persons taking part in hostilities and members of the civilian population. A similar measure two years later, United Nations General Assembly Resolution 2675,[174] provided that "in the conduct of military operations, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations."[175]

Several aspects of these resolutions are noteworthy. First is the apparent acknowledgment by the U.N. and others of the difficulty in distinguishing non-uniformed

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[172] *Id.*

[173] G.A. Res. 2244, U.N.GAOR, 23d Sess., Supp. No. 18, U.N. Doc. A/7218 (1968) [hereinafter UN Res. 2444].

[174] G.A. Res. 2675, U.N.GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970) [hereinafter UN Res. 2675].

[175] *Id.* This Resolution, with the expressed purpose "to ensure the better protection of human rights in conflicts of all types of conflict," set forth provisions protecting civilian populations as objects of attack, protecting areas designation as places of protection for the civilian populations as free from attack, and prohibiting reprisals against civilians. *Id.*

Its most relevant provision was its first, which provided that "in the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in hostilities and civilian populations." *Id.* *See* THE LAWS OF ARMED CONFLICT 3, *supra* note 74, at 259-60. *See also* Parks: Air War, *supra* note 165, at 71.

guerrillas from the civilian populace during the non-conventional conflicts that characterized the era.[176] Second is that neither resolution made any reference to terms such as "combatant," "non-combatant," or "military," but rather used the obviously more generic parlance of "persons." This is another apparent acknowledgment of the increased intermingling of civilians and armed forces in conflict areas.[177]

Perhaps most notable of all, however, was that the United States did not object to two very important concepts within the Resolutions. The first concerned the re-iteration of the principle of distinction as set forth in Resolution 2444. As noted above, the Resolution mandated distinction between persons taking part in hostilities and members of the civilian population. While the United States urged restraint against "attempts to limit the effects of attacks in an unreasonable manner,"[178] it made clear that it accepted the principle of distinction as one of the fundamental principles of customary international law.[179]

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[176] *See* The Law of War Statue of Civilian Employees, *supra* note 56, at 5.

[177] *Id.*

[178] *See* Parks, Air War, *supra* note 165, at 70-71. In response to this third principle as set out within the Resolution, the General Counsel of the Department of Defense issued a letter relating to the United States' interpretation of the law of war. With respect to the principle of distinction as contained within the Resolution, the letter stated:

> "The principle recognizes the interdependence of the civilian community with the overall war effort of a modern society. But its application enjoins the party controlling the population to use its best efforts to distinguish or separate its military forces and war-making activities from members of the civilian population to the maximum extent feasible so that civilian casualties and damage to civilian objects incidental to attacks on military objectives will be minimized

The second was the provision of Resolution 2675 that made it applicable to armed conflicts of all types, clearly stating the intent to make the law of war applicable to internal, as well as international, conflicts. Taken together, these two Resolutions and the U.S. reaction to them hold true significance. Though clearly non-binding, and not necessarily authoritative on the state of the law of war at the time, they nevertheless show a clear trend in the law toward recogg the increased and unavoidable presence of civilians on the battlefield. They also recognize the need to distinguish such civilians from persons taking part in hostilities and highlight the desire to extend protections for these civilians into internal conflict, reflecting the perceived importance of these protections.[180]

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as much as possible." *Id.* (quoting letter from Arthur W. Rovine, General Counsel, U.S. Department of Defense).

A summary of the letter is contained in Arthur W. Rovine, *Contemporary Practice of the United States Relating to International Law*, 67 AM. J. INT'L L. 122-25 (1973).

[179] *See* Parks, Air War, *supra* note 165, at 70.

[180] Because of the effect on state sovereignty, any extension of international law into the realm of internal conflict is significant, and illustrates the importance attached to the issue of protection of the victims of conflict. *See infra* notes 244, et.seq., (discussing the extension of law of war regulation into internal conflict).

But see Parks, Air War, *supra* note 165, at 71. Mr. Parks takes a different view of the Resolutions' interpretation of responsibility under the principle of distinction. He notes that the Resolution "correctly states the general requirement regarding discrimination in the application of force, while limiting the attack of civilian objects only to those used *exclusively* (his emphasis) for military purposes." *Id.* He takes issue, however, with "the requirement that every effort must be made to spare civilian populations the effects of war" for this, he believes, drifts away from the customary standard of reasonable care, while placing entirely upon military commanders without a concomitant responsibility upon the part of the civilian population as such." *Id.*

I do not take issue with Mr. Parks' interpretation; indeed, I believe it to be correct. The significance of the Resolution, I submit, is not its specific interpretation of the law itself, but its broad reflection of the trends in

To this point in time, then, although international law acknowledged that civilians were indeed mingled with accompanying military forces during battle, there remained conflicting authority as to their status as potential targets. Despite this tacit acknowledgment of the presence of civilians on the battlefield, the international community, including the United States, continued to adhere to a simplistic view that there were but two categories of persons in war: civilians who could not be targeted and combatants who could.[181]

At odds with this approach, however, arose another view more attune to both the trends in the law and reality of modern military operations. Under this approach, there was a third, hybrid category of civilians accompanying military forces that was either "quasi-civilian" or "quasi-combatant."[182] As such, they were not protected by the prohibitions against intentional attack on the civilian population as a whole or against individual civilians.[183] Nor

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international law to the protection of civilians, especially those increasingly co-mingled with military forces, and the desire to extend those protections into internal conflicts.

[181] *See* The Law of War Status of Civilian Employees, *supra* note 57, at 5. Mr. Parks suggests that the status of the law to this point provides a "clear recognition in the law of war of a category of individuals who are either quasi-civilian or quasi-combatant. *Id.* At odds with this interpretation, he notes, was the idea, prevalent amongst the Army bureaucracy, that no such hybrid existed and that only non-targetable civilians and combatants existed under the law. This logic, he suggests, belied both the state of the law and military reality. *Id.*

[182] *Id.* One of the first persons to make this argument was Royal Air Force Air Marshal Trenchard, who observed as early as 1928 that civilians who worked in the war effort assumed risk in so doing and were therefore legitimate targets at risk of attack. *See* The Protection of Civilians from Air Warfare, *supra* note 145, at 36-38, citing James Maloney Spaight, *Air Bombardment*, THE BRITISH YEARBOOK OF INTERNATIONAL LAW, 21-33 (1923-24).

[183] *See* The Law of War Status of Civilian Employees, *supra* note 56, at 5.

did their presence on military bases or in theaters of operation violate the requirement of the principle of distinction that nations maintain reasonable separation between military forces and the civilian population.[184]

In contrast to this approach were the assertions of the ICRC and UN that only those actively taking part in hostilities were lawful objects of attack.[185] This approach mirrored Resolution 2675, indicating that, although they remained qualified for protections as POWs, civilian augmentees did not automatically qualify as targets. What was emerging, therefore, was a "conduct-based" test to determine when a civilian augmentee loses immunity from attack, completely independent of POW status, but completely consistent with the rationale for granting such civilians POW status.[186] While this was a promising development, that the term "civilian" still remained largely undefined by the law of war continued to create uncertainty as to whether augmentees fell within the category of those immune from attack.

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[184] *Id.*

[185] *See* Parks, Air War, *supra* note 165, at 71.

[186] *See supra* note 139 and accompanying text.

F. The 1977 Additional Protocol I to the Geneva Conventions of 1949

Between the major efforts of the 1949 Conventions and the 1977 Protocols supplementing the 1949 Conventions, the struggle to define better who was a civilian continued unresolved.[187] Various proposals advocated dividing the civilian population into as many as four categories: (1) pure civilians with no association whatever with the military or the military industrial complex; (2) civilians engaged in the war effort; (3) civilians engaged in the military effort—those involved in the combat service support arena; and (4) those involved in military operations.[188] These and other such proposals that advocated dividing the civilian populace into targetable and non-targetable categories were opposed by international law scholars, who warned of the danger of a "slippery slope."[189] This Diplomatic Conference, which met from 1974 to 1977 to prepare the most significant treaty related to the methods and means of warfare since 1907, eventually adopted a definition that drew no such distinctions.[190]

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[187] *See* The Protection of Civilians from Air Warfare, *supra* note 145, at 38.

[188] *Id.*

[189] *Id.* at 38 (pointing out that scholars resisted any such attempts for the creation of "quasi-civilians" or further subdivisions of the civilian populace). Their rationale, it seems, was that to create any group other than pure civilians would be to endanger the concept of civilian immunity. Mr. Parks, on the other hand, points out that the law of war has been on a slippery slope for most of this century, and posits that the best method to protect the truly innocent civilian may not be to make all civilians "civilians," but indeed be to create such a third category. *Id.* at 38.

[190] The machinations which would eventually result in the adoption of the 1977 Additional Protocols began in 1968 when the ICRC was urged by the Secretary-General of the United Nations to continue the efforts which

The states participating in the Conference heeded the scholars' warnings, as they chose to maintain just two categories of persons for targeting purposes: combatants and non-combatants.[191] Under their definition, only military personnel were subject to attack, while civilians were granted specific immunity from attack.[192] In order to give this previously acknowledged but often subverted principle meaning, the Conference chose finally to define the term "civilian." As illustrated by the Official Commentary to GPI, the definition that the Conference finally settled on was intended to remedy the gaps left by previous attempts:

> In the course of history many definitions of the civilian population have been formulated, and everyone has an understanding of the meaning of this concept. However, all these definitions are lacking in precision, and it was desirable to lay down some more rigorous definitions, particularly as the categories of persons they cover has varied.[193]

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had resulted in the UN Resolutions on "Respect for Human Rights in Armed Conflict." In September 1968, therefore, the ICRC published to the National Societies of the Red Cross and Red Crescent its plans for revision of the Geneva Conventions. There was no intent to completely rewrite the Conventions, but to revise them in such fashion as to guarantee more effective protections for victims of armed conflict. Conferences in Istanbul in 1969, The Hague in 1971, Vienna in 1972, and Geneva in 1972 produced draft texts of two complete Protocols additional to the 1949 Conventions. *See* COMMENTARY, *supra* note 50, at xxx-xxxiii.

The drafts were sent to all governments in 1973, complete with detailed commentary and, though several conferences followed, they failed to produce treaty provisions. In 1974, the Swiss Government, in its capacity as depositary of the Geneva Conventions and in accord with its hundred-year-old tradition, called the *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*. The Conference met in Geneva in four sessions from 20 February 1974 through 10 June 1977. All states that were parties to the Conventions (155) were invited and the number actually participating varied from 107 to 124 over the three-year course of the Conference. In addition, 11 national liberation movements and 51 intergovernmental or non-governmental organizations participated as observers, with a total delegate count of around 700. COMMENTARY *supra* note 50, at xxx-xxxiii.

[191] *See* Protection of Civilians from Air Warfare, *supra* note 145, at 38.

[192] *See* GPI, *supra* note 47, arts. 48, 51, 52.

[193] *See* COMMENTARY, *supra* note 50, at 610. *See also* GPI, *supra* note 47, art. 51 and accompanying text.

To remedy these problems, GPI adopted what has been termed a "negative" definition of civilians.[194] It broadly defined civilians as all persons not qualifying for POW status pursuant to the Geneva Prisoner of War Convention.[195] This may seem to exclude civilian augmentees from the category of immune civilians because of their entitlement to POW status. The definition, however, contained a critical caveat to this rule: *civilians who accompany the force, and therefore qualify for POW status, are explicitly included within the definition of "civilian" for purposes of immunity from attack.*[196]

Thus, GPI explicitly affirmed the "red herring" aspect of POW status for civilian augmentees. Because it specifically separated the two inexorably linked, yet unrelated principles of POW status and targeting status, it resolved the uncertainty generated by granting civilian augmentees POW status.[197] The law finally recognized that the mere fact that civilians accompanied forces and carried identification cards, which would confer upon civilian augmentees POW status, would not automatically render them targets. The GPI,

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[194] *See* COMMENTARY, *supra* note 50, at 610. Recall that such a "negative" definition was proposed in Article 4 of the 1956 Draft Rules, *supra* note 163. The definition in the 1956 Draft Rules was broader, however, defining civilians as anyone not belonging to the armed forces or persons not taking part in hostilities.

[195] *See* GPI, *supra* note 47, art. 47, 50; *See also* COMMENTARY, *supra* note 50, at 609.

[196] *See* GPI, *supra* note 47, art. 50 (emphasis added). *See also* COMMENTARY, *supra* note 50, at 609.

[197] *See* GPI, *supra* note 47, art. 50. *See also* COMMENTARY, *supra* note 50, at 611.

therefore, rejected branding all civilian augmentees as "quasi-combatants," and established a conduct-based test to determine their status as targets.

Specifically, Article 51 of GPI codified the prohibition on targeting civilians, making it, in the opinion of the Commentary, the key article of the Protocol.[198] Its importance is evidenced by the fact that violations of Article 51, which confirms the customary rule of distinction (requiring innocent civilians to be kept outside hostilities and granting them general protections against the dangers arising therefrom), qualify as grave breaches.[199]

This "immunity" for civilians under Article 51, however, is not absolute, as it is subject to the overriding condition that civilians do not take "direct part in hostilities."[200] Although Article 51 does not define this term, the Official Commentary refers to acts "intended to cause *actual harm* to the personnel and equipment of enemy armed forces."[201] Thus, a

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[198] *See* GPI *supra* note 47, art. 51. Article 51(3) provides: "Civilians shall enjoy the protection afforded by this section, unless and until such time as they take a direct part in hostilities." *Id.*

[199] *See* GPI *supra* note 47, art. 50, 98. *See also* COMMENTARY, *supra* note 50, at 611. Although the Geneva Conventions constitute part of the laws and customs of war, the violations of which are commonly referred to as "war crimes," the term "grave breaches" is used to refer to the violations under the respective conventions for which an individual incurs individual responsibility, and requires signatories to prosecute such violations. *See* Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (1995) at xiii [hereinafter Morris & Scharf].

[200] *See* COMMENTARY, *supra* note 50, at 618.

[201] *Id.* at 618 (emphasis added).

civilian who takes part in combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he participates in hostilities.[202] This standard is applied to all civilians, including augmentees.[203]

The Official Commentary goes further to confirm the restrictive definition of hostile acts by making reference to the same phrase used in paragraph 2 of Article 43, which defines combatants and grants them the right to "participate directly in hostilities."[204] This reference to Article 43 suggests, therefore, that "direct" participation under Article 51(3) means "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[205] It is only through such participation that any civilian (including a civilian augmentee) would lose immunity and become a legitimate object of intentional attack.

Further evidence of this definition is reflected elsewhere in the Commentary:

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[202] *Id.*

[203] *Id.*

[204] *Id.* at 505, 619. *See also* GPI, *supra* note 47, art. 43(2) (providing: "Members of the Armed Forces of a Party to the conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.).

[205] *See* COMMENTARY, *supra* note 50, at 619.

> There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. In fact, in modern conflicts, many activities of a nation contribute to the conduct of hostilities, directly or indirectly: even the morale of the population plays a role in this context.[206]

Having exposed the "red herring" and resolved the issue of who is a civilian for targeting status purposes, the law of war provides a workable, conduct-based test from which to draw the distinctions required by it. To examine the extension of this standard into internal conflicts and, ultimately, into MOOTW, a threshold question must be addressed: is such a standard the correct one to apply to U.S. forces?

V. The Need For A Better Standard for United States Forces

> There is a trend toward using more contractors for sustainment. The Army has had a 300% increase in its mission commitments during the past several years, and they do not appear to be tapering off. This level of operations drives equipment usage up, which increases costs. This increased usage is significant since many of the Army's legacy weapons systems are aging rapidly. During this period the Army has reduced the U.S. Army Materiel Command's military strength by 60% and reduced the number of AMC depots by 50%. The Army is striving to further reduce its logistics infrastructure to make it consistent with force constraints.[207]

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[206] *Id.*

[207] *See* Major General Norman E. Williams & Jon M. Schandelmeier, *Contractors on the Battlefield*, ARMY MAG. 33, 34 (Jan. 1999). Major General Williams is Chief of Staff for U.S. Army Materiel Command. Jon M. Schandelmeier is a logistics management specialist at AMC. The purpose of their article is to highlight the

Statements like these are becoming commonplace and reflect a dynamic that is sure to confront military planners with increasing frequency in the years to come. In addition to the standard operational concerns that always confront military planners, however, they now face unprecedented legal challenges with respect to the utilization of civilian augmentees. One legal issue is undeniable. As illustrated throughout this paper, there is a trend toward applying international law principles to protect civilians in all types of military operations.

This trend, coupled with the trends of U.S. military involvement in MOOTW and the increased utilization of civilian augmentees in all operations, requires the development of a bright line rule with respect to the deployment and use of civilian augmentees in active theaters of operation. The first concern that must be addressed by such a rule is the law of war obligations incurred by the United States as a result of the use of such augmentees. As the trend to replace uniformed troops with civilian augmentees continues, the United States must evaluate obligations to those civilians under the principle of distinction. Likewise, the

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Army's increased and increasing dependence upon augmentees and to illustrate the many resulting issues. They highlight such challenges, among others, that the use of augmentees pose: noncombatants require force protection resources, noncombatants cannot perform rear-area security missions; noncombatants are not trained for the emotional and physical hardships of the wartime environment; and the applicability of the Geneva Conventions and status of forces agreements to contractors needs resolution. Note, however, the assumption that augmentees are noncombatants.

United States must be prepared to answer whether the reliance on such civilian augmentees weakens or violates the principle of distinction.[208]

Second, the United States must be cognizant of obligations both to its own civilian population and to potential enemies with respect to the use of augmentees. Specifically, the United States must consider potential violations of Article 58 of Protocol I, which requires Parties to protect their own civilian population, individual civilians, and civilian objects under their control from the dangers of military operations. These issues will be addressed in turn.

A. Obligations Under the Law of War and the Principle of Distinction

There can be no question, based upon the current status of the law of war and the mandates of our own policies, that the United States is bound by the law of war and the underlying principle of distinction. The exact interpretation of the obligation might vary,

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[208] *See* Protection of Civilians from Air Warfare, *supra* note 145, at 39. This question has been asked previously. The United States addressed previously the use of civilian augmentees in the Persian Gulf War and enunciated the ultimate policy determination to treat all civilian augmentees as "quasi-combatants." Noteworthy in this decision, however, was the determination that an increasing number of traditional military positions were filled by civilians weakened the traditional distinction between civilian and military function. *Id.* at 39.

however, according to extent and scope of application. One possibility is to view the obligation as absolute, through acceptance of the requirements of the entire body of the law of war to include GPI and Geneva Protocol II (GPII), across the spectrum of conflict.

