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## Civilians on the Battlefield: By Using U.S. Civilians in the War on Terror, Is the Pot Calling the Kettle Black?

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# Civilians on the Battlefield: By Using U.S. Civilians in the War on Terror, Is the Pot Calling the Kettle Black?

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## I. INTRODUCTION

*Imagine this scenario* . . . February 19, 2013, 2300 hours local time, in the mountains of Afghanistan. A known terrorist leader is meeting with two of his lieutenants in a small hut, in a small mountain village. Without warning, the room in which he is sitting explodes, killing the three terrorists instantly. Also killed are the woman and two children in the neighboring house. What none of these victims knew was that for weeks, a number of Americans had been watching them and planning the missile strike from an unmanned aerial vehicle (UAV). What makes this fictional strike legally interesting, and is the focus of this Article, is the involvement of civilians in the strike.

A lethal strike, such as the one described above, may very well involve civilians during all phases of the operation. For instance, the UAV may have launched from an airstrip in Afghanistan where a civilian contractor serviced the airstrip. Prior to the launch, the military commander that authorized the strike may have received advice from an intelligence officer, who in turn received expert analysis from a civilian contractor. A myriad of other civilians may have supported the military members at their base, ranging from the third country nationals that run the laundry and dining facilities, to the Department of Defense (DoD) civilian employees that provide morale, welfare, and recreation (MWR) services such as internet cafes and movie theaters. Change the location of the strike to Pakistan or other Middle Eastern countries and civilian employees of the Central Intelligence Agency (CIA) very well could have approved and executed the mission. Each of these civilians, in their own way, is supporting a U.S. combat mission, but their activities do not have the same legal importance. This Article will examine some of the issues raised by this scenario.

Since 9/11, America has been engaged in the so-called War on Terror.<sup>1</sup> While some in academia debate whether the conflict against al-Qaeda and associated groups is in fact a “war,” the fact remains that the United States has been and continues to be actively involved in combat or combat-like activities around the world aimed at stopping or minimizing the ability of terrorists to attack the United States or its allies. In many, if not most, instances of the United States’ application of combat power, civilians are present and actively involved in the process. At the same time, the United States continues to grapple with the question of the legal status of our enemy and the legal justification for our use of force, including questions about who applies the force, where, and under what circumstances.

A full analysis of the legal bases for the use of force in the War on Terror is beyond the scope of this Article. Instead, this Article will describe the modern usage of civilians by the United States in its prosecution of the War on Terror and will seek to analyze the actors’ status in terms of the Law of Armed Conflict (LOAC),<sup>2</sup> including the implications for U.S. policy regarding the targeting and capture and trial of members and supporters of al-Qaeda. Part II will describe the modern trend of using civilians to employ armed force, including the use of CIA operatives to employ UAV-launched missiles to engage terrorists. Part III will discuss and apply the various legal principles found in the LOAC to the facts as described. Part IV will then analyze and discuss the implications of U.S. policy and action and will describe various alternative proposals that may help clarify the legal issues at stake.

By using civilians not only to support combat troops on the battlefield, but also to directly engage the enemy by way of covert activities, such as drone strikes, the United States runs the risk of weakening the firm LOAC barrier between combatant and civilian that seeks to protect civilians from harm. Such use of civilians also runs the risk of undermining the United States’ credibility when characterizing the illegality of the actions of our terrorist enemy. This Article will seek to address two key aspects of this problem: first, whether the use of civilians by the United States violates the LOAC, and second, whether such use undermines the legal theory upon which the United States

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1. While the phrase “War on Terror” may no longer be used by the U.S. Government to describe the recent conflict in Iraq and the ongoing conflict in Afghanistan, this author uses it as a general descriptive phrase to refer to Operation Iraqi Freedom, Operation Enduring Freedom (Afghanistan), as well as the drone strikes, which have taken place in locations such as Pakistan, Yemen, and Somalia.
  2. The title “International Humanitarian Law” (IHL) is often used to describe the body of law governing when a State may go to war (*jus ad bellum*) and how it may conduct itself in war (*jus in bello*). “Law of Armed Conflict” is also frequently used interchangeably to describe this body of international law. Because this author believes “Law of Armed Conflict” more accurately describes the true nature of war, that phrase will be used throughout.

bases its targeting and prosecution of al-Qaeda and associated terrorists.