Another approach is more dogmatic in nature: that the United States need comply only with the law as it applies to certain types of conflict, and even then need comply only with certain aspects of the Protocols that arise to the level of customary international law. The argument here would be that GPI applies only in international armed conflict and, absent this, has no application whatsoever. Even in cases of international armed conflict, this argument may assert, the United States need apply only those provisions that rise clearly to the level of customary international law, and to which the United States does not, therefore, object.

A third, more semantic analysis is possible, predicated upon compliance with U.S. policies mandating application of law of war principles in all military operations.[209] According to this approach, whatever the nature of conflict or current interpretation of the bounds of international law, U.S. policy and customary international law dictate employment of U.S. forces in a manner consistent with the law of war and the principle of distinction. As civilians have become a necessary part of our force structure, this would require use of

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[209] *See* JCS INSTR. 5810.01, *supra* note 48; *See also* DOD DIR. 5100.77, *supra* note 63.

civilian augmentees in a manner that does not unnecessarily endanger them or undermine the principle of distinction.

This is not a new dilemma for the United States or other forces throughout the world. In 1994, for example, the Australian Government questioned whether the requirements of GPI allowed them to proceed with plans to civilianize certain military functions.[210] The United States considered the same question during and after the Persian Gulf War. The United States took the position that the use of civilians in traditionally military positions did weaken the distinction between the civilian and the military. It therefore opted for a policy in Kuwait that placed all U.S. Government civilian personnel in uniforms, and informed them that they were at risk of attack and might not be considered noncombatants.[211] Thus, no effort was made to assess status based on conduct. Mere presence in the theater of operations was viewed by DOD as resulting in combatant status. This is obviously inconsistent with the GPI conduct-based analysis.

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[210] *See* Letter, Office of International Law, U.S. Attorney General's Office, subject: Use of Civilians in an Area of Operations (12 May 1994). Ultimately, the Government's answer was that it could proceed with its plans to do so. Similar questions have been asked by the British military regarding the increased use of civilians on British military bases for catering mess facilities. *See also* Williams & Schandelmeier, *supra* note 207.

[211] *See* Parks, Air War, *supra* note 145, at 39. *See also* DoD DIR. 3020.37, *supra* note 15; DOD DIR. 1404.10, *supra* note 13.

That the U.S. has considered this question previously is an important point. Some very prominent experts in the law of war still dispute provisions of GPI and question its application.[212] It is important that the principle of distinction, which lies at the very heart of GPI and indeed the law of war, was considered by planners before the Gulf War. It was used as the basis of a policy for the deployment of civilian augmentees in the Persian Gulf, and therefore serves as expressed evidence that the United States is bound by it.

This thesis takes a position consistent with the first of the three approaches described above: that U.S. obligations regarding civilian augmentees are absolute under the entire body of the law of war, including GPI. Indeed, the premise is that the standard established in GPI is the only workable solution to distinguish legitimate targets in either combat or non-combat operations. A blanket policy such as that employed during the Persian Gulf War is inadequate because it represents an over-simplistic approach to resolving an issue critical to ensuring compliance with the principle of distinction. This is especially true considering the

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[212] *See* Parks, Air War, *supra* note 165, at 78. Mr. Parks considers in totality the law of war as it relates to the use of air power. Most relevant for our purposes is his consideration of GPI—from the Diplomatic Conference, through the United States' consideration of the final product offered for ratification, and the potential military consequences of application of GPI. Though I cannot do justice to his article here, and will consider many of his arguments in the final section of this paper, I shall point out generally the main grounds for Mr. Parks' opposition to GPI. In general, Mr. Parks asserts that the U.S. delegation to the Diplomatic Conference made numerous decisions regarding GPI without an appreciation of their potential implications, and without consultations with the military services. The result, according to Mr. Parks, is a product which is "militarily unacceptable" for many reasons. *Id.* I will discuss many of those reasons further along.

increased number of civilian augmentees accompanying U.S. forces, and the range of duties they perform.

The need for a better standard for U.S. forces which establishes combatant and noncombatant status distinctions based upon conduct, and not mere presence in a theater of operations, is further evidenced by the limited guidance offered by the law itself. Though GPI is clear that civilians may not be targeted unless they take direct part in hostilities, and that there should be a distinction between direct participation in hostilities and participation in the war effort,[213] little more guidance is offered. While the Commentary goes further to offer that "in modern conflicts, many activities of the nation contribute to the conduct of hostilities,"[214] it fails to identify grounds for distinguishing those participating in hostilities from those not doing so. Although this lack of clarity contributed to the formulation of the Persian Gulf War approach, other law of war obligations mandate that the United States develop a more precise standard.

In view of U.S. legal obligations, and in light of the lack of clear and specific guidance, a bright line rule for U.S. forces needs to be established. Such a rule will benefit not only U.S.

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[213] *See* COMMENTARY, *supra* note 50, at 619. *See also* GPI, *supra* note 47, art. 51.

[214] *See* COMMENTARY, *supra* note 50, at 619.

civilians directly, and help ensure U.S. compliance with international law, it will also help U.S. forces maintain the "moral ascendency"[215] that has come to be characteristic of the American soldier.

B. Potential for Violations of Article 58, GPI

In addition to U.S. obligations to ensure distinction for the protection of our civilian augmentees, Article 58 also requires the U.S. to distinguish those taking part in hostilities from the civilian population. Article 58 provides:

> The Parties to the conflict shall, to the maximum extent possible:
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> a) without prejudice to Article 49 of the Fourth Convention, endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objects;
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> b) avoid locating military objectives within or near densely populated areas;

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[215] On 17 February 1999, General Richard E. Cavazos, United States Army (Retired), one of the most highly decorated soldiers of his or any other time, delivered the Fifth Annual Hugh J. Clausen Lecture on Leadership to the assembled audience at The Judge Advocate General's School, United States Army, Charlottesville, Virginia. I was fortunate to be in attendance. In articulate, honest, and emotional terms, General Cavazos imparted a lifetime's worth of knowledge on the military and leadership. He used the phrase "moral ascendency" on several occasions, always in reference to the penchant of the American fighting man to take the moral high ground and do the harder right. I believe this phrase fits well here. General Cavazos's remarks will remain on file with the Judge Advocate General's School (unpublished manuscript). In the meantime, should accuracy require it, my program memorializing this event remains, tear-stained, on file with the author.

> c) *take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.*[216]

Article 58, therefore, established rules that every power must follow in its own territory in favor of its nationals, or in territory under its control.[217] This three-part requirement is formulated for two purposes: (1) so belligerents may expect their adversaries to distinguish those taking part in hostilities from persons not so doing; and (2) that parties themselves take such measures for the benefit of their own population.[218]

In order to illustrate, consider a U.S. Army Division, such as the 1st CAV in the opening hypothetical, performing a peacekeeping operation on foreign soil. It is virtually certain that civilian augmentees would be used during the operation, probably in relatively high numbers. Because the operation would not be taking place in America, U.S. forces would not have a responsibility to distinguish civilians and combatants to protect its own civilian population. U.S. forces would, however, owe a responsibility both to the local nationals of the country in which they were performing the mission, and to potential enemies considering hostile action against the United States, to ensure that persons engaged in hostilities (potentially including

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[216] *See* GPI, *supra* note 47, art. 58 (emphasis added).

[217] *See* COMMENTARY, *supra* note 50, at 692. *See also* GPI, *supra* note 47, at art. 58.

[218] *Id.*

civilian augmentees), were sufficiently separated from civilians not taking part (potentially including other civilian augmentees).

In order to comply with this obligation, thereby preserving credibility under the law of war, some definitive rule or policy is required to determine which, if any, augmentee functions are "combatant" in nature. Such a policy must, by its very nature, offer some means or criteria by which both the U.S. and potential adversaries could distinguish those taking part in hostilities from those not taking part. This policy should rely on the "conduct-based" standard of GPI.

C. The Conduct-Based Standard of Article 51, GPI

Article 51, and indeed all of GPI, codify the customary principle calling for the general protection of civilians against dangers arising in military operations.[219] This general immunity protecting the civilian population by prohibiting intentional attacks, emphasizes that the population, and individual civilians, must never be used as targets or as tactical

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[219] *See* COMMENTARY, *supra* note 50, at 617.

objectives.[220] This general immunity is qualified, however, and it is this qualification that forms the basis of the conduct-based standard.

Article 51(3) provides that civilians shall receive this immunity unless they take "a direct part in hostilities."[221] While the exact meaning of this phrase is not included within the text of Article 51, the Official Commentary interprets it generally to mean that civilians "do not become combatants."[222] To give weight to this interpretation, the Commentary refers back to similar language used in Article 43 of GPI, which refers to "direct participation as acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[223] GPI, therefore, creates a clear standard, based upon individual conduct, that may be used in determining status. This is the standard that U.S. forces should adopt and apply across the spectrum of conflict.

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[220] *Id.* at 619. *See* GPI, *supra* note 47, art. 51(2).

[221] *See* GPI, *supra* note 47, art. 51(3). *See also* COMMENTARY, *supra* note 50, at 618.

[222] *See* COMMENTARY, *supra* note 50, at 619.

[223] *See* GPI, *supra* note 47, art. 43. *See also* COMMENTARY, *supra* note 55, at 619.

VI. Why this Standard Applies to Internal Armed Conflict

Much of the law analyzed thus far traditionally applies only to armed conflict of an international nature. There is a growing consensus, however, that any issue related to the principle of distinction also applies to purely internal conflicts. Such application leads inexorably to the question of whether and how this law might then be extended into situations not involving conflict at all—such as the MOOTW missions our forces currently perform.

A. Common Article 3 of the Geneva Conventions of 1949

The starting point for the application of international law to internal conflicts is common article 3 of the 1949 Geneva Conventions.[224] This article is considered a mini-convention and provides that, "in the case of conflicts not of an international nature," the parties to the conflict are bound to apply, as a minimum, certain protections.[225] It was the first express treaty provision to apply to purely internal conflicts.[226]

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[224] *See, e.g.*, GPW, *supra* note 19, art. 3; *see also supra* note 43 (explaining the scope and application of common articles generally and common article 3 specifically).

[225] *See, e.g.*, GCC Commentary, *supra* note 141, art. 3; *see also* Pictet, *supra* note 161, at 25.

[226] *See* Pictet, *supra* note 141, at 28-9.

When the Diplomatic Conference of 1949 took up the idea of extending international law protections to victims of internal wars, it was not a novel idea.[227] Indeed, the ICRC had been attempting to set the idea in motion since at least 1912.[228] By the time the issue was seriously considered at the Diplomatic Conference, however, the polar-opposite positions of participating states had hardened. On one pole stood the ICRC, concerned first and foremost with people as human beings, no matter their nationality.[229] Wounded or sick, the ICRC argued, victims of war were entitled to be protected as all victims, regardless of the nature of the conflict.[230]

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[227] *See* BEST, *supra* note 51, at 168.

[228] *See* Pictet, *supra* note 161, at 26-27. The ICRC had long been trying to aid the victims of internal conflicts, largely because the horrors they engendered could be more terrible than those of international wars due to the fratricidal hatred often incumbent in them. Due to political differences on their roles in such conflicts, however, the ICRC and other international aid organizations were unable to muster support for their position and, instead, attempted to play their traditional role by engaging in relief work during these conflicts. Often, however, their applications for permission to provide such relief were rejected as attempts to interfere. At their Conference in 1912, therefore, the ICRC issued a draft Convention on the role of the Red Cross in civil wars or insurrections, but it was tabled without discussion. *Id.* at 30.

[229] *See* Pictet, *supra* note 161, at 27. Despite the lack of success of their 1912 efforts, the ICRC did not relent. The issue was again placed on their agenda in the 1921 conference, and a resolution was passed affirming the right of all victims of civil wars, or social or revolutionary disturbances, to relief in conformity with the principles of the Red Cross. *Id.* In 1938, largely as a result of the brutal and highly-publicized Spanish Civil War, a resolution strengthening and affirming the 1921 resolution was passed. *Id.* It was with this effort that the Red Cross was, for the first time, explicitly urging the application of all the provisions of the Geneva Conventions to internal conflicts. *Id.* at 28.

[230] *Id.* at 27.

Steadfast on the other pole were the "realists," many from the war departments of the larger countries. They believed that extending these new protections to persons they considered rebels and criminals, was an ill-conceived intrusion of the political rights of a sovereign state to deal with a rebellion that might threaten its continued existence.[231] To force a state battling rebellion, opponents argued, to apply the provisions of a Convention expressly concluded to cover war, would mean giving rebels and traitors the status of belligerents and perhaps even legal recognition.[232] They also argued that there was the added risk of these common criminals organizing as a mere pretext to claim the benefits of the Convention, thereby receiving combatant immunities and escaping punishment for their traitorous acts.[233]

With the Conference at apparent loggerheads, a small committee was formed to consider the issue.[234] The original idea had been to apply the Conventions, in full, to all non-

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[231] *See* BEST, *supra* note 51, at 172.

[232] *See* Pictet, *supra* note 141, at 31. From the very outset of the Conference, according to the Final Record (*See* Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-B, Article 2, pp. 9-15) the great divergence in positions was clear. *Id.* Those opposed understood that the proposed extension would cover all forms of insurrection, rebellion, anarchy, the break-up of states, and even ordinary brigandage. Their fear, therefore, was that these attempts to protect individuals would come at the expense of attempts to protect and preserve the state. *Id.* Since rebel parties, however small, would be entitled to Conventional protections, their increased legal status and authority would hamper and handicap the government in its measures of legitimate repression. Pictet, *supra* note 161, at 30-31.

[233] *Id.*

[234] *Id.* at 32.

international conflicts.[235] When this met with nearly-universal opposition, the focus was shifted with a view toward limiting the types of conflicts to which the Conventions would apply.[236] This approach proved uniformly unworkable. An alternative approach was offered by the French, who suggested limiting not the type of conflict, but rather the number or nature of protections applicable to these conflicts.[237]

The idea proved a good one, and the committee began the task of establishing a list or definition of the humanitarian principles that would apply to all cases of non-international conflict.[238] Acceptance of this approach was a virtual certainty, as it made it practically impossible for governments to protest the extension of basic human rights to non-combatants and persons-out-of-combat. The common article was adopted.[239]

Though the article was clearly a compromise, it contained sufficient virtue to render it virtually non-debatable: no party could realistically oppose efforts to do something about a

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[235] *Id.*

[236] *Id.*

[237] *Id.* at 32.

[238] *Id.* at 33.

[239] *See* BEST, *supra* note 51, at 174.

widely recognized humanitarian problem.[240] Essentially a "convention in miniature,"[241] common article 3 was the only article applicable to non-international conflicts to emerge in the 1949 Conventions. Its purview was limited. All it really required was respect for basic human rights, such as the postponement of imprisonment or execution of criminals or bandits until a fair trial was conducted.[242]

Despite its wide appeal, however, the article was not free of problems.[243] Still, the article clearly marked a critical stage in the development of the law of war. It implicitly embraced

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[240] *Id.* at 177.

[241] *See* Pictet, *supra* note 161, at 34.

[242] *See* BEST, *supra* note 51, at 177.

[243] *See* Pictet, *supra* note 161, at 32-34. Two very large questions remained unresolved: What is "armed conflict not of an international character," and who are the "party[ies] to the conflict" required to abide by the provisions of the article? *Id.* Regrettably, the Article failed to offer concrete guidance on either question. First, while all parties agreed that the conflict needed to be beyond the "exploits of bandits, " the Article failed to establish any objective criteria for determining the existence of non-international armed conflict. Second, the question of parties referred to undefined future conflicts likely involving few, if any, of the signatories to the Conventions.

These questions were answered, at least in part, 9 years later in the ICRC Commentary to the Geneva Conventions. With respect to what is meant by "armed conflict not of an international character," Pictet offered what he freely admitted were non-obligatory criteria. *Id.* The essence of these criteria is that the revolting party possess indicia of being an organized military force, thereby distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection. *Id.* The resolution of who are "Parties" was, for Pictet, one of the great achievements in international law for, in his opinion, it would previously have been impossible to bind non-signatories to Conventions. In his view, the obligation resting on the established authority within a country was unquestioned, for the mere fact of the legality of a government involved in an internal conflict serves to bind that government as a Contracting Party to the Convention. *Id.*

At the Diplomatic Conference, however, members had expressed doubt as to their ability to bind insurgents, as they had not themselves signed the Convention. Pictet resolved this issue easily, by stating that the if the responsible authority at the head of an insurgency exercises effective sovereignty, it is bound because it claims

the principle of distinction, and explicitly made it applicable to internal conflict.[244] For the first time, therefore, fundamental principles of the international law of war were made applicable to internal conflict.[245]

These principles extended explicitly to persons taking no active part in hostilities. This supports the conclusion that any standard developed to classify civilian augmentees into combatant and/or non-combatant categories, based upon a "taking a direct part in hostilities" standard, should apply equally to all types of armed conflict. The conduct-based test established by GPI is, essentially, therefore applicable to all conflicts.

B. 1977 Additional Protocol II to the 1949 Geneva Conventions

GPII[246] expanded upon and more fully developed the very general provisions of common article 3.[247] The minimum rules embodied in common article 3 had proven inadequate in

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to represent that country or some part thereof. *Id.* The logic appeared fool-proof: if the insurgent party complied with Common Article 3, so much the better for all concerned and, if it did not, this only served to confirm the allegations of the government that they were no more than criminals. *Id.* at 31.

[244] *Id.* at 40. Article 3 has an extremely wide field of application and covers members of the armed forces as well as persons who do not take part in hostilities. The Article applies first and foremost to civilians—that is to people who do not bear arms.

[245] *Id.* at 34 ("Its observance does not depend upon preliminary discussions as to the nature of the conflict or the particular clauses to be respected...it defines those principles and in addition lays down mandatory rules. It has the advantage of expressing, in each of the four Conventions, the common principle which governs them.").

response to a seemingly global epidemic of violent internal conflicts, and the myriad humanitarian problems that accompanied them.[248] In response, a very short document intended to supplement the substantive provisions of common article 3, GPII emerged from the same Diplomatic Conference that produced GPI.[249]

GPII codified the non-binding criteria, expressed in Pictet's Commentary for establishing application of the common articles. These included the requirement for organization within armed factions, the requirement that they be under responsible command, that they exercise control over territory, and that they possess the ability to carry out sustained and concerted military operations and to observe the law of war.[250] This shift from non-binding "guidance" to mandatory criteria represented a significant change in how states could determine when the law of war applied to internal conflicts.

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[246] The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, 16 I.L.M. 1391 (Dec. 12 1977) [hereinafter GPII], *reprinted in* DEP'T OF ARMY, PAM. 27-1-1 [hereinafter DA PAM. 27-1-1].

[247] *See* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 88, at 26. *See also* COMMENTARY, *supra* note 55, at 1325.

[248] *See* THE LAWS OF ARMED CONFLICTS 3, *supra* note 74, at x.

[249] GPII, *supra* note 246, art. 1.

[250] *Id.*

Furthermore, GPII added to these criteria the requirement that the armed forces of the government must be a party to the conflict, previously just another non-binding factor to be considered in the analysis for the application of common article 3.[251] GPII did, however, specifically exclude from coverage internal disturbances and tensions such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as they were not deemed armed conflicts.[252]

The U.S. opposed this more restrictive scope of application for the law of war applicable to internal conflicts, taking the view that its application should have been as permissive as allowed by common article 3.[253] Specifically, the U.S. believed that the narrowing had the

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[251] *See* Remarks of Judge Abraham D. Sofaer, *supra note* 59, at 462.

[252] GPII, *supra* note 246, art. 1.

[253] *See* Remarks of Judge Abraham D. Sofaer, *supra* note 59, at 462:

> "The obligations contained within Protocol II are no more than a restatement of the rules of conduct with which United States military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency. These obligations are not uniformly observed by other states, however, and their universal observance would mitigate many of the worst human tragedies of the type that have occurred in internal conflicts of the present and recent past."

Id.

> "In one important respect, however, the Protocol did not meet the desires of the United States and other Western delegations. It only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations. This is a narrower scope than we would have desired and has the effect of excluding many internal conflicts in which dissident armed groups occupy a significant territory but carry out guerrilla operations over a wide area."

effect of excluding from coverage internal conflicts in which armed dissident groups occupied no significant territory, but could nevertheless conduct sporadic guerrilla operations over a wide area.[254] Consistent with this view is the current U.S. policy (which is shaped in contemplation that the U.S. will ratify GPII and currently views it in its entirety as binding customary international law) that, if common article 3 applies to a conflict, the U.S. will also apply GPII.[255]

The key consideration for the U.S. is, and always has been the existence of "armed conflict." Only the existence of such conflict (and nothing more—hence the U.S. objection to GPII) triggers the limited law of war obligations of common article 3 and GPII. Because of the provisions of GPII, however, it is conceivable that the U.S. could commit forces to an operation without the benefit of any binding law of war. In fact, the lack of conflict in Bosnia and Haiti may fall into this "no law of war" category. It is this vacuum of binding rules of conduct for warriors that compels consideration of extending the basic concepts of the law of war, including distinction, to the non-conflict MOOTW environment.

Id. at 462.

[254] *Id.*

[255] *Id.*

While U.S. policies dictate that U.S. forces we will apply principles of the law of war to all operations,[256] the current gap in both law and policy dictate that better guidance is required. Recognition of the extension of international law even further, into MOOTW, is one obvious solution. This is explored below.

VII. Extending The Law of War Further: Application of International Law to MOOTW

As noted earlier, current international law, in the form of the Hague Regulations, the Geneva Conventions, and GPI thereto, set forth a solid underpinning of protections for civilians accompanying the force in international armed conflict. In short, the targeting tradition of the Hague Regulations protects civilians from indiscriminate attack, and the Geneva Conventions extend POW protections to those captured. GPI goes a step further, to define which civilians accompanying the force will be immune from attack: essentially all those not "taking a direct part in hostilities."[257]

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[256] DOD DIR. 5100.77, *supra* note 63; JCS INSTR. 5810.01, *supra* note 48.

[257] GPI, *supra* note 50, art. 51(3).

Though the U.S. has neither signed nor ratified GPI, it does recognize that the non-objectionable provisions of it operate as customary international law.[258] Indeed, GPI codifies the customary principle of distinction, a position that the U.S. very much supported.[259] DOD's subject matter expert and one of the world's foremost authorities on the law of war has stated with respect to GPI:

> Article 48, which codifies the customary law of war principle of distinction, sometimes referred to as discrimination, requires parties to the conflict to "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives.
>
> The principle of **distinction** is the very heart and soul of the law of war, and the importance of its codification has received historic, resounding support within the international legal community as being essential to the protection of civilians from avoidable injury by the effects of military operations.[260]

Under this principle, therefore, U.S. civilian augmentees accompanying military forces in international armed conflict are immune from attack and are not to be considered combatants as long as they refrain from "taking a direct part in hostilities."[261] The problem at present, however, is that the GPI applies technically only in international armed conflict.

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[258] *See generally* Remarks of Judge Abraham D. Sofaer, *supra* note 59, at 460. *See also* Parks, Air War, *supra* note 165.

[259] *See* Remarks of Judge Abraham D. Sofaer, *supra* note 59, at 460.

[260] *See* The Protection of Civilians from Air Warfare, *supra* note 145, at 7 (expressing his agreement with other experts, including Dr. Dieter Fleck, original emphasis).

[261] *See* GPI, *supra* note 47, art. 51(3). *See also* COMMENTARY, *supra* note 50.

In internal armed conflict, the same bodies of law, through common article 3[262] and GPII,[263] extend the benefit of distinction to civilians. This extension of international law into these internal conflicts marked the first real step in the process of eroding the traditional barrier of state sovereignty, and served as recognition that the protection of human rights required the intervention of international law beyond state borders. Though many nations opposed, on political grounds, this intrusion into the states' ability to deal with insurgents in the manner they saw fit, they likewise realized that the protection of non-combatants in these conflicts was essential.[264]

Though the common article 3 approach offered only "mini-convention" protections, the codification in GPII of previously non-obligatory criteria marked further erosion of the barrier of sovereignty. That this erosion was legitimate, and even invited, is evidenced by U.S. reaction to GPII, objecting not to its increase in regulation of internal affairs, but instead to the narrowed scope of application resulting from the specific exclusion from coverage of

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[262] *See supra* note 244 and accompanying text.

[263] *See supra* note 248 and accompanying text.

[264] *See* Pictet, *supra* note 161.

certain dissident activities.[265] The U.S., therefore, adopted a policy calling for application of GPII whenever common article 3 was deemed applicable.[266]

A. A Gap in the Law: Military Operations Other Than War

Contemporary armed forces have discovered, however, that even these great advances leave a gap—illustrated by the aforementioned U.S. operations in Bosnia. What law governs if operations do not qualify as "armed conflict" under either the Article 2 or Article 3 standard?[267] At present, the technical answer is "none," a situation that leaves unanswered a significant question for military commanders and civilian augmentees accompanying U.S. forces. What law, if any, governs status of civilian augmentees during such operations?

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[265] *See* Remarks of Judge Abraham D. Sofaer, *supra* note 59 and accompanying text (analyzing the U.S. position on GPII).

[266] *See* Remarks of Judge Abraham D. Sofaer, *supra* note 59, at 462 ("I believe that the United States should make clear when it ratifies Protocol II that it will apply the Protocol to all conflicts covered by common article 3 of the 1949 Geneva Conventions, and only such conflicts, which will include all non-international armed conflicts as traditionally defined.").

[267] *See supra* note 42, 43 and accompanying text (analyzing the application of common articles 2 and 3 respectively).

One solution is to extend international law further, to the types of peacekeeping and peace enforcement operations currently being performed in Bosnia and elsewhere. The United States should embrace a position that the principle of distinction (and all of the derivative measures incumbent therein) are so fundamental that they should follow U.S. forces, and all armed forces, into non-conflict MOOTW. The factual and legal predicate for this practice, however, must be the legitimate application of international law into this sphere of military activity. Because distinction lies at the core of GPI and the entire body of the law of war, the extension of this principle to MOOTW is essential. Such an approach is consistent with U.S. policy and recent developments in the law of war.

B. The Trend in International Law

Traditional international law distinguished sharply between international and internal armed conflict.[268] While that distinction remains intact, there have been efforts to erase or to weaken it. The United Nations General Assembly has twice declared, in non-binding resolutions, that humanitarian law applies to all types of armed conflicts.[269] More recently,

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[268] *See* BEST, *supra* note 51, at 171.

[269] *See* UN. Res. 2444, *supra* note 173; UN Res. 2675 *supra* note 175; *See also* Geoffrey R. Watson, *The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic*, 36 VA. J. INT'L. 687, 713 (Spring 1996) [hereinafter Watson]; *See generally Nuremberg and the Rule of Law: A Fifty Year Verdict*, 149 MIL. L. REV. 1 (1996).

this issue has become the subject of significant debate, most notably in the context of war crimes tribunals in Rwanda and the Former Yugoslavia.[270] Indeed, many authors and scholars have used the war crimes debate, especially as it relates to the formation and jurisdiction of international criminal tribunals, to illustrate the legal void between peacekeeping and international law.[271] Unfortunately, as the practical distinction between international and internal conflict seems less and less relevant, often as a result of vicious and large-scale combat activity during internal conflicts, this legal void grows more troublesome.[272] As a result, this vacuum of authority was specifically addressed, and substantially refuted, by the first opinion from the tribunal for the Former Yugoslavia.

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[270] *See* International Criminal Tribunal for the Former Yugoslavia, Prosecutor Against Dusan Tadic, Case No. IT-94-I-T, Response to the Motion of the Defense on the Jurisdiction of the Tribunal (7 July 1995) [hereinafter Prosecution Brief on Jurisdiction] (copy on file with author).

[271] *See* Karl Arthur Hochkammer, *The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law*, 28 VAND. J. TRANSNAT'L L. 120, 122 (Jan. 1995). In this Article, Dr. Hochkammer describes the historical incompatibility between peacemaking and war crimes prosecution that the UN Security Council and the International Criminal Tribunal for the Former Yugoslavia must overcome to fulfill the United Nations' larger mission of maintaining peace in the post-Cold War era. In particular, the author explains that the United Nations has two simultaneous tasks in the Former Yugoslavia: to enforce international humanitarian law, and to maintain peace through the peace making and peacekeeping processes. The question, for the author, is whether those two tasks are mutually exclusive. *Id.* at 122.

[272] *See* Watson, *supra* note 269, at 713 ("It is all to easy to discern evidence that troops in the field routinely ignore traditional humanitarian law in internal conflicts. The post-Cold War era alone supplies a depressing list of lawless civil wars: Rwanda, Liberia, Chechnya, and the Former Yugoslavia.").

1. The International Criminal Tribunal for the Former Yugoslavia and the Trend to Extend the Limits of Humanitarian Law

A striking example of this legal dilemma is the convergence of international armed conflict, internal armed conflict, and MOOTW in the current crisis in the Balkans. In 1993, in the face of mounting international pressure to respond to reports of large-scale atrocities in the Former Yugoslavia, the United Nations Security Council established the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991.[273] This marked the first such international court since the Nuremberg and Tokyo tribunals at the close of World War II.[274]

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[273] *See* Morris & Scharf *supra* note 199. Morris and Scharf report that, in 1992, media reports detailed the existence of Serbian-run concentration camps in Bosnia-Herzegovina. These reports included details of the systematic rape of thousands of Bosnian Muslim women by former Bosnian Serb nationalist fighters in efforts to decimate non-Serb populations and drive non-Serbians out of their towns and villages. In addition, Serbian military forces sieged and bombed Bosnian population centers, including one well-publicized attack on an outdoor market at midday. *Id.*

[274] *Id.* In October 1943, the Allies established the United Nations Commission for the Investigation of War Crimes and issued the Moscow Declaration, which stated that, after the war, German and Japanese political and military leaders responsible for waging aggressive war, committing war crimes, and crimes against humanity, would be brought to trial. *Id.* at xiv. In August 1945, the victorious Governments of France, the United Kingdom, the United States, and the Soviet Union met in London and concluded an agreement for the establishment of the International Military Tribunal at Nuremberg to try the most notorious German war criminals. *Id.* The Tribunal was established solely by the agreement of these Allies, as reflected in the London Agreement and the Charter of the Tribunal. *See also* Telford Taylor, The Anatomy of the Nuremberg Trials 66 (1992).

The genesis for the Tribunal was United Nations Security Council Resolution 808, adopted 22 February 1993, in which the UN formally decided to establish the tribunal.[275] Soon thereafter, the Security Council received guidance from the Secretary General on how to implement its February decision,[276] and on 25 May 1993, acting pursuant to Chapter VII of the United Nations Charter (articles 39-51), simultaneously established the tribunal and adopted the tribunal's constitutive statute.[277]

In the months and years subsequent, the tribunal has investigated alleged war crimes, issued indictments, and conducted war crimes trials. The first decision issued by the tribunal clearly indicated the trend the court would follow.[278] It also illustrated the larger trend in

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[275] S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993). This Resolution was by no means the first action taken by the UN. In July 1992, the Security Council adopted Resolution 764, which reaffirmed that all parties to the conflict must comply with international humanitarian law, particularly the Geneva Conventions of 1949. The following month, Resolution 771 was issued, demanding an immediate cessation of breaches of international humanitarian law, and directing States and international organizations to report violations known to them. Despite these efforts, the Security Council continued to receive reports of widespread killing and torture. In response, in October 1992, it issued Resolution 780 S.C. Res. 780, U.N. SCOR, xxxxth mtg. U.N. Doc. S/RES/780 (1992) which requested the Secretary-General to establish an impartial commission of experts to investigate allegations or war crimes. The Secretary general did so, and a five member Commission investigated allegations in November 1992. Their report concluded that war crimes had been committed on a large-scale. *See* UNITED NATIONS, FINAL REPORT OF THE COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO SECURITY COUNCIL RESOLUTION 780, *annexed to* Letter from Bhoutros Bhoutros-Ghali, Secretary-General of the United Nations, to the President of the Security Council, U.N. Doc. S/1994/674 (May 24, 1994) [hereinafter FINAL REPORT].

[276] UNITED NATIONS, REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808, U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159-1202 1993 (including therewith proposed statute for the Tribunal).

[277] S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993).

[278] *See* Discussion, *infra* note 280.

international law—a trend which provides a significant legal basis justifying the extension of international law of war principles to MOOTW.

In January 1995, Dusko "Dusan" Tadic, a Sergeant in the Bosnian Serb Army, was charged with a variety of war crimes ranging from participation in murder, rape, and torture, to complicity in genocide.[279] The accused moved to dismiss the charges, contesting nearly every aspect of the Court's jurisdiction.[280]

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[279] *See* International Criminal Tribunal for the Former Yugoslavia, Prosecutor Against Dusan Tadic, Case No. IT-94-I-T, Prosecutor's Pre-Trial Brief (10 Apr. 1996) [hereinafter Prosecutor's Pre-Trial Brief] (copy on file with author).

[280] *See* International Criminal Tribunal for the Former Yugoslavia, Prosecutor Against Dusan Tadic, Case No. IT-94-I-T, Defense Brief to Support the Motion on the Jurisdiction of the Tribunal (23 Jun. 1995) [hereinafter Defense Brief on Jurisdiction] (copy on file with author). The Defense moved to dismiss on the following grounds: (1) the establishment of the Court was not in accordance with law because the Security Council lacked the authority to vest jurisdiction in the Court; (2) the Court lacked primary jurisdiction over any offenses committed in Bosnia-Herzegovina because international law provided no basis for infringing upon local sovereignty; and (3) the Court lacked subject matter jurisdiction over charges brought under the grave breach provisions of the Geneva Conventions because those provisions were applicable only in a state of international armed conflict and the conflict in the Balkans was entirely internal in character. *Id.*

The Prosecution responded that the Court had been established in accordance with the law and in full conformity with the United Nations Charter, and that the Court had jurisdiction to try the accused for any crimes under its statute. Prosecution Brief on Jurisdiction, *supra* note 279, at 2. The Court agreed with the prosecution, finding that whether or not the conflict was international for the purposes of applying the law of war, it was clearly a threat to international peace and security. The Security Council, therefore, had a sufficient basis to create a tribunal and to give it subject matter jurisdiction over crimes the basis of which was a body of humanitarian law applicable in internal conflicts. *See* Decision on Jurisdiction, *supra* note 42.

The initial analysis was based upon the Charter of the United Nations. International involvement in Bosnia was based upon Chapter VII of the Charter, the Court noted, and the Security Council has few limits on its power under Chapter VII. Security Council Resolution 1031, S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., U.N. Doc. S/RES/1031 (15 Dec. 1995) expressly invoked Chapter VII of the Charter, which refers to "Actions with respect to threats to the peace, breaches of the Peace, and acts of aggression." UN Charter at Chapter VII. Chapter VII gives the Security Council many powers, the most important of which are enumerated in Articles 41 and 42. Under Article 41, the "Security Council may decide what measures not

involving the use of armed force are to be employed to give effect to its decisions." *See* U.N. Charter, art. 41. Article 42 gives the Security Council the power to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." *See* U.N. Charter, art. 42. The Security Council's decision to establish the Tribunal qualified as a measure short of the use of armed force under Article 41. Although the provision does not expressly authorize the Security Council to establish a war crimes tribunal, the Charter has since the earliest days of the United Nations, been interpreted as conferring upon the Security Council the powers necessary to fulfill its primary responsibility for the maintenance of peace and security. *See also* Morris & Scharf, *supra* note 273, at 42.

When the Security Council, therefore, determined that violations of international humanitarian law in the region constituted a threat to international peace and security and the establishment of an international criminal court would contribute to the restoration and maintenance of peace and security, it was well within its authority to create the Court. *See* Decision on Jurisdiction, at 10. *See also* Morris & Scharf, *supra* note 273, at 42.

The Court then examined the Defense contention that a state of international armed conflict was required to invoke the Grave Breach provisions under which several war crimes were charged. The Court held that Article 2 of its constitutive statute contained no formal requirement for international armed conflict, but added that "if it did, there are clear indications in the great volume of material before the Trial Chamber that the acts alleged in the indictment were in fact committed in the course of international armed conflict." *See* Decision on Jurisdiction, at 21. Under these circumstances, regrettably, the Court made no finding on the nature of the conflict.