This Article will conclude that U.S. civilian actions are not per se LOAC violations (“war crimes”), but will further conclude that, based on the types of activities undertaken by civilians, and based on the current Military Commissions Act (MCA)-based prosecutions of terrorists, the use of some U.S. civilians on or in support of the battlefield undermines the U.S. position vis-à-vis terrorists.

## II. FACTUAL BACKGROUND

### A. Civilianization

During this author’s deployment to Iraq in 2009 at a division-level headquarters, numerous types of actors were personally observed. These included active and reserve component military members, DoD civilians, civilian contractors, third country national (TCN) civilians, and civilian employees of other U.S. agencies and departments. The use of civilians on or near the battlefield is not unique to the recent conflict in Iraq or the ongoing conflict in Afghanistan. Indeed, civilians have performed tasks with or for the U.S. military in every major conflict since the Revolutionary War.<sup>3</sup> While to some degree the privatization of military or military-related functions has been cyclical,<sup>4</sup> since the early 1990s the use of civilians in support of America’s military objectives has increased dramatically.

Many attribute the increased use of civilians in military operations with the end of the Cold War.<sup>5</sup> Professor Sullivan, for instance, notes that the end of the Cold War caused a “public eagerness for a ‘peace dividend’ [and] sparked a dramatic troop drawdown in the West.”<sup>6</sup> In response to the demand for a “peace dividend,” Congress mandated that the DoD convert 10,000 uniformed billets into civilian positions by the end of Fiscal Year 1997.<sup>7</sup>

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3. See, e.g., Lt. Col. Thea Harvell III, Department of the Army Civilians in Support of Military Operations: How Should Current Policies Change to Better Support Them on Today’s Battlefield?, 1–2 (unpublished U.S. Army War College Mar. 18, 2005), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA432749>. The author describes how civilians were used to support the U.S. Army during the Revolutionary War, the Civil War, both World Wars, and virtually every major armed conflict before and since.
  4. Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 144–45 (2005).
  5. See, e.g., Scott M. Sullivan, *Private Force/Public Goods*, 42 CONN. L. REV. 853 (2010).
  6. *Id.* at 880–81.
  7. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1032, 110 Stat. 186, 429.

This reduction in active-duty troops did not necessarily equate to a reduction in workload, however. As the United States found itself involved in various “peacekeeping” and other humanitarian operations throughout the 1990s, there was an urgent need to perform roles once occupied by a much larger active-duty military force. During the 1990s, the United States reduced its armed forces by 35%. On November 9, 1989, at the time that the Berlin Wall fell, the U.S. military had 2.1 million active-duty members.<sup>8</sup> By September 11, 2001, however, there were only 1.4 million members in the U.S. armed forces.<sup>9</sup>

A second reason for the increased reliance on civilians was the use of advanced technology by the military.<sup>10</sup> Some argue that the use of advanced technology by the military has outpaced the military’s ability to train operators and maintenance personnel, thus creating a need to use contractors to maintain and operate certain types of equipment.<sup>11</sup> For instance, contractors maintain, among other things, the F-117 stealth aircraft, the M1-A1 main battle tank, the Patriot missile defense system, the Apache helicopter, and all types of UAVs.<sup>12</sup>

Thirdly, some argue that the United States prefers privatization of many former military functions because it leads to reduced accountability, both because actions can be attributable to a corporation, even if contracted by the U.S. Government, and because certain records may not be as readily accessible through the Freedom of Information Act.<sup>13</sup>

Regardless of the reasons, the privatization of military-related functions enables the United States to maintain a relatively small active-duty component, while maintaining the capability of projecting power and deploying significant combat force. By using contractor support, the force is “scalable” in the sense that contracts can be made for deployments, and then cancelled during peace, all while maintaining a smaller military footprint.<sup>14</sup> Civilianization also provides fiscal benefits through a decrease in the number of active-duty pensions and benefits paid out and a political dividend because a force could deploy

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8. Col. W. Hays Parks, USMC (Ret.), Former Senior Associate Deputy General Counsel in the International Affairs Division of the DoD’s Office of General Counsel, Address at the NYU Panel at the Tikvah Center for Law and Jewish Civilization and the Institute for International Law and Justice: Privatization of War: the Role of Civilians (Mar. 8–10, 2010) (transcript available at [www.nyutikvah.org/events/docs/papers/Parks\\_Privatization\\_of\\_War.pdf](http://www.nyutikvah.org/events/docs/papers/Parks_Privatization_of_War.pdf)) [hereinafter Parks’ Address].