Finally, the Defense contended that the Accused could not be tried for violations of the laws or customs of laws because the constitutive statute conferring jurisdiction over such crimes was based upon Hague IV and Protocol I, both of which required a state of international armed conflict for invocation. Article 3 of the constitutive statute gives the Tribunal "the power to prosecute persons violating the laws or customs of war." *See* Morris & Scharf, *supra* note 273 (*reprinting* art. 3), at 69. Specifically enumerated thereafter are 5 such offenses. The definition of war crimes within Article 3 is based upon similar provisions of the Nuremberg Charter, applied by the Nuremberg Tribunal. The Nuremberg Charter's definition of war crimes reflected the rules of land warfare in the Hague Rules of 1907 and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War. The members of the Security Council, when voting on Resolution 827 establishing the Tribunal, expressed the view that this provision should be interpreted to include other serious violations of international humanitarian law contained within the 1949 Geneva Conventions and Additional Protocol I thereto. *See* Morris & Scharf, *supra* note 273, at 69-71. *See also* the Statements of the United States, France, and the United Kingdom contained in U.N. Doc. S/PV.3217, at 15 *reprinted in* Morris & Scharf, vol. II at xxx.

The Defense appealed the decision of the Trial Chamber on 14 August 1995 and submitted its brief in support of the appeal on 25 August 1995. In its appeal, the Defense re-asserted the same grounds advanced before the Trial Chamber but added a fourth, very relevant, ground: that the International Tribunal lacked jurisdiction because there was no armed conflict at all. International Criminal Tribunal for the Former Yugoslavia, Prosecutor Against Dusan Tadic, Case No. IT-94-I-T, Defense's Additional Brief to Support the Notice of Appeal, Jurisdiction of the Tribunal (6 September 1995) [hereinafter Defense Additional Brief on Appeal] (copy on file with author). The Prosecution responded essentially as before: the conflict should be characterized as international, and a contrary finding would be inconsequential because the Tribunal was empowered to adjudicate crimes arising out of internal armed conflict as well. International Criminal Tribunal for the Former Yugoslavia, Prosecutor Against Dusan Tadic, Case No. IT-94-I-T, Appeals Chamber Decision on the Defense Motion on the Jurisdiction of the Tribunal at 25-26 (10 Aug. 1995) [hereinafter Appeals Chamber Decision on Jurisdiction] (copy on file with author).

In both the Trial and Appeals Chambers, the tribunal considered defense arguments ranging from the United Nations' inability to properly convene the Court, to the Court's lack of subject matter jurisdiction over a conflict that was strictly internal in nature. When the

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The Appeals Chamber issued its opinion on 2 October 1995. Clearly the most compelling aspect of the opinion, at least for purposes of this thesis, is the holding regarding the additional ground for appeal: that there did exist a legally cognizable armed conflict—both either international and internal in nature—at the time and place that the alleged war crimes were committed. *Id.* at 43.

The Appeals Chamber began its examination of the jurisdiction question by admitting that, while international humanitarian law governs the conduct of both internal and international conflicts, a state of armed conflict must exist to invoke the law. While this is no departure from traditional interpretations, the Court's observation that armed conflict exceeds the narrow time and place of actual fighting is somewhat unique. For example, the Court points out, each of the four Geneva Conventions of 1949 contains language intimating that they are applicable beyond the cessation of fighting. *Id.* at 36. *See also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 5, 75 U.N.T.S. 970 [hereinafter GWS]; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, art. 5, 75 U.N.T.S. 972 [hereinafter GPW]; GCC, *supra* note 54, art. 6.].

Though the Conventions are silent as to the geographical scope of international armed conflicts some provisions, the Court opines, suggest that they apply to the entire territory of the parties to the conflict and not just to the vicinity of actual fighting. Other provisions, particularly those relating to prisoners of war, are not so limited. It makes no difference, for example, whether combatants in the hands of the enemy are kept anywhere near the vicinity of hostilities. Likewise, Geneva Convention IV protects civilians anywhere in the territory of the parties. Article 2 of Convention IV wraps arguments as to both time and place of application into one, providing: "[i]n the territory of the Parties to the conflict, the application of the present Convention shall case on the general close of military operations. GCC, *supra* note 54, art. 6, para. 2.

Article 3(b) of Protocol I contains similar language and thus, according to the Court, the very nature of the Conventions themselves dictate their application throughout the territories of the parties to the conflict and beyond the time of actual fighting. Any other construction, according to the Court, would substantially defeat their purpose. *See* Decision on Jurisdiction, at 36. The Court applies essentially the same argument to authorities relating to internal conflicts, noting that the protections of Common Article 3 also apply outside of the narrow geographical context of the actual theater of operations. *Id.* at 37. Similar provisions in Protocol II extend coverage to all persons "affected" by armed conflict. *See also* GPII, *supra* note 246, art. 2, para. 1.

Applying this logic, the Court opined that armed conflict exists whenever there is a resort to armed force between States, or protracted violence between governmental authorities and organized armed groups, or between such groups within a state. *See* Decision on Jurisdiction, at 37. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. *Id.* at 37. Until that moment, international humanitarian law continues to apply to the whole territory of warring States, or, in the case of internal conflicts, the whole territory under the control of a party, whether of not actual combat takes place there. *Id.* at 37.

Appeals Chamber sided with the defense on the subject of the applicability of the grave breach provisions of the Geneva Conventions, holding that they may be enforced only in international armed conflict, [281] it seemed that the legal barrier of sovereignty between the realms of conflict would remain.

The gap was closed, however, as the Appeals Chamber affirmed the Trial Chamber's holding that international law reaches into internal conflicts in other ways. The Trial Chamber held, for example, that international law may reach into internal conflicts to gain jurisdiction over what it termed "serious violations of international humanitarian law that are part of customary law. International humanitarian law includes international rules designed to solve humanitarian problems arising from international or non-international conflicts"[282]

"Laws or customs of war,"[283] the Court continued, "should not be limited to international conflicts, and should include prohibitions of acts committed in both international and internal

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[281] Tadic contended that the grave breaches enforcement system only applied to international armed conflicts and that Article 2 of the constitutive statute therefore only conferred jurisdiction on the court in the context of international armed conflict. The United States urged otherwise, contending that the grave breach provisions applied to armed conflicts of a non-international nature (*see* [*Amicus Curaie*] Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic*, 17 July 1995, at 35-36 [hereinafter *U.S. Amicus Brief*]). The Court disagreed, however, concluding that, "in the present state of the development of the law, Article 2 of the Statute only applies to offenses committed within the context of international armed conflicts." Appeals Chamber Decision, *supra* note 280, at 45-47.

[282] *See* Decision on Jurisdiction, *supra* note 280, at 23. *See also* COMMENTARY, *supra* note 50, at xxvii.

[283] *See* Decision on Jurisdiction, *supra* note 280, at 23.

conflicts."[284] Indeed, the Court noted, "common article 3 is clear evidence that customary international law limits the conduct of hostilities during internal armed conflicts."[285]

As manifested by the following quote, the Court was clear that international law could reach beyond international conflict:

> The Trial Chamber finds that it has subject matter jurisdiction under article 3 because violations of the laws or customs of war are part of a customary international law over which it has competence regardless of whether the conflict is international or national . . the fact that common article 3 is a part of customary international law was definitely decided by the International Court of Justice in the Nicaragua case, in which the Court, applying customary international law, determined that the rules contained in common article 3 constitute a "minimum yardstick" applicable in both international and internal armed conflicts.[286]

This ruling does not come without precedent or support. Indeed, as early as the 1940's several allies had begun to suggest that a link between war crimes and armed conflict was not legally necessary and that the linkage established in the Nuremberg Charter was simply a

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[284] *Id.* at 23.

[285] *Id.* at 23.

[286] *See* Decision on Jurisdiction, *supra* note 280, at 24-26. *See also* Military and Paramilitary Activities (Nicaragua v. United States), 1986 I.C.J. 14 Merits Judgment (27 June 1986) [hereinafter Nicaragua] *reprinted in* 25 I.L.M. 1023 (1986). In the *Nicaragua* case, the International Court of Justice issued what has become an oft-cited opinion with respect to Article 3 and the issue of whether conflict is deemed international or internal. In *Nicaragua*, the ICJ called common Article 3 of the Geneva Conventions a "minimum yardstick" that "reflects elementary considerations of humanity." Nicaragua at 1030. These considerations, the Court held, quoting Geneva Convention I, article 63, are broad and stem from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience.

self-imposed limit on the court's jurisdiction.[287] As the Tadic Court pointed out, this view was re-iterated in 1958 when it was stated that common article 3:

> ...merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the municipal law of the states in question, long before the Convention was signed . . . no government can object to observing, in its dealings with enemies, whatever the nature of conflict between them, a few essential rules which it in fact observes daily, under its own laws.[288]

This trend has continued since then, as most states have come to accept that crimes against humanity can be committed in the absence of armed conflict.[289] This trend is also echoed in two recent developments. The Statute for the International Criminal Tribunal for Rwanda, for example, passed by the Security Council, contains no requirement for a state of armed conflict; and during conferences relative to the establishment of the International Criminal Court in Rome most nations, including the U.S., opined that crimes against humanity do not require a nexus to armed conflict.[290]

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[287] *See* Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237, 247 (Spring 1998).

[288] *See* Pictet, *supra* note 141, at 36.

[289] *See* Ratner, *supra* note 287, at 247.

[290] *Id.* at 248 (*citing* United States Department of State Memorandum on Positions of Delegations Regarding Jurisdiction of an International Criminal Tribunal, 1995).

This does not suggest that all scholars agree that customary law "beyond any doubt applies norms of international armed conflict to internal conflict" or in the absence of any conflict. There is almost universal agreement however, that "this is not to say that such an extension is not warranted—only that it be carried out prospectively, not retrospectively."[291]

None of the principles of the law of war, to which the Court refers as "certain rules already recognized as essential in all civilized countries," is more deeply ingrained in custom or practice than distinction. What the Court has done, therefore, is to indicate that human beings should be protected from the dangers arising in all military operations—a de facto extension of these customary principles beyond lines of conflict characterization. As the Court noted:

> Before leaving this question relating to the violation of the sovereignty of states, it should be noted that the crimes the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, *and transcending the interest of any one state.* The Trial Chamber agrees that in such circumstances, *the sovereign rights of states cannot and should not take precedence over the right of the international community to act* appropriately as they affect the whole of mankind and shock the conscience of all nations of the world.[292]

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[291] *See* Watson, *supra* note 272, at 714.

[292] *See* Decision on Jurisdiction, *supra* note 280, at 18 (emphasis supplied).

By establishing that these customary principles should be extended regardless of characterization of conflict, the Court has established the logical and legal framework that allows for the extension of the principles to MOOTW.

It follows, then, that if the fundamental customary principles referred to in common article 3, which form the core of GPI, are deemed applicable to internal conflict for the expressed purpose of protecting civilians in civil strife, they could be deemed to apply to any operations military forces currently perform. This is to say, because they operate to shield noncombatants from the harmful effects of military operations, they are principles that "go with the military force," and do not depend on whether that force is involved in an operation qualifying as an armed conflict.

It follows also then, that the provisions of GPI, necessary for implementing the customary law principle of distinction, should also apply to all military operations. This logic provides the legal and logical basis for applying U.S. policy regarding determination of civilian status to MOOTW.

2. Our National Policy Justifies This Extension

The best evidence of the United States' view of the critical nature of the principle of distinction, and the reason why the United States should therefore embrace an expanded scope for it, is found in the United States' response to GPI. The United States objected to GPI primarily because, from its perspective, it contains significant flaws that undermine humanitarian law and endanger civilians.[293] It endangers civilians, for example, by granting combatant status to irregulars, even in circumstances where they might not identify themselves as combatants and therefore fail to distinguish themselves from civilians. [294]

In expressing the U.S. position on GPI, Judge Sofaer makes specific reference to the principle of distinction. He points out that "a fundamental premise of the Geneva Conventions has been that to earn the right to protection as military fighters, soldiers must distinguish themselves from civilians by wearing uniforms and carrying their weapons

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[293] *See* Remarks of Judge Abraham D. Sofaer, *supra* note 59, at 462-3. This article is the prepared text presented by Judge Abraham Sofaer, Legal Advisor to the United States Department of State, to a Humanitarian Law Workshop in 1987. His comments followed an extensive United States Executive Branch review of the 1977 Protocols and describe the United States position with respect to the Protocols. Judge Sofaer describes Protocol I as an "attempt to revise and update in a comprehensive manner the 1949 Geneva Conventions on the Protection of War Victims, the 1907 Hague Conventions on Means and Methods of Warfare, and customary international law on the same subjects. *Id.*

Judge Sofaer reported that an extensive interagency review of GPI led the United States to conclude that Protocol I "suffers from fundamental shortcomings that cannot be remedied through reservations or understandings...in key respects, Protocol I would undermine humanitarian law and endanger civilians in war." Very troubling for the United States, notes Judge Sofaer is the fact that Article 44(3) grants combatant status to armed irregulars, even in cases where they do not distinguish themselves from combatants." *Id* at 462-3.

[294] *Id.*

openly."[295] He goes on to take issue with the way GPI deals with the distinction issue, pointing out that, while Article 44(3) does recognize the principle, it also allows a combatant to not distinguish himself in certain situations.[296]

In essence, then, one of the principal U.S. objections to GPI was the fact that, while it professes to promote the principle of distinction by obligating combatants to distinguish themselves from the civilian population, its relaxed rules regarding irregular troops really serve to undermine this principle.[297] This is illustrated by Judge Sofaer's observation that, under GPI, a terrorist could hide among civilians until just before an attack and, in order to be considered a combatant, need only brandish his arms openly while he is engaged in a deployment or while he is in an actual engagement.[298]

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[295] *Id.* at 466.

[296] *See* GPI, *supra* note 47, art. 44. Article 44(3) states: "to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack." *Id.* The provision goes on, however, to allow "that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself. In such situations, he shall retains his status as a combatant, provided..." *Id.*

[297] *See* Remarks of Judge Abraham D. Sofaer, *supra* note 59, at 466.

[298] *Id.* at 467.

The significance of this position is the demonstration that the United States continues to hold the principle of distinction dear. This is evidenced clearly by the United States' invocation of the principle as the primary reason for its objections to GPI. An extension of international law, applying this principle to MOOTW, is thus justified by U.S. policy.

3. The Extension is Supported by Current Department of Defense Policy

A corollary point regarding application of GPI to MOOTW and its adoption as the standard utilized in formation of U.S. policy regarding civilian augmentation, is that it is completely consistent with the mandates of current DOD policy. This DOD guidance on compliance with the law of war exists in two forms: Department of Defense Directive 5100.77,[299] (DOD Law of War Program), and CJCS Instruction 5810.01,[300] (Implementation of the DOD Law of War Program). Taken together, these two documents tell U.S. forces, as a matter of policy, what law they will apply and how they will apply it.

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[299] *See* DOD DIR. 5100.77, *supra* note 63.

[300] *See* JCS INSTR. 5810.01, *supra* note 53.

These policies mirror the two trends established in preceding pages. The DOD Law of War Program has as its functional base the principle of distinction. It compels a combination of initiative, discipline, and restraint—all based upon distinction. It also applies this principle, and the law of war as a whole, across the operational spectrum. The CJCS Instruction that implements the DOD program applies this principle, as well as the entire body of the law of war, during all stages of operational planning and execution. The two dovetail and are consistent with the extension of international law into MOOTW.

Under DOD Directive 5100.77, all U.S. military personnel are required to observe the law of war. Further, the Directive proscribes that "The Armed Forces of the United States shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized."[301] The obvious intent of this provision, is that the U.S. believes the law of war to be applicable in every operational setting.

Pursuant to CJCS Instruction 5810.01, U.S. forces are directed to ensure that all aspects of military operations, including operations plans, rules of engagement, deployment orders,

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[301] *See* DOD DIR. 5100.77, *supra* note 63.

policies, and directives, comply with the DOD law of war program, as well as domestic and international law.[302] The Instruction also requires:

> The Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized, and unless otherwise directed by competent authorities, *will apply law of war principles during all operations that are characterized as military operations other than war.*[303]

The obvious effect of this guidance is the application of the key law of war principles to all military operations, regardless of the existence of conflict.

Thus, DOD already requires what this policy proposes—the application of the law of war and the customary principle of distinction to MOOTW. The final step in the process, then, is to proscribe the actual method by which this principle will be applied vis a vis civilian augmentees.

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[302] *See* JCS INSTR. 5810.01, *supra* note 53.

[303] *Id.* at para. 4(a) (emphasis added).

VIII. Shortcomings in the Current Policy and a Proposed Remedy

> Law develops out of a dynamic where historical opportunity provides the occasion for evolving a new sort of legal understanding and development that can provide a more settled foundation for behavior in the future.[304]

A. Recent Developments Involving Contractors

In the aftermath of the GPI and GPII and the differences that developed regarding ratification, the United States and other nations continued to view civilian augmentees accompanying the force as noncombatants, perhaps creating expectations of protections not always required under international law.[305] This belief was not consistent with the realities of military operations, however, as it was becoming common for the United States and other nations to involve civilians in functions that had traditionally been military in nature. More importantly, it also reflected a failure to recognize the true requirements of the principle of distinction.[306]

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[304] *See* M. Cherif Bassiouni, Nuremberg: Forty Years Later, In Panel Session: Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law, 80 AM. SOC'Y INT'L L. PROC. 56, 59 (1986).

[305] *See* The Law of War Status of Civilian Employees, *supra* note 56, at 7. This incorrect view of protections sprang mostly from the belief fostered after World War II that there were only two categories of persons under the law of war, civilians and combatants. Combatants could be attacked, it was thought, and civilians could not be. On this basis, Army or DOD civilians could not be attacked. As indicated earlier, the true test should be based on conduct, not status. *See also supra* note. 53.

[306] *See* The Law of War Status of Civilians, *supra* note 56, at 5-6. The all-or-nothing approach to civilian status was especially troubling from a targeting perspective, as it failed to recognize that a particular civilian working

As a result, in the late 1980s and early 1990s, The Office of the Judge Advocate General of the Army, DOD, and other agencies began a comprehensive effort to change military practices to bring them into better compliance with the law of war.[307] The result was a series of wide-ranging policy initiatives that were intended to proscribe, if not "codify," the manner and method by which civilian augmentees would be identified, deployed, and utilized in theaters of active operations. Among others, the principal documents were DOD Directives on Emergency-Essential Employees,[308] and the Army Materiel Command's *Civilian Deployment Guide*.[309]

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in support of military operations might be the most valuable target for the enemy because of his or her expertise. *Id.*

[307] *Id.*

[308] *See* DOD DIR. 1404.10, *supra* note 13. The first DOD Directive regarding civilians was published 6 April, 1990 and dealt exclusively with the retention and deployment of civilian employees of the U.S. Government. In essence, this document created policy to ensure the continued performance of employees in positions that had been designated "emergency-essential," or which had not been so designated but were deemed essential in support of combat-essential systems. This Directive remained in effect until 10 April 1992 when it was superseded by another Directive bearing the same title and number. The crux of the policy is that certain positions held by civilian employees may be designated "emergency-essential." Other positions not designated such may be designated as "essential to support the combat systems" of the Department of Defense. Under the policy, persons filling these positions are required to sign agreements allowing their deployment, relocation, or assignment to duties required to aid the uniformed force in emergency situations, such as the performance of its war-time mission. The policy also provides procedures for the provision of supplies and equipment to these civilians, issuance of Identification Cards as required by the Geneva Conventions and other logistical-type arrangements. The policy was specifically geared to prevent civilian employees' refusals to perform such tasks, situations which often left military commanders without essential combat assets. Contractors and Contractor's employees are covered under a similar Directive, U.S. DEP'T OF DEFENSE, DIR. 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING CRISES (6 November 1990).

[309] *See* LOGCAP, *supra* note 8. The current edition of the AMC Deployment Guide was produced in March 1994. It is a small and convenient handbook, which contains sections ranging from authority to deploy to weapons and training, living under deployment conditions, and overtime pay. The section entitled "Geneva

1. The Persian Gulf Impetus, and the Post-War Trend Toward Civilianization: Have We Forgotten the Law of War?

These efforts to define better the status of civilian augmentees were sped along by The Persian Gulf War.[310] Since the Gulf War, the challenges and complexities of modern military operations, especially as they relate to logistics, have continued to increase, as have efforts to convert military billets into civilian contract positions.[311]

Convention, Prisoner of War Status, Combatant/Non-Combatant Status, deals primarily with POW status and mandates the issuance of an Identification Card. *Id.* at 41. The handbook does, to a degree, however, consider targeting status:

> "Civilians who take part in hostilities may be regarded as combatants and subject to attack and/or injury incidental to an attack on military objectives. Taking part in hostilities has not been defined in the law of war, but generally is not regarded as limited to civilians who engage in actual fighting. Since civilians who augment the Army in areas in which technical expertise is not available or is in short supply, they, in effect, become substitutes for military personnel who would be combatants."

Id. at 41.

[310] *See* Conduct of the Persian Gulf War, *supra* note 36. In Operations Desert Storm and Desert Shield, civilians deployed into a theater of military operations in unprecedented numbers. Immediately prior to the commencement of the ground assault, more than 4,500 U.S. Government civilians were in the Southwest Asia Theater—career civil service and contract employees—performing duties from logistics, transportation, aircraft maintenance, and technical representatives for weapons systems. *Id.*

[311] *See* Althouse, *supra* note 14, at 14.

Though estimates as to degree vary, this trend toward civilianization of the military logistics function will certainly continue.[312] The October 1994 issue of *Federal Times* reported that the House Armed Services Committee identified more than 10,000 military support positions suitable for conversion to civilian billets.[313] The U.S. Army Training and Doctrine Command (TRADOC) states: "[Civilians]will provide an ever-increasing number of capabilities in support of future Army operations. Use of these support personnel will require their integration into the battle command environment and into the CSS framework, as well as mission training for civilians involved."[314]

In an essay published in 1995, the Association of the United States Army noted that defining issues related to the use of civilians would be of great assistance as the Army tests and develops doctrine for Force XXI, the Army of the 21st Century.[315] Uniformed logistics personnel agree, as Major James Althouse illustrates:

> As it currently exists, the key to logistical support of the conservative heavy division of Force XXI is a seamless support system covering the whole spectrum of logistics—from the strategic to the tactical level. Civilians will

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[312] *Id.* at 14. Indeed, the aforementioned 1996 Department of Defense Authorization Act directed DoD to convert 10,000 uniformed positions into civil service jobs by 30 September 1997. *See supra* note 38.

[313] *See* Althouse, *supra* note 14, at 14.

[314] U.S. DEP'T OF ARMY, UNITED STATES TRAINING AND DOCTRINE COMMAND, PAM. 525-XXX, COMBAT SERVICE SUPPORT (Circulating Draft) (Feb. 1999) [hereinafter TRADOC PAM. 525-xxx].

[315] Landpower Essay Series, the Association of the United States Army (1995). *See* Althouse, *supra* note 14, at 14.

> be involved at each of these levels. At the strategic level, they will assist military planners and commanders in determining support requirements and coordinating with they industrial base. At the operational level they will tie the strategic and tactical together in the preparation of the theater and the establishment of the support base. The tactical level will feature, as it does now, the direct presence of civilians on the "battlefield."[316]

This trend toward downsizing and the increasingly complex nature of weapons systems have continued, creating increased reliance upon civilians to perform combat service and combat service support functions.[317] As the Commanding General of the U.S. Army Personnel Command pointed out in January 1999: "There will be continued interest throughout the Department of Defense on privatization and outsourcing as a means of reducing costs."[318]

This reliance does not manifest itself only in traditional combat operations. More than 6,000 civilian augmentees have participated with U.S. Forces performing peacekeeping and peace enforcement missions in the Balkans.[319] These facts and figures suggest undeniably

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[316] *See* Althouse, *supra* note 14, at 14-15. Major Althouse is an U.S. Army Logistics Officer pursuing his Masters of Business Administration Degree with a concentration in logistics at the Florida Institute of Technology. He wrote the above-referenced article in partial fulfillment of his course requirements at the Army Logistics Management College's Logistics Development Course.

[317] *Id.* at 17.

[318] *See* Williams & Schandelmeier, *supra* note 207, at 35.

[319] According to information received and retained by the Center for Law and Military Operations [hereinafter CLAMO], The Judge Advocates General's School, Charlottesville, Va. Interview with Major John W. Miller

that civilian augmentees are becoming a permanent part of U.S. military force structure. If U.S. commanders are to deal effectively with civilian augmentees and the legal issues their utilization creates, they must receive better guidance than is currently available.

2. *The Current U.S. Policy*

Although current policy on the deployment, use, and status upon capture of civilian augmentees exists in several forms, guidance on the targeting status of these augmentees is extremely limited.[320] Essentially, the same policy formulated for the Persian Gulf War continues to govern civilian augmentee status in traditional military operations.[321] A much-

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II, Deputy Director, CLAMO, in Charlottesville, Virginia, 1 Sept. 1998. *See* BOSNIA LESSONS LEARNED, *supra* note 1, at 151.

[320] The deployment of Department of Defense Civilians is governed by DOD DIR. 1404.10, *supra* note 13; DOD DIR. 3027.10, *supra* note 15; U.S. DEP'T OF DEFENSE, INSTR. 1400.32, DOD CIVILIAN WORK FORCE CONTINGENCY AND EMERGENCY PLANNING GUIDELINES AND PROCEDURES (24 April 1995). Supplemental guidance is contained in U.S. DEP'T OF ARMY, PAM. 690-47, DEP'T OF ARMY CIVILIAN EMPLOYEE DEPLOYMENT GUIDE (27 FEB. 1998); U.S. DEP'T OF ARMY, REG. 690-11, MOBILIZATION PLANNING AND MANAGEMENT (1 Nov. 1995).

[321] During the Persian Gulf War, the U.S. took the position that the increasing use of civilian augmentees to fill traditional military positions weakened the equally-traditional distinction between the civilian and the military. As a result, the U.S. placed all U.S. Government civilians entering the Kuwaiti theater of operations in uniform, informed each that he or she was at risk of attack, and may not be regarded as a noncombatant. *See* Protection of Civilians from Air Warfare, *supra* note 145, at 39.

less specific policy exists with respect to MOOTW, requiring that civilian status be determined on a case-by-case, mission-specific basis.[322]

Unfortunately, as this policy and its supporting rationale indicate, international law, U.S. military policy, and even U.S. military doctrine have failed to reconcile the trend to rely on increased civilian augmentation with the mandates of the law of war and its extension into MOOTW. While the Persian Gulf War is the basis for current policies regarding the use of civilians, those policies were geared toward a high-intensity conflict with relatively few civilian issues. The Gulf policy, for example, stressed that while civilians may lawfully accompany forces into battle, they would likely be regarded as combatants. They were,

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[322] *See* DA Policy Memorandum, Contractors on the Battlefield, *supra* note 64. The next to last paragraph of this Memorandum sets forth the U.S. position on status of civilian augmentees. It provides:

> "Contractor employees accompanying U.S. Armed Forces may be subject to hostile actions. If captured, a contractor's status will depend on the type of conflict, applicability of any relevant international agreements, and the nature of the hostile force. The full protections granted to Prisoners of War (POWs) under the Geneva (1949) and Hague (1907) Conventions apply only during international armed conflicts between signatories to these conventions. Accordingly, these conventions are generally non-applicable during MOOTW. Therefore, contractor employee protection during MOOTW will depend on the specific circumstances of an operation. When the United States is a participant in an international armed conflict, contractors are entitled to be protected as POWs if captured by a force that is a Geneva/Hague signatory. To ensure proper treatment, contractors will be provided with a Geneva Conventions (DD Form 489) or similar Identification Card."

Id.

therefore, subject to attack and consequently wore uniforms and possessed appropriate identification cards.[323]

While this was clearly a simple approach, it lumped together service department civilians, DOD civilians, U.S. contract employees, local national contract employees, and third-party national contract employees. It placed in the same status truck drivers, meal servers, mail haulers, intelligence specialists, surveillance personnel, and weapons maintenance system technicians. Fortunately, most of these civilians were located at rear-echelons, and few were subject to enemy lethality. None were captured or detained as POWs. It is unlikely, however, that future operations will involve such a tidy "battlespace."

In spite of the evolving nature of military operations, DOD continues to apply an "all or nothing" approach. The current version of the *AMC Civilian Deployment Guide*,[324] however, is an example of U.S. recognition of dangers associated with deploying civilian augmentees. The proactive nature of the AMC approach reflects a general move toward, and an affirmation of, the core of this thesis when it indicates:

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[323] *Id. See also* DOD DIR. 1404.10, *supra* note 13.

[324] *See* AMC Civilian Deployment Guide, *supra* note 309.

> Civilians who take part in hostilities may be regarded as combatants and subject to attack and/or injury incidental to an attack on military objectives. Taking part in hostilities has not been defined in the law of war, but generally is not regarded as limited to civilians who engage in actual fighting. Since civilians who augment the Army in areas in which technical expertise is not available or is in short supply, they, in effect, become substitutes for military personnel who would be combatants.[325]

This passage is significant for several reasons. First, it is an express adoption of the GPI standard regarding targeting status. Both the language itself and the tenor of the guidance suggest that civilian augmentee status as targets will be predicated upon this conduct-based standard. Second, it impliedly endorses the kind of bifurcated policy this paper urges, which provides for a more extensive reliance on civilian augmentees during MOOTW precisely because the lack of conflict renders it unlikely they could be regarded as "taking part in hostilities."[326]

The prominence of LOGCAP,[327] and the reliance on digitization for military operations in the 21st Century make such a conduct-based approach mandatory, and the simplistic, uniform approach used previously inadequate. These current and future initiatives will

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[325] *Id.* at 41-2.

[326] *Id.* at 41-2. On the issue of uniforms, the Guide states: "It is not a violation of the law of war for an Emergency-Essential employee to wear a uniform or to carry a weapon for personal self-defense while accompanying the military force." *Id.*

[327] *See* LOGCAP, *supra* note 8 and accompanying text.

obviously increase the numbers of civilian augmentees participating in military operations. To allay fears that employees and military commanders may have regarding this reality, better guidance is required.

B. Rationale for the Proposed Policy

A bifurcated policy for the utilization of civilian augmentees provides a possible solution to many of the dilemmas noted herein. This policy will establish a dual-use standard—one for combat and one for MOOTW. Portions of the policy will apply during more traditional military operations involving armed conflict, and other portions will be applicable only during MOOTW. The justification for this approach is explained below. The policy itself is contained in Appendix A.

1. Why a Better Standard Is Required

Though no policy can be fool-proof and there is no way to anticipate every eventuality, a bright-line rule remains the best defense and best offense for effective, disciplined, and lawful military operations. Three reasons support a bright line rule.

The first is that the principle of distinction requires it. The United States is obligated to

distinguish civilians "taking a direct part in hostilities" from those not doing so, or from the civilian population in general. A careful delineation by function of who is acting as a "quasi-combatant" will help the United States meet this obligation. Such a standard complies with the obligation of distinction by identifying to the enemy functions considered "quasi-combatant," and therefore lawful objects of attack. Not only does this enhance protection for those who may not be targeted, it effectively precludes the enemy from making claims that the United States co-located innocent civilians with legitimate targets. This maintains United States credibility, and ensures compliance with the mandate of Article 58 of GPI.[328]

This standard also averts claims of misunderstanding by individual augmentees, contractors, or the population in general, that they were unaware of the requirements or dangers of their function.[329] These might come in three different forms.

First, it quells demands for contract modifications. A clear understanding of the mission to be performed, the circumstances under which that mission will be performed, and the possible consequences of performing the mission under those circumstances, will preclude

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[328] *See* GPI, *supra* note 47, at art. 58.

[329] *See* FM 100-xx, *supra* note 18 at C-15. Doctrine recognizes the importance of this requirement, providing: "When considering using a contractor in high-risk situations, contract solicitations must clearly identify the services needed and the conditions under which they will be performed." *Id.*

assertions that any of those three variables were not bargained for. It will prevent, therefore, a contractor from attempting to extract additional compensation for what it perceives to be un-bargained for risks or costs.[330]

This standard also prevents claims of non-deployability. Clarity of the three factors cited above will prevent individual civilian augmentees from asserting that they lacked understanding of the magnitude of undertaking their stated duties. They may not claim lack of knowledge that their job as maintenance technician of the M109A6 Paladin might require their presence in an area where it might actually be used. Indeed, this eventuality is noted in new doctrine.[331] Early clarification of these roles and responsibilities will avert such situations.

The standard averts the "CNN factor." When the Government, the contractor, the individual augmentee, and the enemy all have notice who is a de facto combatant, the

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[330] *See* FM 100-10-2, *supra* note 18, at C-15, 16. "When contractors are willing to perform under dangerous conditions the cost of a contract may be substantially influenced by the degree of risk involved. When contractors are willing to perform under dangerous conditions, the cost of a contract may be substantially influenced by the degree of risk involved. In some situations, the cost of using contractors may not warrant the risk or monetary expense involved."

[331] *See* FM 100-xx, *supra* note 18, at C-15. "For example," this section observes, "some contractors may refuse to deliver goods or services to potentially dangerous locations or may desert an operational area in the face of danger. Contingency contracts and their support clauses must be carefully drafted to specify the services required and the conditions under which they are required so that contractors are fully aware of what is involved."

possibility of bad press is reduced greatly should that augmentee become a casualty or lodge a complaint as a result of service in an active theater of operations. Similarly, a thorough understanding of the mission and its potential consequences also mitigates individual or press claims of lack of fairness or knowledge. It may no longer be considered sheer cynicism to suggest that tolerance or citizen support of the military mission is undermined when Americans become casualties. The prospect of civilians as casualties is likely more problematic still. For these reasons, the U.S. must do its level best to avert the belief that every augmentee is either a civilian or a combatant, an approach that will not likely withstand media and public scrutiny.

2. *Why DOD Needs A Better Definition of "Quasi-Combatants"*

The determination of status of civilian augmentees impacts on operational commanders in many ways. Therefore, these determinations need to be made as far in advance of operations as possible. A comprehensive definition of which augmentee functions shall be considered "quasi combatant" provides this advance determination.

This advance determination also facilitates the hiring and contracting processes. The opening hypothetical referenced two adverse situations involving the utilization of civilian augmentees. The first was the contractor's difficulty in soliciting volunteers to deploy into

austere environments. The second involved the employees' desire to leave such an environment after discovering potential dangers, specifically, learning that they might be targeted.

Early determination of status based on function will alleviate the potential for such situations to occur. At the contract negotiation and award stages, for example, Government, contractor and employee alike, would be advised of which functions would carry "quasi-combatant" status and could, therefore, plan accordingly. An employee hired to maintain a weapons platform, for example, would be aware that he would be subject to deployment to both combat and non-combat operations and, after deployment, would be considered a "quasi-combatant" and therefore subject to potential harm as a lawful target.

Food service workers, on the other hand, would be treated differently. Though subject to deployment to a MOOTW environment, they would not be considered for deployment into a theater of combat operations. Likewise, in a MOOTW environment, they would not be considered "quasi-combatants," would not be considered lawful targets, and would not require extensive training.

Status determinations will have a pre-determined impact on force structure. Armed, so to speak, with a pre-determination of status based on function, military planners at all levels

could evaluate force structure needs. A division commander evaluating task organization for combat operations, therefore, would be apprised in advance that the DISCOM[332] must contain more military personnel than would be required if deploying to a non-combat theater of operations. This would also, obviously, apply to all levels of force structure planners, appropriations and budget experts, and even political decision-makers. Theoretically, at least, before Congress urged further conversion of military billets into civilian contract positions, they would know the potential legal and operational consequences thereof.

The desired effect is a reversal, or at least full awareness, of the current dynamic. In an era of declining resources and perceived decreasing potential for large-scale combat operations, it is tempting for civilian decision makers to reduce the number of uniformed personnel, who must be fed, housed, cared for, moved, and trained, in favor of civilian contractors. It is paramount for these decision makers to implement such changes with appreciation for the law of war-based strategic, operational, and tactical burdens they impose.

Determination of status in advance clarifies command responsibilities as to civilian augmentees. The decision to employ civilian augmentees carries many such command

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[332] Division Support Command. The DISCOM is organic to a division and is listed in the division's table of organization and equipment (TO&E) and its table of distribution and allowances (TDA). The DISCOM provides organic logistical support (supply, maintenance, transportation, and services) to the division. *See* FM 71-100, DIVISION OPERATIONS, *supra* note 34, at A-17.

responsibilities. Though ultimate responsibility falls upon the theater CINC, the nature of the operation and extent of use of augmentees carries implications for commanders and planners at many levels.[333]

Protecting contractors on the battlefield is the tactical commander's responsibility. In situations likely to involve conflict, therefore, a commander utilizing civilian augmentees assumes a heavy force protection burden. This burden is increased because contractor personnel are prohibited by doctrine and international law from performing force protection functions.[334] Force protection requirements include not only active protection such as perimeter security, but may also include escorts for required movement and transportation, and training and equipment relating to an individual's ability to protect himself, if required. This dilemma is further exacerbated by the fact that although contractor personnel are bound to follow the commander's directives regarding force protection and related issues, such as

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[333] *See* FM 100-xx, *supra* note 18, at C-54.