9. *Id.*

10. Sullivan, *supra* note 5, at 881.

11. See, e.g., Eric Christensen, *The Dilemma of Direct Participation in Hostilities*, 19 J. TRANSNAT’L L. & POL’Y 281, 295 (2010).

12. J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F. L. REV. 155, 190 (2005).

13. Dickinson, *supra* note 4, at 191–92.

14. See Sullivan, *supra* note 5, at 885.

to a conflict zone and expect relatively fewer troops to return home in flag-draped caskets.<sup>15</sup>

The United States now routinely relies on civilians and contractors to guard prisoners, analyze intelligence, build and operate overseas combat zone bases and posts, repair and service sophisticated equipment, train U.S. and foreign soldiers, conduct interrogations, and perform many other functions.<sup>16</sup> In the first Gulf War, the ratio of civilian contractors to military members was 1 to 36.<sup>17</sup> During the conflict in the former Republic of Yugoslavia, the ratio was 1 to 10,<sup>18</sup> and as of 2010, the ratio in Iraq and Afghanistan exceeded 1 to 1.<sup>19</sup> Indeed, by 2015, the DoD has committed to hiring 20,000 new contract-monitoring personnel just to manage the contracts governing civilian personnel.<sup>20</sup> Candidly, when testifying before Congress in 2007, General David Petraeus noted that the U.S. military “would not be able to function in Iraq at all without contract security personnel.”<sup>21</sup>

## B. Specific Types of Civilians

The increased use of civilian labor to support U.S. combat efforts takes many forms. Broadly speaking, the civilians on or near the battlefield fall into one of three categories. They are either DoD employees, employees of private corporations that have been hired through contract to support U.S. military efforts, or employees of another U.S. government agency or department (e.g., the CIA or the Department of State (DoS)).<sup>22</sup>

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15. Dickinson, *supra* note 4, at 149–50. This does not imply that contractor deaths are any less deplorable, but instead reflects the sad reality that service member deaths appear, at least anecdotally, to garner more attention and have a greater negative political impact.
  16. Laura A. Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 N.Y.U. J. INT'L L. & POL. 355 (2010).
  17. Maj. Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 111 n.5 (2001).
  18. *Id.*
  19. Laura A. Dickinson, *Outsourcing Covert Activities*, 5 J. NAT'L SEC. LAW & POL'Y 521 (2012).
  20. *Id.* at 531–32, 532 n.39.
  21. Dickinson, *supra* note 16, at 357 (citing *Nomination of Lt. Gen. David H. Petraeus to be General and Commander Multi-National Forces, Iraq: Hearing Before the S. Comm. on Armed Services*, 110th Cong. (2007) (statement of Lt. Gen. Petraeus), available at [http://dpc.enate.gov/dpcdoc.cfm?doc\\_name=OR-110-1-13#Link3](http://dpc.enate.gov/dpcdoc.cfm?doc_name=OR-110-1-13#Link3)).
  22. Present on the battlefield are also numerous non-governmental organization (NGO) representatives, but because their activities generally do not implicate LOAC issues, they are not the focus of this Article.

### 1. DoD Employees

The DoD directly employs more than 700,000 civilian employees,<sup>23</sup> many of whom are deployed alongside active and reserve military members. The work performed by these employees ranges from low-paid clerks in the Pentagon and military bases scattered around the United States to highly trained scientists in research laboratories and analysts and managers deployed overseas. Civilian employees are especially prevalent in logistics and support-type jobs such as shipyards, logistics centers, arsenals, and repair depots.<sup>24</sup>

Many of the DoD's civilian employees are required, as a condition of their employment, to be ready and willing to deploy with the Armed Forces to combat zones and other high-risk areas. These employees are designated as "emergency essential" (E-E), and are required by law to "provide immediate and continuing support for combat operations or to support maintenance and repair of combat essential systems of the armed forces."<sup>25</sup> Additionally, by law, the work performed by E-E employees cannot practically be performed by military members "because of a necessity for that duty to be performed without interruption."<sup>26</sup> Most E-E employees that deploy to combat zones perform logistics and engineering support roles, though some perform jobs such as recreation specialist to help deployed soldiers find ways to recreate and relax when off-duty.<sup>27</sup>

### 2. Private Military Companies/Contractors

While there are certainly still numerous DoD civilian employees deployed with U.S. armed forces around the world, the trend has been to replace many civilian employees with contracted civilians.<sup>28</sup> In 2009, United States Central Command, which at the time was overseeing the conflicts in both Iraq and Afghanistan, had contracts for approximately 243,000 civilians to support the two conflicts.<sup>29</sup> In fact, by late 2009, security contractors outnumbered all foreign troops in

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23. CAREERS IN NATIONAL DEFENSE, <http://www.godefense.com> (last visited Mar. 14, 2012).

24. Heaton, *supra* note 12, at 184–85.

25. 10 U.S.C. § 1580(a)(1) (2006).

26. 10 U.S.C. § 1580(a)(3).

27. THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK, 231 (2008) [hereinafter OPLAW Handbook].

28. See, e.g., *Transforming the Department of Defense Personnel System: Finding the Right Approach: Hearing Before the S. Comm. on Governmental Reform*, 108th Cong. (2003) (statement of Donald H. Rumsfeld, Secretary of Defense) (noting that due to perceived difficulties in managing civilian employees, 83% of civilians supporting the U.S. military at the beginning of Operation Iraqi Freedom were contractors).

29. Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 8 (2010).

Iraq (except the United States) and in Afghanistan (except the United States and the United Kingdom).<sup>30</sup>

The U.S.' *Operational Law Handbook* refers to these employees as "Contingency Contractor Personnel" and breaks their services down into three categories: (1) external support (those hired from outside the theater of operation, such as TCNs, to support deployed forces); (2) systems support (those with technical expertise hired to support key weapons systems and communications gear); and (3) theater support (those hired from local vendors to meet the immediate needs of operational commanders, such as fuel and transportation support).<sup>31</sup> Examples of the services contractors provide include "communication services, interpreters, base operations services, weapons systems maintenance, gate and perimeter security, [and] intelligence analysis."<sup>32</sup>

One of the largest and most widely used contracting firms is Kellogg, Brown, and Root. This firm's employees are ubiquitous in Iraq and Afghanistan and they "built and maintained military bases, transported troops and equipment to and on the battlefield, repaired and maintained roads and vehicles, distributed water and food to troops, washed laundry, refueled equipment, attended to hazardous materials," and performed a myriad of other services, all to the tune of roughly \$1.7 billion annually.<sup>33</sup>

### 3. *Specific and Controversial Employment of Civilians*

Some of the tasks performed by contractors are legally benign and do not implicate the LOAC in any meaningful way. Others, however, raise questions about whether the civilian is directly participating in hostilities (DPH). The contours of the concept of DPH and other applicable legal doctrines will be addressed in Part III below. For now, it is worth noting some of the more controversial tasks performed by contractors on or near the modern battlefield.

#### a. *Intelligence and Information Operations*

Both from this author's personal experience in Iraq and as reported in the literature, contractors are involved in the areas of military intelligence and information warfare.<sup>34</sup> The work performed by contractors in these areas includes intelligence analysis and the maintenance of intelligence collection and analysis sensors and computer

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30. *Id.* at 9.

31. OPLAW Handbook, *supra* note 27, at 240.

32. *Id.* at 239.

33. Dickinson, *supra* note 4, at 150.

34. *See, e.g.*, Heaton, *supra* note 12, at 190. Additionally, in this author's experience in Iraq in 2009, contractor employees were active members of the headquarters intelligence directorate. Further detail is not provided for classification reasons.

systems.<sup>35</sup> In 2009, Congress expressly banned direct intelligence gathering by contractors,<sup>36</sup> but contractors are still certainly involved in the overall intelligence business. DoD civilian employees, unlike contractor employees, may “direct or control intelligence . . . and perform intelligence activities that require the exercise of substantial discretion in applying governmental authority and/or in making decisions for the government.”<sup>37</sup>