[334] *See* FM 100-xx, *supra* note 18, at C-53. Using a civilian augmentee for missions such as perimeter security would surely violate the principle of distinction and cause the loss of noncombatant status for any person so engaged. One of my more fundamental concerns in this area is the ultimate irony of it. As we have seen, most of the research and literature available suggest that the impetus for contracting results from downsizing or reducing uniform billets. In many circumstances, however, the use of such augmentees may impose such additional burdens (like the force protection requirements referred to above) that their use ultimately requires more organic support than it saves.

Consider the following: The commander assumes force protection responsibility for civilian augmentees under his control. He may not, however, use any augmentees for this purpose. He or she must, therefore, devote additional organic support, such as military police assets, to perform this function. The net result may be an actual diminution in the number of uniform assets available to accomplish the mission.

willfully engaging in essential training, the commander's ability to control their actual behavior during deployment is limited.[335]

Early status determinations assist commanders in clarifying operational issues such as uniforms, arms, training and logistical support. Before or after force structure decisions are made other decisions, such as who will wear uniforms, who will be armed for self-defense purposes, and what training is required for civilian augmentees, must be considered. Pre-determination of status assists in this process. Whether deploying into a combat or MOOTW theater, planners at all levels will be able to make better logistical and training decisions.[336]

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[335] Recall, for example, that the military commander's jurisdiction to discipline contractor personnel is governed by the contract. A practical example of this command dilemma occurred in Bosnia. Though local rules varied, most areas had strict convoy requirements for movement of military personnel. One such requirement called for all movement outside secure areas in four vehicle convoys with at least one crew-served weapon. While uniformed personnel had to adhere to this strict requirement, and it technically applied to contractor personnel as well, it was routinely disregarded by contractor personnel, who dismissed the requirement as onerous. According to Information received and retained by the Center for Law and Military Operations [hereinafter CLAMO], The Judge Advocates General's School, Charlottesville, VA. Oral interview with Captain Dave Balmer, U.S. Army Reserve, Foreign Claims Judge Advocate, 1st Armored Division (Task Force Eagle), in Charlottesville, VA, 1 April 1997. *See also* BOSNIA LESSONS LEARNED, *supra* note 1, at 436-442.

[336] *See* FM 100-xx, *supra* note 18, at C-55. While the question of who must provide specific items supporting contractor personnel are often the subject of specific contractual terms, operational circumstances will always dictate whether such items may be provided safely within mission bounds. For these reasons, commanders must always anticipate a requirement to provide greater support than the letter of a contract may require. *Id.*

These are not the only command responsibilities imposed by the use of augmentees. Life support provided to contractors, such as rations, housing, laundry and bath, medical care, mortuary affairs, MWR, postal, and religious support must be equivalent to those services provided to uniformed service members.[336] While the presence of a few contractors amongst many troops may not contribute substantially to the overall requirement, the presence of many civilian augmentees, or the requirement to provide for additional personnel under combat conditions, could impose substantial logistical burdens. *Id.*

Legal training may be required as well, particularly in situations where civilian augmentees operate weapons systems or perform other functions for which law of war training would be required. Under the mandates of U.S. policy and international law, which place special legal burdens upon military commanders for the training and conduct of their forces,[337] such civilians would be required to receive this training, a burden commanders may wish not to undertake.

3. Function, Not Location, Is Determinate Factor

Under this policy, it is the function, or duty description, of the civilian augmentee that controls the determination whether he or she will be considered a "quasi-combatant" under either portion of the policy. There are three reasons why function is the determinate factor in status.

The training issue surfaces in two important respects. The first is in the area of self-defense. Personnel deployed to theaters of active combat operations must receive training in NBC protection, weapons familiarization issues, and other concerns relative to that operational environment. *Id.*

[337] *See* DoDD 5100.77, *supra* note 63; CJCS Instruction 5810.01, *supra* note 53.

Differentiation by function validates the principle of distinction. In traditional operational environments, it was easier to draw a distinct line between combatants and noncombatants, or between military and civilian participation. This was so because military personnel, or combatants, typically performed those mission essential functions that involved warfighting skills. Noncombatants, or civilians, if they were involved at all, typically performed support or logistical-type functions that usually did not cause direct harm to the enemy or destruction of enemy property.

The location of these participants normally coincided with their role in combat. Warfighters, for example, had direct contact with the enemy, while noncombatants performing support functions were located at rear-echelons. Often, they were well beyond the reach of enemy weapons systems.

In both modern combat and MOOTW operations, however, these generalities no longer apply. Weapons systems located far forward are maintained, and sometimes even operated, by civilian contractors.[338] Surveillance systems are also maintained and operated by such contractors. Aircraft and weapons system maintenance functions are performed at all

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[338] *See* FM 100-xx, supra note 18 ("The relationship between the Army and a contractor to support a weapon system will be long term and continuous. Accordingly, the Army will not be able to deploy these weapon systems without also deploying the supporting contractors. This creates a habitual relationship that is necessary and appropriate."). *Id.* at C-18.

echelons by civilians. The ability to distinguish by location, therefore, has been overcome by events. Function, therefore, remains the only logical discriminator with respect to who "takes a direct part in hostilities" for status purposes. Furthermore, this approach already enjoys support from DOD's law of war expert, who urges that we need not amend GPI to meet our needs, because they can be "achieved through a pragmatic interpretation of the phrase taking a 'direct part in the hostilities,' and the practice of nations."[339]

Categorization by function reconciles realities of modern operations with the law. For many of the same reasons noted above, categorization by function, rather than location is more reflective of the nature of modern operations. In the Balkans, for example, civilian augmentees are involved in base operations at air bases all over the region.[340] They also participate in information operations, psychological operations, and civil-military affairs operations throughout the region.[341] In the past, it was likely that uniformed personnel may have performed these functions, activities likely considered taking part in hostilities. Today, however, a civilian augmentee would likely perform these functions and, since there is arguably no "enemy," such a determination regarding status is not possible.

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[339] *See* Protection of Civilians from Air Warfare, *supra* note 145, at 40.

[340] *See* BOSNIA LESSONS LEARNED, *supra* note 1, at 129.

[341] *Id.* at 131-2. *See also* PASCALE COMBELLES SIEGEL, INSTITUTE FOR NATIONAL STRATEGIC STUDIESU29, NATIONAL DEFENSE UNIVERSITY, TARGET BOSNIA: INTEGRATING INFORMATION ACTIVITIES IN PEACE OPERATIONS (Jan. 1998) (detailing information operations in Bosnia).

Distinction by function assists in the decision-making process. Because this policy is bifurcated according to combat and non-combat operations, and because U.S. forces remain ready to perform both types of missions, discrimination by function will assist military planners at the strategic, operational, and tactical levels in deciding which civilians the U.S. should rely upon to perform certain functions. Acquisition specialists and force developers may, for example, opt for one weapons platform over another because the latter may require in-theater operation by civilian augmentees. Should such a system be employed in combat operations, it would obviously necessitate the deployment of civilian augmentees into an active theater of combat operations.[342] This, in turn, would likely avail the operator of "quasi-combatant" status, a situation neither the civilian augmentee nor the military commander may favor.

At the tactical level, because a military commander is obligated to distinguish civilians from military personnel, he or she may wish to deploy to combat operations with the absolute minimum number of civilian augmentees. Regardless of the planning and force structure decision level, the functions to be performed, and who will perform them, will be critical issues. Distinction requires commanders to consider these questions long before movement into the mobilization or deployment phase of operations. This requirement is identified

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[342] *See* FM 100-xx, *supra* note 18, at C-18: "The Army will not be able to deploy these weapon systems without the supporting contractor."

clearly in doctrine that notes "contractor status is an important issue for the commander in determining the extent of their use and where within the AO they should be permitted."[343]

4. This Policy Is Analogous to Modern Rules of Engagement

> The aggressiveness that is important in wartime operations must be tempered with restraint in the ambiguous environment of peace operations.[344]

As the quote above illustrates, the rules of engagement[345] used during modern military operations are usually based upon the conduct, and not status, of other parties.[346] In Bosnia,

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[343] *Id.* at C-22.

[344] *See* JOINT WARFIGHTING CENTER, JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS, I-17, (16 Jun. 1977) [hereinafter JTF HANDBOOK].

[345] *See* JOINT PUB 1-02, *supra* note 9. Rules of engagement are defined as: "Directives issued by competent military authority which delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered. Also called ROE." *Id.* at 317.

[346] *See generally* Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1-160 (1994). In this thesis, Major Martins posits that recent changes in Army doctrine, national security strategy, and the world at large have heightened attention to land force ROE because these changes mandate that modern land forces be highly flexible. Individual soldiers, therefore, as well as their units, must be capable of applying appropriate levels of force across the spectrum of military operations. In response to these changes and requirements, Major Martins proposes adoption of a training model of ROE, known by the mnemonic "RAMP," designed to minimize the defects that often result from the cognitive limits of humans under stress. *Id.*

At this writing, the system proposed by Major Martins has been adopted as the ROE training model by at least one U.S. Army Corps and it is likely to be further embedded by Army units. Because it is conduct based, because it is used by a goodly number of United States Army units and is currently being employed at all of the Combat Training Centers currently preparing soldiers for deployment to MOOTW, it reflects the trend within the Army and especially within MOOTW, to predicate action or status on the conduct of individuals involved. This trend is consistent with the approach recommended herein.

for example, no hostile force has been declared and the use of force must be based upon a demonstration of hostile intent.[347] It is consistent with the United States' point of view, therefore, to use conduct that will be based upon function, as the test for status. A weapons system technician stationed far forward, for example, would be considered a "quasi-combatant" under this policy. The basis of this determination is the function performed, which illustrates the nature of conduct that will be exhibited during operations, and not merely the contractor's status as a civilian augmentee.

Application of this analogy is valuable for one critical reason: it is consistent with the analytic framework and training received by U.S. soldiers in preparation for deployment to MOOTW.[348] This approach is being used to train U.S. soldiers with respect to the vast numbers of civilians, both "pure" civilians and civilian augmentees, within the Balkan theater of operations. This is illustrated by the most recent iteration of training conducted by the 1st CAV Division, in preparation for deployment to Bosnia. During this training, civilian augmentees and contracting officials are listed as "players," and the training scenario itself

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[347] *See* BOSNIA LESSONS LEARNED, *supra* note 1, at 56-74. The rules of engagement in MOOTW, especially peace operations, require a very delicate balance of initiative and restraint. This is particularly the case in joint and combined operations, where ROE from different services may be involved or combined. The operative point is that, in MOOTW, it is often the case that no hostile force is declared. Thus, use of status-based ROE, which allow engagement of a party merely because of their status as a member of a declared hostile force, is not possible. Conduct-based ROE are therefore employed and require the demonstration of hostile intent before a party can be engaged. *Id.*

[348] *Id.* at 64-66. Deployment training conducted at Fort Benning, GA, Hohenfels, Germany, at the 10th Mountain Division (Light), at home station in Germany, and in Bosnia, successfully used RAMP as a training tool for deploying soldiers.

contains at least 450 civilian augmentees operating in various capacities within the area of operations.[349]

It is clear that deploying troops receive training that identifies function of uniformed troops and civilians as the determinate factor in assessing their status. If confronted with issues regarding the use of force against civilian augmentees used by the enemy, U.S. soldiers are readily equipped to evaluate conduct and determine the appropriate reaction. This standard is also consistent with the conduct-based GPI standard. If a civilian is "taking direct part in hostilities," he or she is a lawful target.

The policy is consistent with modern rules of engagement in another way, as the line of demarcation used to distinguish combat operations from MOOTW under the policy (the declaration of a hostile force) is consistent with the CJCS SROE. Commanders and soldiers alike, therefore, who have worked with and trained under the SROE are familiar with the concept and are therefore easily able to make the transition.

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[349] *See* Mountain Eagle VIII, Scenario Briefing, III Corps U.S. Army, January 1999 (copy on file with the author). *See also* electronic mail message from Major John Miller, Center for Law and Military Operations, to the author, dated 8 February 1999, re: Paper Stuff, (copy on file with the author).

While the policy is analogous to modern rules of engagement, it is also attune to U.S. concerns over GPI's dilution of the principle of distinction.[350] Indeed, this is precisely the reason that civilian augmentees identified as "quasi-combatants" by function are subject to attack under both portions of the bifurcated policy. Upon initial acceptance of their position, at all times subsequent thereto, and in all types of operations, the weapons system operator is a de facto combatant. This actually validates U.S. compliance with the law of war, preventing criticism that the U.S. is mixing combatants and nocombatants.

5. The Policy Employs, And Is Consistent With, Doctrinal Classifications for Types of Contractors

The policy refers specifically to the type of contractors present in U.S. operations, or operating under the LOGCAP contract. It also makes reference, where appropriate, to new Army doctrine on Contractors on the Battlefield.[351] It is necessary, therefore, to identify the types of contractors subject to this policy.

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[350] *See Remarks of Judge Abraham D. Sofaer, supra* note 59, at 466. *See also* Parks: Air War, *supra* note 165, at 119.

[351] *See* FM 100-xx, *supra* note 18, at C-37-43.

Battlefield contractors are generally referred to as either support contractors (which includes systems contractors), or contingency contractors. The first category of contractors is support contractors. Support contractors encompass systems contractor personnel supporting Army Materiel Command-fielded systems, as well as contractors supporting fielded equipment or providing services in support of the Army services component commander (ASCC).[352] Systems contractors include contractors involved in the manufacture, operation, and lifecycle management of systems such as vehicles, weapons, command and control, and aircraft.[353] They generally provide support throughout the life cycle of a piece of equipment. Therefore, the more complex a piece of equipment, the more likely it is that contractors must be deployed to support it.[354]

These contractors generally provide support at the operational level, through the Logistics Support Element (LSE).[355] The LSE is a critical element in the Army's support doctrine and

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[352] *Id.* at C-38.

[353] *Id.* at C-38. *See* Althouse, *supra* note 14, at 15.

[354] *Id.* at C-38. *See* Althouse, *supra* note 14, at 15.

[355] *See* FM 100-xx, *supra* note 18, at C-81. The Logistics Support Element is a subordinate element of the Army Materiel Command (AMC) and it serves as the focal point for all AMC activities in a theater. AMC fields three theater-oriented LSEs: LSE-Europe, LSE-Far East, and LSE-CONUS, with responsibility to support the Central Command (CENTCOM) and Southern Command (SOUTHCOM). AMC augments LSEs as required with military personnel, DA civilians, and contractor personnel. The LSE retains administrative control of these attached contractors, coordinating their life support, transportation, and force protection with the Theater Support Command (TSC) which centralizes the command, control, and supervision of support functions at the operational level. The LSE maintains direct lines of communication to contracting officers assigned to AMC's major subordinate commands to modify their contracts as required, and fully integrates

is integral to battlefield success. It consists of skilled military personnel, civilians, and contractors, all providing on-the-ground weapon system and equipment support to the warfighter.[356]

The second category of contractors is systems contractors. They are also involved in the design, manufacture, and support of major items of equipment and weapon systems, or a specified set of components. Normally, the design and manufacture takes place outside the active theater. When used in a theater of operations, these contractors normally provide sustainment maintenance and item management for deployed systems.[357]

The majority of systems contractors in a theater of operations deal with the maintenance and technical assistance for particular systems. Doctrine states that, because of the complex nature of many systems, contracting for maintenance and technical support has often been found to be more effective (both in terms of responsiveness and cost) than organic support

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contractors into their structure. The LSE does not manage LOGCAP contractors, as AMC deploys personnel as required from their LOGCAP Program Office to assist the commander with this requirement. *Id.*

[356] *See* Williams & Schandelmeier, *supra* note 207, at 34.

[357] *See* FM 100-xx, *supra* note 18, at C-38.

units.[358] As a result, contractor personnel could be placed anywhere on the battlefield that the major system is employed. By virtue of their function, in almost all cases, the policy considers contractors performing these functions as "taking direct part in hostilities," and therefore labels them "quasi-combatants."

Other contractors within this category operate battle labs, flight simulators, and off-the-shelf equipment. They provide technical, operator, or maintenance support for these systems or equipment, and are controlled through the government contract. Their status under the policy is determined by affiliation with particular systems. For example, those operating or maintaining battle labs or simulators are engaged primarily in training and pose no direct risk to enemy personnel or equipment. They are usually not deployed into active theaters of operations and, therefore, do not take direct part in hostilities. They are usually considered noncombatants. In contrast, those that maintain and operate off-the-shelf equipment will be categorized based upon the function of their equipment. Vehicular mechanics maintaining

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[358] *Id.* at C-39. Two initiatives of private industry regarding support to major systems have emerged recently. Prime Vendor Support and Fleet Management Support involve support by the system manufacturer. Under prime vendor support, the manufacturer assumes full responsibility for total system performance and wholesale support for a system. This involves the acquisition, management, storage, and distribution of repair parts, including interfacing directly with soldiers at the retail level. His responsibility continues after the system has been delivered to the using units, and includes in-theater support for deployed systems. *Id.*

Similar to prime vendor support, fleet management support involves a fleet manager who assumes responsibility for complete wholesale support of weapon system unique items only. Both concepts are expected to reduce overall support costs, improve spare parts availability, and increase system readiness. *Id.*

non-combat vehicles will be considered noncombatants, while those who maintain or operate off-the-shelf weaponry would carry "quasi-combatant" status.

The third category of contractors is contingency contractors. Contingency contractors provide supplies and services in support of Army forces, primarily during specific missions.[359] These contractors may include U.S. contractors, host nation contractors, or third-country contractors who fall into two subcategories. The first are LOGCAP contractors, whose services during operations are pre-planned.[360] The second type is operation specific contractors.

LOGCAP contractors work under two types of contracts. The first type of LOGCAP contract is the Army's umbrella LOGCAP Contract.[361] Umbrella contracts are arranged

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[359] *See* FM 100-xx, *supra* note 18, at C-40. *See also* Althouse, *supra* note 14, at 15.

[360] *See* FM 100-xx, *supra* note 18, at C-41, 2. The guiding principle of LOGCAP is to pre-plan for use of contractors as an alternative in support of contingency operations, and to augment combat support and combat service support force structures when identified shortfalls exist. Army major commands determine what form of LOGCAP is most appropriate for their specific theater and can use LOGCAP for warding contracts for use during contingencies, or including contingency clauses in peacetime contracts. *Id.*

[361] *See* FM 100-xx, *supra* note 18, at C-40. The Army's umbrella LOGCAP contract is managed and administered by AMC. It is a special contingency contract program that provides for maintaining, on a multiregional basis, a worldwide contract. It allows for the swift acquisition of contract combat support and combat service support required in a crisis. The basic scope of AMC's umbrella contract is for a previously selected contractor to plan for, and when called upon, provide needed construction and services worldwide. The planning requirement calls for the contractor to prepare worldwide, generic underdeveloped and developed country plans, operationally specific plans, and country-specific plans. To correspond with these plans, the

before an operation and are integrated into support plans for anticipated contingencies.[362] Contractor-provided supplies and services under the LOGCAP contract[363] may include, but are not limited to:[364]

Supply Operations	**Field Services**	**Other Maintenance and Services**
All Classes of Supply Except Class VII, which is not done w/in a theater of operations.	Clothing Exchange and bath	**Maintenance:** Equipment/systems Weapons systems Routine/ non-systems
Ammunition	Laundry	**Transportation:** Strategic

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contractor is also required to develop and maintain a worldwide database of available equipment, supplies, and services. *Id.*

The contractor plans and maintains database support for five broad categories: facilities, supplies, services, maintenance, and support. Support for actual operations is tailored, based upon the concept of the operation and scope of the work provided by the supported commander. *Id.*

[362] *See* FM 100-xx, *supra* note 18, at C-40.

[363] *See* FM 100-xx, *supra* note 18, at C-40. Recent LOGCAP operations give an example of how these services are provided. Under the AMC Support Contract, the contractor provides a basic plan for receiving, housing, and sustaining 25,000 troops in eight base camps for 180 days. Under a generic contingency scenario formed in the contract, the contractor is also required to set up sea and aerial ports of debarkation for deployed personnel. Military personnel are then deployed to a rear-area support base before being further deployed to forward-area base camps. *Id.*

Though specific numbers vary by operation, in one recent operation, the contractor was required to begin receiving 1,300 personnel within 15 days from notice to proceed. Thirty days after notification, the contractor was required to support 25,000 troops in one rear and seven forward base camps for up to 180 days with options to increase the size of the supported force to 50,000 troops and to extend support to 360 days. *Id.*

Each base camp was required to provide billeting, dining facilities, food preparation, potable water, sanitation, showers, laundry, transportation, utilities, and other logistical support. The contractor remains required under the contract to maintain the capability of supporting two contingencies concurrently in widely separated geographical areas. *Id.*

[364] *See* Policy *infra* at Appendix A.

		Operational Tactical
Petroleum: (bulk& packaged)	Clothing Repair	Medical Service
Personal Demand and Hygiene	Food Service	**Engineering and Construction**: Facilities Construction Seaport Const/ Improvement Aerial Port Constr./Improv. Utilities Road Constr./Improvement/ Lines of Communication
Medical Materiel and Supplies	Mortuary Affairs	**Signal Support Services**: In-transit Visibility (IVA) Total Asset Visibility (TAV)
Repair Parts	Hazardous Materials/ Waste Disposal Services	Support of Army Personnel & Equipment Retrograde
Office Supplies and Equipment	Billeting	Power Generation and Distribution
Organizational Clothing & Individual Equipment	Facilities Management	Standard Army Management Information System Operations (STAMIS)
	MWR	**Communications Support**: Voice/Data Info. To Theater Out-of-theater Access
	Information Management	
	Personnel Support	

The second category of contingency contracts is those negotiated for operation-specific services. These are ad-hoc arrangements, usually made after initiation of planning for a specific contingency and often lasting through the duration of the operation and re-deployment.[365] Since there is no system in place to monitor these contracts, the contracting officer is responsible for all aspects of them.[366] Because of their nature, there are myriad possibilities for the types of goods, services, and personnel that may be contracted for during the hectic times before and during a deployment. It is very difficult, therefore, to anticipate every eventuality. However, as the vast majority of these contracts involve strictly logistical support that does not cause direct harm to enemy personnel or property, these personnel will likely remain classified as noncombatants.

6. Why a Bifurcated Approach? Conflict Operations Require A More Restrictive Standard.

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[365] *See* FM 100-xx, *supra* note 18, at C-42. *See also* Althouse, *supra* note 14, at 15.

[366] *See* FM 100-xx, *supra* note 18, at C-41. A contracting officer is trained, certified, and warranted to acquire requested supplies and services, and is the only individual legally authorized to financially obligate the U.S. Government about the micropurchase threshold. The contracting officer is responsible for ensuring that all applicable laws and regulations are complied with. *Id.*

There are vast differences between a person's ability to perform their duties in a combat environment and something less than combat.[367] Based on this, and the following reasons, the U.S. must adopt a more restrictive standard for the utilization of civilian augmentees in combat environments.

It is fundamental that DOD cannot and should not deploy to combat operations with the same levels or types of civilian augmentees employed in MOOTW. For this reason, more restrictive standards regarding the types and numbers of augmentees to accompany military forces into combat should be adopted. This is not a novel idea. Indeed, the average numbers of civilian augmentees used in the largest military operations in recent years[368] support this theory. In the Persian Gulf War, one civilian supported every 50 soldiers. In Bosnia, however, there is one civilian for every ten soldiers.[369] These numbers are validation that DOD can and should rely less heavily on civilian augmentees during combat.

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[367] *See* FM 100-xx, *supra* note 18, at C-15 ("To properly evaluate the value of contractors to a military operation, the requesting authority or designated supporting unit must make an assessment of risk. This assessment evaluates the impact of contractor support on mission accomplishment and contractor safety to determine the most effective use of contractor support. Assessment also addresses potential degradation of contractor effectiveness during situations of tension or increased hostility.") *Id.*

[368] *See supra* pp. 15-16. *See also supra* note 37.

[369] *See* Peters, *supra* note 37.

One of the reasons DOD may expect to rely less on civilian augmentees in war is the availability of the Reserve Component. With the current emphasis on a "seamless force," and changes in force structure placing a significant amount of firepower in the combat units of the National Guard, and the bulk of the combat support and combat service support functions in the United States Army Reserve,[370] military commanders can expect that the Reserve Component will play a major role in future combat operations.[371]

This conclusion is also supported by federal law, which facilitates mobilization of the Reserve Component in times of war.[372] DOD should, therefore, rely more heavily on the

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[370] At present, there are 15 "enhanced brigades" within the United States Army National Guard. The term "enhanced" refers to the increased personnel and logistical assets assigned to those brigades in order to facilitate their increased readiness for mobilization. Seven of these brigades are heavy (armor and mechanized infantry), seven are light, and one is organized in the form of an armored cavalry regiment. Each has its own support element, allowing for ease of integration into active component organizations. INTERNATIONAL & OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 34-2 (1998) [hereinafter OPLAW HANDBOOK].

The primary mission of the enhanced brigades is to mobilize and deploy to one of the two major regional conflicts that presently define our national security strategy. The Former Secretary of the Army, Togo West, has stated that "the Army National Guard Brigades are the principal combat maneuver forces of the United States Army." *Id.*

On the other hand, the United States Army Reserve contains most of the Army's support structure for traditional combat operations. The Troop Program Units (TPUs) of the USAR consist primarily of combat support and combat service support elements that are trained to mobilize in units, in direct support of combat activities. *Id.*

[371] More than 139,000 reserve component personnel were mobilized for service in the Persian Gulf War. 124,500 of them came from 1,033 different units and 14,900 were from the individual ready reserve. While 40 percent of the Army's CSS Assets were deployed to the theater, 60 percent of those assets came from the reserve component. *See* FM 100-5, OPERATIONS, *supra* note 33, at 12-2.

[372] Generally, the magnitude of a potential operation dictates the level of mobilization. There are four levels of mobilization: full mobilization is governed by Title 10, U.S.C. § 12302(a); partial mobilization is governed by

Reserve Component for regular combat operations, and less upon civilian augmentation. In MOOTW, however, where the availability of the Reserve Component may be lessened, the U.S. will be forced to rely more heavily upon civilian augmentation.

The increased risk of harm and the decreased likelihood of civilian augmentee success in conflict operations are strong reasons why DOD should rely much less heavily, if at all, on civilian augmentees in conflict operations. The very nature of combat operations subjects civilian augmentees to greater dangers than they would be exposed to in other types of operations. In addition, since they are less trained and equipped to handle the rigors of combat operations and the inherently austere conditions of a battle zone, the potential for non-combat related injuries is also increased. The cumulative effect of these conditions creates potential risks to mission accomplishment. In such circumstances, contractor support may not be suitable.[373]

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10 U.S.C. § 12302; selective mobilization is governed by 10 U.S.C. § 12301(b); and Presidential Selective Reserve Call-Up (PSRC) is governed by 10 U.S.C. §12304.

[373] *See* FM 100-xx, *supra* note 18, at C-32-3. "In operations where hostile action against contractors is likely, a contractor may have difficulty in accomplishing the mission. Failure of the contractor to provide the required support could jeopardize the overall success of the operation. In these situations, contractor support may not be suitable and organic support should be used, if available." *Id.*

Military personnel train for months and years to perform their stated duties in combat environments. They train not only individually, but collectively as well. Despite this, in the "fog of war," optimal performance is rarely achieved, as the environment of combat exposes the physiological and psychological limits that make soldiers the most vulnerable part of the warfighting system.[374] Civilian augmentees lack the opportunity, inclination, and skills to perform optimally in such environments.

A more restrictive standard on the use of civilian augmentees in conflict operations is required by the law of war. All of the reasons discussed within this section converge to emphasize the compelling obligation to reduce risk to civilians under the principle of distinction. The simple fact is that the risk of harm to participants increases with the intensity of the conflict. Commensurately, the risk of harm to civilians increases proportionally to the number of civilians deployed to a combat environment.

Remaining constant, however, is the international law obligation to distinguish combatants from civilians and protect those augmentees DOD "brings to the fight."[375] The

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[374] *See* FM 100-5, Operations, *supra* note 33, at 14-1.

[375] *See* FM 100-xx, *supra* note 18, at C-21. "When contractors provide support to a military force (particularly during offensive operations), an adversary may challenge their status as noncombatants. Commanders will not put contractors in a position that jeopardizes this status." *Id.*

U.S. reaction, then, must be two-fold: (1) to modify force structure or change task organization for combat operations, thereby utilizing only that number of civilian augmentees required for mission accomplishment; and (2) distinguish those augmentees "taking part in hostilities" from true civilians.

This approach will preserve U.S. credibility under the law of war and condemn enemy violations. It also limits the number of civilian augmentees in combat theaters, carefully delineates by function which are "taking part in hostilities," and distinguishes them from others that may not be doing so. All this allows the U.S. to retain credibility under the law of war and condemn enemy violations thereof. Not only does this allow the U.S. to better protect its personnel, but it plays well in the media, both home and abroad.

7. What Justifies a More Permissive Standard for MOOTW?

Many of the reasons to adopt a more restrictive standard for conflict operations, justify a more permissive standard in MOOTW. Perhaps the most compelling factor, however, is pragmatism. The economic and political realities are that dwindling resources have forced reductions in military billets. While these numbers have shrunk, the number of missions has increased. The nature of these missions has also changed. The reality is that to perform these missions, DOD must rely on civilian augmentees.

This reality, however, does not change the legal analysis. The obligation to distinguish still remains, but the characteristic lower intensity of these operations allows a finer line which reconciles these competing realities to be drawn. For the following reasons, the more permissive standard for MOOTW is the solution.

The differing nature of MOOTW operations allows for such a policy. While no military operation may be thought of as conflict-free, the very nature of recent MOOTW missions differentiates them from traditional combat activities. One of the largest differences is the service support intensive nature of MOOTW. During these operations, extensive time and effort is devoted supplying and sustaining not only the U.S. force, but also sister services, coalition partners, non-governmental organizations, international aid societies, and the country or entities requiring assistance in the first place. Military and civilian personnel re-build infra-structure, restore power, re-organize governments, sit as members of joint commissions, and supervise elections.[376] In short, they perform many functions that may be performed by persons other than soldiers. They do so on a dramatically different "battlefield," however, making the utilization of civilian augmentees possible.

There is a lower risk of harm to civilian augmentees in MOOTW. The support-intensive nature of these missions is one factor that makes them less risky to participants. This fact, along with many others, reduces the risk of harm to civilian augmentees. It is far more palatable, therefore, to employ augmentees when there is a much lower possibility that they will be harmed.

There is a decreased likelihood of availability of Reserve Component support during MOOTW. Another of the economic and political realities is the fact that the National Command Authorities will not activate or mobilize the Reserve Component for MOOTW, in great numbers or for lengthy periods of time, that it would for war.[377] Since a large portion

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[376] *See* BOSNIA LESSONS LEARNED, *supra* note 1, at 151.

[377] *See* RAND Study, *supra* note 14. In 1997, DOD commissioned RAND to conduct a study to determine whether force mix changes could improve the ability of the U.S. to respond to peacetime contingency operations. *Id* at 1. The study followed the 1993 Bottom-up Review (BUR) conducted by the Secretary of Defense which recognized that the reduced size of the active component (AC) would increase reliance on reserve component (RC) forces and noted that reserves would be required to support, augment, reinforce, and backfill active forces engaged in contingency and OOTW operations. *See* Les Aspin, Secretary of Defense, *Report on the Bottom-Up Review*, Department of Defense, October 1993, at 1-9.

The RAND study considered the potential for using RC forces in OOTW on either a voluntary or involuntary basis. *Id.* at 2. The study concluded that, because RC participation is often reliant solely on volunteers, contract civilian employees are a more attractive political alternative. *Id.* at 75. While nonmilitary or contract civilian capabilities are viable, the study found, they are often more costly and operationally restricted. Despite this, the study concluded, changes in force structure to improve peacetime contingency capabilities did not favor increased use of the RC. *Id.* at 75.

This finding was based upon several key factors. The study cited several recent peacetime contingency operations in which civilian contractors provided support capabilities such as laundry, transportation, and other logistics functions. *Id.* at 66. It noted that a principal advantage of using contractors for such purposes is that they can be called upon as needed, as opposed to being part of the force structure. *Id.* at 66. The cost of using contractors, however, is much higher than the AC or RC. *Id.* at 66.

of the Army's CSS units are in the Reserve Components, the preparedness of those units and the time and money necessary to mobilize them will be significant planning factors.[378] In addition, Reserve Component assets may be used for a peacetime contingency only if members volunteer or if involuntary authorities are invoked, such as a PSRC, that allows for recall or mobilization of the reserve forces.[379] The realities of draw-downs, without substantial augmentation from the reserve component, necessitates augmentation from civilians. Mission accomplishment in MOOTW, then, demands a more permissive standard.

Due to the nature of the MOOTW mission, there is less likelihood of the U.S. violating international law or straining credibility by employing civilian augmentees in such operations. The cumulative effect of the factors cited above, decreases the likelihood that we would use civilian augmentees in a manner that would violate the principle of distinction, or that would endanger our credibility for some perceived violation of it.

While cost alone seemed a significant reason to employ the RC in these operations, the inability of the RC to mobilize on short notice is a definite drawback, the study noted. By design, it concluded, most RC units could not contact unit personnel, assemble personnel and equipment, and ready all of the above for deployment. *Id.* at 69. A bigger hindrance, the study concluded, was the law: by law, the RC may be used for a peacetime contingency operation only if members volunteer or if involuntary authorities are invoked, such as a PSRC. *Id* at 70. *See also, supra* note 372. Based upon the totality of the evidence, the study concluded that civilian contractors will continued to be employed for peacetime contingencies until and unless current impediments are removed. *Id* at. 73.

[378] *See* FM 100-5, OPERATIONS, *supra* note 33, at 12-6.

[379] *See* RAND Study, *supra* note 377, at 70.

8. Consistent With, And Fills Gaps Remaining In, New Army Doctrine on Contractors on the Battlefield

The function of this new Army doctrine regarding contractors, detailed in FM 100-xx, is to describe the mission, organization, functions, and location of contracting elements down to division level. It describes how these contracting elements control and manage the contractors they bring to the battlefield, and identifies the key players in the planning, managing, and provision of contracting services on the battlefield.[380] It also discusses the potential risks of using civilian augmentees, and the need for a risk assessment that supports the decision making process.[381]

Like other Army Field Manuals (FM), it is a source of information for commanders and staffs. In this case, the focus is how to plan for and obtain contracting support when deployed and provides a process by which commanders may do so. This recognizes the vast need to assemble a logistical infrastructure before deployment. To do so, a force must be assembled which can meet this need.[382]

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[380] *See* FM 100-xx, *supra* note 18, at C-37-43.

[381] *Id.*

[382] *Id.* at C-29. According to doctrine, assembling the force modules to provide support to a force performing its operational mission is the responsibility of the Army Service Component Commander (ASSC). As the

In general terms, this FM also addresses several points that are very relevant to this thesis. That they are raised and closed without resolution signals that they must be resolved by policy. The first is the issue of status. The document indicates that "the status of a contractor engaged in support of a military operation concerning exposure to hostile action or capture by an enemy force in unclear under the laws of war."[383] While this is technically true, it is hardly a satisfactory answer for military commanders. It is a gap that must be filled by policy.

Next, the FM places great emphasis on the principle of distinction and, in no uncertain terms, advises commanders that they "will not put contractors in a position that jeopardizes" this status [as noncombatants.][384] While this, too, is an accurate statement of the law and fine

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embedded initial support structure can provide only minimum essential support functions and capabilities, contracting force structures at theater and operational levels include early entry modules (EEM) to establish operations before the insertion of ground forces. As the deployed force grows, the support structure adds necessary capabilities. This is generally done through contingency contracting, host nation services, and LOGCAP, and usually done at Echelons Above Corps (EAC) or theater levels. *Id.*

It is noteworthy that doctrine recognizes a unique dynamic in modern operations: the corps and echelons below corps are normally fully engaged in their tactical missions and, if they are given operational-level support requirements, they must be augmented by operational-level combat service support organizations to provide logistical capability to the force Contracting augmentation is the most common method of doing so.

[383] *Id.* at C-21.