*b. Security*

As has been highlighted by frequent media accounts throughout the wars in Iraq and Afghanistan, contractors are heavily involved in security work in combat zones, both providing security on and around military bases, as well as providing security for the U.S. DoS and various Non-Governmental Organizations (NGOs).<sup>38</sup> The number of security contractors in Iraq alone is astounding. In 2004, an estimated 20,000 security contractors were operating in Iraq,<sup>39</sup> and by 2008, the number was approximately 30,000.<sup>40</sup>

According to the U.S. Army's *Operational Law Handbook*, the general U.S. policy is for contractors to only provide security services for “other than uniquely military functions”<sup>41</sup> and if major combat operations are ongoing, “contract security services will NOT be used to guard U.S. or coalition military supply routes, military facilities, military personnel, or military property except as specifically authorized by the Combatant Commander.”<sup>42</sup> Quite clearly, for Iraq and Afghanistan, the Commander of U.S. Central Command has authorized con-

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35. *Id.* (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-695, MILITARY OPERATIONS: CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DoD PLANS (2003), available at <http://www.gao.gov/new.items/d03695.pdf>).

36. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 110-84, § 1038 (2009). Waivers are authorized in the interest of national security.

37. U.S. DEP'T OF DEFENSE, INSTRUCTION 1100.22, POLICY AND PROCEDURES FOR DETERMINING WORKFORCE MIX, encl 4, ¶ 4(b)(11) (Apr. 12, 2010).

38. See GOV'T ACCOUNTABILITY OFFICE, GAO-05-737, REBUILDING IRAQ: ACTIONS NEEDED TO IMPROVE USE OF PRIVATE SECURITY PROVIDERS 2005; see also, Heaton, *supra* note 12, at 187 (noting security contractors provide protection for many different military and government function in Iraq); Kirit Radia, *Controversial Blackwater Security Firm Gets Iraq Contract Extended by State Dep't*, ABCnews.com, Sept. 1, 2009, available at <http://abcnews.go.com/Blotter/Blackwater/blackwater-security-firm-iraq-contract-extended-state-dept/story?id=8466369#.T1ZpS8zBp7w> (discussing the extension of a contract with a private security firm to provide transportation by helicopter around Iraq for embassy employees).

39. Heaton, *supra* note 12, at 187.

40. Schmitt, *supra* note 29, at 9.

41. OPLAW Handbook, *supra* note 27, at 248–49.

42. *Id.* at 249.

tractors to provide security services in theater.<sup>43</sup> These security contractors are not authorized to engage in military actions, though they are authorized to use force in self-defense or defense of others.<sup>44</sup>

*c. Prisoner Handling and Interrogation*

Though no longer authorized, until 2009, contractors were allowed to function as interrogators of prisoners and detainees in DoD and CIA detention facilities.<sup>45</sup> Notably, contractors hired by the U.S. Department of Interior supervised some of the military members who abused detainees at Abu Ghraib prison in Iraq<sup>46</sup> and the contractors had “little, if any, training on [the] Geneva Conventions,” and little interrogation experience.”<sup>47</sup> Some of these same contractors were directly implicated in the abuse of detainees.<sup>48</sup>

*d. Translation*

Many contractors were used as translators in Iraq and continue to be used as translators in other areas of conflict. While this service does not ordinarily implicate the LOAC, it can and did where contractor translators were implicated in the Abu Ghraib abuse.<sup>49</sup>

*e. Training & Advising*

Contractors are used to provide both U.S. and foreign troops with training and advice. This training includes basic officership and soldiering, war-gaming, and tactical planning.<sup>50</sup> Although in many ways benign, some contractors performing training and advising missions actually become involved in combat operations by either providing on-site training during combat missions or by doing actual tactical mis-

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43. In this author’s personal experience, bases throughout Iraq were guarded by a combination of U.S. and Coalition military forces, as well as contractor security forces—typically TCNs.

44. See, e.g., Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 FED. REG. 56227, 56240 (Sept. 12, 2011) (noting that “combat” functions are “inherently governmental functions” and thus cannot be performed by contractors).

45. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 110-84, § 1038 (2009).

46. See, e.g., Dickinson, *supra* note 19; see also Won Kidane, *The Status of Private Military Contractors Under International Humanitarian Law*, 38 DEV. J. INT’L L. & POL’Y 361, 405 (2010) (noting that private military contractors were also involved in the prisoner abuse at Abu Ghraib prison).

47. Dickinson, *supra* note 16, at 382 (quoting Maj. Gen. George R. Fay, ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 51 2004, available at <http://fl.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>).

48. Dickinson, *supra* note 4, at 151–52.

49. *Id.*

50. *Id.* at 150.

sion planning.<sup>51</sup> Contractors provide advice on how to conduct actual combat operations to both the Iraqi and Afghani armies.<sup>52</sup>

*f. DoD Drone Operations*

According to the media, the U.S. Air Force is short of personnel to operate UAVs, analyze the intelligence feeds coming from the drones, and technicians to repair and maintain the aircraft, so civilians are often used for critical drone operations.<sup>53</sup> For instance, in 2010, a DoD drone strike in Afghanistan struck the wrong target, killing a number of innocent men, women, and children.<sup>54</sup> The ensuing investigation revealed that the UAV mission was commanded from Florida and a contractor working for SAIC was providing the real-time intelligence analysis that led to the erroneous identification of the target.<sup>55</sup> Although uniformed members operated the drone and made the actual decision to fire the missile in the above example, there are instances where contractors operated the UAV during combat missions.<sup>56</sup>

*4. Title 50 Employees & Para-Military Strikes*

Although typically referred to obliquely or through insinuation, the CIA and its employees appear to be deeply involved in the War on Terror, both before and after the events of 9/11. A number of CIA officers and employees have been killed on the battlefield,<sup>57</sup> and countless others have contributed in significant ways to the protection of Americans from further attack. From both media reports and statements by government officials, it is evident that the CIA, like the military, is involved in conducting drone strikes and direct action raids to kill al-Qaeda militants.<sup>58</sup>

Professor Robert Chesney is an expert on the “convergence” that has occurred between CIA para-military forces and DoD’s special operations forces, and he writes about the so-called “Title 10/Title 50”

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51. Heaton, *supra* note 12, at 188–89.

52. *Id.*

53. David S. Cloud, *Civilian Contractors Playing Key Roles in U.S. Drone Operations*, LOS ANGELES TIMES, Dec. 29, 2011, available at <http://articles.latimes.com/2011/dec/29/world/la-fg-drones-civilians-20111230>.

54. *Id.*

55. *Id.*

56. Maj. Lynn R. Sylmar, *Warrior Civilians—Non-Military Personnel on the Battlefield 4* (April 2009) (unpublished report submitted to faculty of Air Command and Staff College, Air University), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA538897>.

57. Daniel Nasaw & Vikram Dodd, *Eight Americans Killed in Afghan Blast Were CIA Agents*, THE GUARDIAN, Dec. 30, 2009, available at <http://www.guardian.co.uk/world/2009/dec/30/afghanistan-khost-civilians-killed>.

58. See, e.g., Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT’L SECURITY L. & POL’Y 539, 567–72 (2012).

debate within academia that deals with the blending of the roles of these two parts of the Executive Branch.<sup>59</sup> Professor Chesney describes this convergence as follows:

The military's [Joint Special Operations Command] and the CIA's [Counter Terrorism Center] appear to have developed parallel counterterrorism capacities spanning: the collection, analysis, and exploitation of intelligence; non-kinetic operations to influence events; and kinetic operations up to and including the use of lethal force outside of combat zones.<sup>60</sup>

The current domestic legal authority for the CIA's actions stems from a secret presidential finding signed by President Bush just days after 9/11.<sup>61</sup> This order modified and expanded a similar finding signed by President Reagan in 1986.<sup>62</sup> President Reagan's finding authorized the CIA to take military-style action, including the use of deadly force, when attack was imminent.<sup>63</sup> The new post-9/11 order "grant[ed] the agency broad authority to use deadly force against bin Laden as well as other senior members of al-Qaeda and other terrorist groups."<sup>64</sup> This revised order provided "programmatically approval" rather than requiring the agency "to return to the President again and again to obtain specific authorizations for particular actions"<sup>65</sup> and authorized detentions without criminal charge, use of proxy forces for lethal action, and lethal drone strikes.<sup>66</sup>

As seen in reports of the raid that killed Osama bin Laden, the CIA and the military have not necessarily operated on parallel but separate tracks in the War on Terror. While each entity has developed its own resident intelligence and operational capabilities to combat terrorists, the two entities cooperate on missions in various settings around the globe.<sup>67</sup> In fact, each organization details operators to the other and forms joint or "hybrid" tactical teams for certain missions.<sup>68</sup>

A key controversy created by the employment of CIA civilians in this manner is the military-like lethal action being undertaken by unprivileged civilians. The 9/11 Commission recommended that "[l]ead responsibility for directing and executing paramilitary operations, whether clandestine or covert, should shift to the Defense Department [to be] consolidated with the capabilities . . . already being developed

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59. *See id.*

60. *Id.* at 578.