[384] *Id. See also supra* note 375 and accompanying text.

generic advice for commanders, it does not help them answer the questions of how augmentees are to be used or where they should be placed. Policy must do so.

According to doctrine, logistical support is provided at three levels that correlate to the three levels of war: strategic, operational, and tactical.[385] The proposed policy urges an analysis using these same levels. However, it requires planners at all three levels to fully consider civilian augmentation issues in full cognizance of the legal requirements.

This requirement will impact planners at different levels in different ways. Strategic planners, for example, might have to decide whether the use of contractor personnel in combat theaters is desirable at all in view of our legal obligations. Operational-level planners, likely faced with the requirement to use augmentees, might focus on positioning the

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[385] *Id.* at C-77. Strategic logistics provides the linkage between the nation's economic base and the military force and is primarily the purview of DoD, the component services, and non-DoD Government agencies with the support of the private sector. The focus at this level is on requirements determination, personnel and materiel acquisition, stockpiling, and strategic mobility.

Operational logistics provides the linkage between the strategic and tactical levels. It deals primarily with support to joint and combined operations, and other military activities within an area of operations. DOD civilians, contractor personnel and equipment, and available host nation resources augment military units making up the organizational structure at this level. The primary focus at this level is on reception, positioning of facilities, materiel management, and distribution. *Id.*

Tactical logistics is the synchronization of all CSS activities required to sustain soldiers and their weapons systems. Military units organic to the deployed tactical force make up the bulk of the logistics organization at this level. However, the organization may include some support from DoD civilians and contractors. The focus of the tactical logistician is on the logistics sinews of arming, fueling, fixing, moving, and sustaining the soldier and his equipment. *Id.*

bulk of civilian personnel at logistics bases far from active theaters. Tactical planners—faced with having to arm, fuel, fix, move, and sustain their troops to win the fight or restore peace—will have the most difficult job of all regarding augmentees. Faced with the reality that he must deploy with civilian augmentees to support his forces, the tactical commander must then decide how to use them and protect them to comply with the law of war. This has been, from the opening hypothetical and throughout the paper, the real focus. Though the commander of forces on the ground possesses great authority, reality is that his or her sphere of influence is limited. His will not be to determine how many personnel he is given to perform the mission. Hers will not be to determine whether civilians will be necessary to assist. These decisions will likely be made long before, by those at higher pay grades.

He or she will be responsible, however, to determine how those assets will be employed within that theater of operations, and any related legal obligations will fall upon the commander. To the greatest degree possible, then, this policy is consistent with new doctrine on the use of contracting support, for it strives to fill gaps that remain in the doctrine, and it tries to remain cognizant of the ground commander's sphere of influence.

IX. Epilogue: Bosnia, 2 January 2000

Meeting for the third time since the New Years' Eve incident, the SJA was prepared to

provide his final briefing to the CG. There had been other such meetings over the past 2 days, but this one, thankfully, would bring this matter to a close. With his BOLT in tow, the SJA advised the CG that the best possible resolution, both near and long-term, had been achieved.

"The Serbs have released our people," the SJA began, "including the body of the contractor killed. Though they did not buy the argument about POW status because this is clearly not international armed conflict and the law of war does not apply, they were placated by our assertions of their status as Experts on Mission. The real linchpin, however, Sir, is our promise to take some action against these guys. Our diplomatic mission promised we would."

"I understand that," responded the CG, "but, as you have explained to me many times before when we have discussed discipline, Congress enacts the laws—even the UCMJ"--he laughed, "and I guess Congress will need to take a look at jurisdiction over civilians. I am more concerned with this status issue: we're still here, we're staying here, and it is my responsibility to protect and, what's the term, distinguish? these folks. What's your determination on their status as targets?"

"Major Rellim is here to brief you on the latest in this regard. As it turns out, he has

discovered that a new policy is being considered. . . on exactly this issue. . . "

X. Conclusion

Having begun by introducing the problem through the use of a hypothetical, this paper has come full circle to introduce, in the epilogue, the solution to the problem. To the commander of the 1st CAV Division in the hypothetical, the gap in the law relative to MOOTW created serious operational issues—issues which may well, if they had arisen in the "real world," threatened mission accomplishment.

By examining the development of international law as it relates to civilians, a pattern of concerns has been discerned that leads to the conclusion that this gap can and needs to be filled. By concentrating acutely on the principle of distinction, which lies at the very core of the law of war, a framework has been established that allows international law, once again, to evolve to meet the needs of the victims and participants of modern military operations.

The vehicle chosen to solve the problem is a legitimate one. Through the use of an age-old customary principle and the practice of nations, in combination with a pragmatic interpretation of the simple and well-accepted phrase "taking a direct part in hostilities," a basis has been created for a policy which strives to lessen an immense burden on military

commanders and soldiers alike.

The modern American soldier trains to master high-tech weaponry of unprecedented lethality. At the same time, he or she deploys to maintain a shaky peace between factions that have been warring for thousands of years. The commander is responsible for ensuring that U.S. soldiers are capable of performing flawlessly, under the veritable microscope of world opinion. Not only this, the commander is also entrusted with the lives of a group of people he has never seen before, and over whom he has precious little control.

The commander is expected to utilize them properly, place them appropriately, train them when required, ensure their safety, and comply with the law—all at the same time. To do so, the commander needs specific guidance. This thesis and the policy appended to it strive to give this guidance. If it fails to do so and does nothing more than stimulate debate, it will have served an important need.

APPENDIX A

SUBJECT: Policy Memorandum—Contractors on the Battlefield

Purpose. The purpose of this memorandum is to revise existing policy on the use of U.S. civilian augmentees in support of U.S. Army operations. This policy applies to all U.S. Army Elements, civilian employees of the Department of the Army, and Department of the Army contractors.

Summary. The policy is applicable to all U.S. Army operations. The basis of the policy is a pragmatic interpretation of which civilian augmentees take direct part in hostilities by causing direct harm to the personnel or equipment of an enemy force. The policy is bifurcated, with different standards applicable depending on the conflict nature of the operation. Specifically, the policy sets forth a more restrictive standard for the deployment and use of civilian augmentees in operations involving armed conflict, and a more permissive standard for the deployment and use of civilian augmentees in MOOTW.

Authority. The Secretary of the Army or designee (usually the Combatant Commander), in conjunction with the National Command Authorities, shall determine the exact nature of the operation, must approve recommendations for the provision of contractor support and the degree of support required, and the criteria to be employed regarding civilian augmentee status.

Focus. The focus of this policy is the status as targets of U.S. civilian augmentees accompanying U.S. Army forces into active theaters of operations. It is clear from previous operations involving the use of civilian augmentees that they can make strong contributions and can be effective Combat Service Support and Combat Support force multipliers. It is also clear, however, that international law imposes special responsibilities upon military commanders regarding the utilization of these unique members of the force, especially as it relates to their status as potential targets.

Legal Requirements. Military commanders at all levels are obligated to consider and comply with the law of war and the principle of distinction when planning for and utilizing civilian augmentees in the field. In accord with U.S. policy regarding the law of war, U.S. forces will comply with the law of war in all operations, regardless of nature. This includes application of the principle of distinction, which requires the physical separation and distinction of those acting as combatants from those not doing so.

Bifurcated Standards. Because of the increased risks of armed conflict operations, a more restrictive standard will be employed to assess the utilization of civilian augmentees in operations involving armed conflict or likely to result in such conflict. By definition, combat operations will be those in which a hostile force has been declared. Civilian augmentees will be used in armed conflict operations only when absolutely necessary. Their status will be

determined in advance, and both contractors and individual contract employees will be advised of their status before deployment, preferably upon formal assumption of their duties. Lastly, if civilian augmentees are so deployed, they will be utilized within theaters of operations in accord with the principle of distinction.

In MOOTW, commanders and planners will have greater latitude in the decision to deploy and utilize civilian augmentees in the field. Due to the decreased risk to augmentees in MOOTW, there will be greater disparity in their status as targets throughout a theater of operations. Individual commanders must, however, continue to comply with the law of war and the principle of distinction in the deployment and use of civilian augmentees.

Status Determinations. Status in all cases will be determined on the basis of whether, according to their FUNCTION, augmentees "take direct part in hostilities." Ultimate authority to make this determination rests with the operational commander that has the authority to select the force package deployed for that particular mission. In the case of armed conflict operations, this will usually be the Army Service Component Commander (ASCC). In the case of MOOTW, it will be the commander that task organizes for the MOOTW mission or acts as commander for such a mission. This determination must be made in consultation with the commander's legal advisor.

A. Status in Armed Conflict. Due to the increased risk of harm to augmentees and the commander's legal obligation to clearly distinguish those taking part in hostilities from those not doing so, a restrictive standard is applied in operations involving or likely to involve armed conflict. Operations involving or likely to involve armed conflict are those in which a hostile force has been declared. The basis of the determination is the same: pragmatic application of whether the augmentee's function is considered taking part in hostilities.

The policy is more restrictive in armed conflict operations in a number of respects:

The number of civilian augmentees used in armed conflict operations should be kept to an absolute minimum. Organic Combat Service Support assets must be used to the maximum extent possible. This may necessitate increased reliance upon uniformed Reserve Component assets, if possible.

Augmentees identified as "quasi-combatant," meaning that they have been determined to perform functions that are taking part in hostilities, will be distinguished from any civilians not deemed so. This may be accomplished in the following ways:

All augmentees identified as taking part in hostilities by virtue of their function will be placed in uniform. They will also receive chemical protective gear and training on the use thereof, as appropriate to the threat. This issuance/training will be conducted at home station

or at the CONUS replacement center prior to deployment. In accord with other DOD guidance, they will receive Geneva Convention Identification Cards and may receive personal weapons for their self-defense. The option to accept a weapon is voluntary, and civilian augmentees requesting issuance of weapons will receive training regarding same at home station or a CONUS replacement center prior to deployment.

Augmentees identified as not taking part in hostilities will not be deployed within the Combat Zone (CZ), defined as the area required by combat forces to conduct operations. The CZ begins at the forward line of own troops (FLOT) and extends to the Communications Zone (COMMZ) boundary. The COMMZ extends from the rear of the CZ in the theater of operations to the CONUS base and includes the Theater Logistics Base (TLB). The TLB is the furthest-forward point where non-uniformed augmentees will be utilized. In no cases, without approval of the Combatant Commander, will civilian augmentees be deployed forward of the TLB.

Even within the TLB, non-uniformed civilian augmentees should, to the greatest extent possible, be separated from uniformed personnel. They should remain separated from strategic reserves such as fuel and ammunition, theater missile defense systems, air fields or air bases, or other items which may qualify as legitimate targets for enemy attack. One suggestion is to place civilian augmentees in areas where commanders will locate members of non-governmental relief organizations or private organizations.

Host nation support will be limited to absolute minimum requirements. If so employed, host nation contractors will not be allowed forward of the theater logistics base.

No third country nationals will be employed as contractors in U.S. combat operations. Only U.S. civilian or contract employees may be deployed into combat theaters.

Military Jurisdiction Over Civilian Augmentees. To the greatest degree possible, persons charged with negotiating contracts for civilian augmentation will include provisions subjecting augmentees to the disciplinary control of military commanders. This will include compliance with general orders.

The following chart depicts specific status determinations in armed conflict operations. Civilian augmentees deemed combatants for status purposes are identified by "COM." All others are deemed non-combatants and retain civilian status.

Supply Operations (NONCOMBATANTS UNLESS INDICATED)	**Field Services (NON-COMBATANTS UNLESS INDICATED)**	**Other Maintenance and Services (AS INDICATED)**	**Systems Contractors (COMBATANTS AT ALL TIMES)**
All Classes of Supply Except Class X	Clothing Exchange/Bath	**Maintenance:** Aviation (AVUM, AVIM, Rear-area) & Tactical Vehicle Maintenance= COM All others= NO	**Weapons Systems:** Operation or Maintenance of any tactical system
Ammunition: Transport and Handling=COM	Laundry	**Transportation:** Tactical=COM Fuel, Ammunition, Weapons, Combat Supplies= COM All others= NO	**Navigational Systems:** Radar, etc.
Petroleum: (bulk& packaged) Transport and Handling=COM	Clothing Repair	**Medical Service**= NO	**Intelligence:** CA, Psyops, Recon
Personal Demand and Hygiene	Food Service/ Water Treatment/ Water Well Drilling	**Engineering and Construction** Any facility used by troops (port, pier, base, etc.)=COM= Facilities Construction, Seaport Construction, Aerial Port construction, Road Construction All others, e.g. civilian infrastrucutre= NO	
Medical Materiel and Supplies	Mortuary Affairs	**Signal Support Services** Any system used tactically or for information warfare= COM (regardless of degree)	
Repair Parts: Transport, Handling, Use for Tactical Vehicles and Weapons Systems=COM	Hazardous Materials/ Waste Disposal Services	**Support of Army Personnel & Equipment Retrograde** Direct Support or Tactical Vehicle=COM	

Office Supplies and Equipment	**Billeting** On-site troop billets= COM	**Power Generation and Distribution** Direct Combat Support= COM General Public Use= NO Combination=COM	
Organizational Clothing & Individual Equipment: C.I.Facility=COM	**Facilities Management** ISB, Land Base, Air Base, Port Operations= COM	Standard Army Management Information System Operations (STAMIS)=COM	
	MWR		
	Information Management Any system used tactically in Information Warfare (regardless of degree)=COM		
	Personnel Support Combat Support=COM (Engineers, camp construction, etc) Non-combat support=NO (clerical support)		

B. Status in MOOTW. Due to the decreased risk of harm to augmentees and the decreased number of augmentees likely to be taking direct part in hostilities, a more permissive standard is applied in MOOTW. While the basis of the determination is the same: pragmatic application of whether the augmentee's function is considered taking part in hostilities, commanders are given more discretion in the deployment and placement of

civilian augmentees.

The policy is more permissive in MOOTW in a number of respects.

While the number of civilian augmentees used in MOOTW should be minimized to the greatest extent possible, it is recognized that organic Combat Service Support and availability of uniformed reserve component assets may be limited.

The number of augmentees identified as "quasi-combatant," meaning that they have been determined to perform functions that may take part in hostilities, will likely be lower in MOOTW, but those so identified must still be distinguished from any civilians not deemed so. This may be accomplished in the following ways:

All augmentees identified as potentially taking part in hostilities by virtue of their function will be placed in uniform. In accord with other DOD guidance, they will receive Geneva Convention Identification Cards and may receive personal weapons for their self-defense. The option to accept a weapon is voluntary, and civilian augmentees requesting issuance of weapons will receive training regarding same at home station or a CONUS replacement center prior to deployment. In no case will augmentees considered noncombatants be issued weapons.

Unlike armed conflict situations, augmentees identified as not taking part in hostilities may be deployed outside of established TLBs as required. Care should be taken, however, to minimize their exposure to regular or irregular military forces operating in the area of operations (AO).

Throughout the AO, non-uniformed civilian augmentees should, to the greatest extent possible, be separated from uniformed personnel. They should remain separated from strategic reserves such as fuel and ammunition, theater missile defense systems, air fields or air bases, or other items which may qualify as legitimate targets for enemy attack.

Host nation support will likely be used much more extensively in MOOTW. If so employed, host nation contractors should be separated from uniformed troops to the maximum extent possible.

Third country nationals may also be employed as contractors in U.S. MOOTW operations. Where possible, only U.S. civilian or contract employees should be utilized. However, if third country nationals are used, they should be separated, to the greatest extent possible from uniformed troops and civilian augmentees, and legitimate military targets. Under no circumstances should third country nationals be used in situations requiring them to wear uniforms.

The following chart depicts specific status determinations in MOOTW operations. Civilian augmentees deemed combatants for status purposes are identified by "COM." All others are deemed non-combatants and retain civilian status. The categories are the same as those used above and correspond to a list of services provided by contractors under the LOGCAP contract and other contracts in past operations.

The principal difference between the two charts, however, is that in MOOTW, the vast majority of such services are used for the support of the local populace in peacekeeping or peace enforcement. Based upon the application of a more permissive standard, many categories differ in status, therefore, from the chart above.

Supply Operations (NONCOMBATANTS UNLESS INDICATED)	**Field Services (NON-COMBATANTS UNLESS INDICATED)**	**Other Maintenance and Services (AS INDICATED)**	**Systems Contractors (AS INDICATED)**
All Classes of Supply Except Class VII, which is not done w/in a theater of operations	Clothing Exchange and bath	**Maintenance:** Aviation (AVUM, AVIM, Rear-area) & Tactical Vehicle Maintenance= COM All others= NO	**Weapons Systems:** Operation or Maintenance of any tactical system=COM
Ammunition: Transport & Handling=COM	Laundry	**Transportation:** Tactical transport of, Ammunition, Weapons= COM All others= NO	**Navigational Systems:** Radar, etc=NO.

Petroleum: (bulk& packaged)	Clothing Repair	**Medical Service**= NO	**Intelligence:** CA, Psyops, Recon=NO
Personal Demand and Hygiene	Food Service/ Water Treatment/ Water Well Drilling	**Engineering and Construction** Any facility used by troops (port, pier, base, etc.)=NO Facilities Construction=NO Seaport Const/ Improvemen=NO Aerial Port Constr./Improv=NO Utilities=NO Road Constr./Improvement/ Lines of Communication=NO All others, e.g. civilian infrastrucutre= NO	
Medical Materiel and Supplies	Mortuary Affairs	**Signal Support Services** Signal Support Services: In-transit Visibility (IVA) Total Asset Visibility (TAV Any system used tactically or for information warfare= COM	
Repair Parts	Hazardous Materials/ Waste Disposal Services	**Support of Army Personnel & Equipment Retrograde** Direct Support or Tactical Vehicle=NO	
Office Supplies and Equipment	**Billeting** On-site troop billets	**Power Generation and Distribution** Direct Combat Support=NO General Public Use= NO	

Organizational Clothing & Individual Equipment	**Facilities Management** ISB, Land Base,Air Base, Port Operations	Standard Army Management Information System Operations (STAMIS)=NO	
	MWR	**Communications Support:** NO	
	Information Management All systems		
	Personnel Support Combat Support Non-combat support		

Conclusion. It is incumbent upon military planners and commanders to protect civilian augmentees accompanying military forces. In order to do so, and to comply fully with the law of war obligation to distinguish civilians taking no part in hostilities from those that do, commanders and planners must minimize the number of civilian augmentees deployed in support of military operations. When civilians are deployed, they must be carefully categorized and separated in compliance with the law of war.