61. *Id.* at 563.

62. *Id.*

63. *Id.* at 553–54.

64. *Id.* at 563 n.120 (quoting Joby Warrick, *CIA Assassin Program Was Nearing New Phase: Pannetta Pulled Plug After Training Was Proposed*, WASH. POST, July 16, 2009, at A1).

65. *Id.* at 563.

66. *Id.* at 564–65.

67. *Id.* at 578–80.

68. *Id.* These hybrid teams known as "omega" or "cross matrix" teams have operated in at least Iraq, Afghanistan, and Yemen.

in the Special Operations Command.”<sup>69</sup> Clearly, this recommendation was not followed. Today, 20% of the CIA operatives that work in the Counterterrorism Center are “targeters”<sup>70</sup> and “[l]ike a military commander, the CIA’s Director now routinely decides whether to launch missiles to kill various targets, balancing the advantage to be gained with the risks (including the risk of collateral damage).”<sup>71</sup>

In the past three years, the CIA has reportedly used force over 300 times in Pakistan alone, or approximately once every three days.<sup>72</sup> At least until the bin Laden raid, the Pakistan operations appear to have been conducted with notice to the Pakistani government.<sup>73</sup> However, as one U.S. Army judge advocate notes, “[p]aramilitary operatives do not meet any of the prerequisites necessary to be considered lawful combatants . . . [and] are not members of the Armed Forces and cannot be incorporated into the force.”<sup>74</sup> Many of the Pakistani drone operations are commanded by CIA officials, but are flown by the U.S. Air Force.<sup>75</sup> In Yemen, drone strikes have been a combination of DoD, CIA, and “joint” strikes (the DoD operating under CIA authority and control).<sup>76</sup>

### III. LEGAL PRINCIPLES

The activities of the civilians described above raise a number of questions in terms of the LOAC. Before analyzing these issues, it is necessary to first examine the relevant LOAC terms and categories applicable to these civilians.

#### A. Types of People Found on the Battlefield

Of the many categories of people found on the modern battlefield, the two classic and key categories are that of “combatant” and “civilian.”<sup>77</sup> These terms describe the necessary divide that allows the LOAC principle of distinction to do its work and minimize the harm

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69. *Id.* at 575–76 (quoting NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., FINAL REPORT 415 (2004)).

70. *Id.* at 562.

71. *Id.* at 569.

72. *Id.*

73. *Id.* at 568. Professor Chesney notes that in 2008, the policy appears to have changed from prior notification of Pakistani officials, to “concurrent notification,” meaning the Pakistanis would be informed as a mission was underway or complete. In 2009, President Obama approved the CIA request for more drones and expanded their use dramatically.

74. Lt. Col. Mark David “Max” Maxwell, U.S. Army, *The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?*, MILITARY REVIEW Sept.–Oct. 2004, at 17, 20.

75. Chesney, *supra* note 58, at 580.

76. *Id.* at 570.

77. OPLAW Handbook, *supra* note 27, at 15–16.

suffered by non-participants in war. A number of other terms have been developed to describe the various types of people found on the modern battlefield. All of terms are now discussed in turn.

*Combatant.* Additional Protocol I to the Geneva Conventions (AP I) says, “[m]embers of the armed forces of a Party to a conflict (other than medical personnel and chaplains . . .) are combatants” and as such “have the right to participate directly in hostilities.”<sup>78</sup> Combatants enjoy the “combatant’s privilege,” which entitles them to carry out attacks on enemy personnel and objects, yet not face prosecution for those acts under the domestic legislation of the host country.<sup>79</sup> A combatant “[m]ay only be punished for breaches of the law of war as a result of a fair and regular trial.”<sup>80</sup>

In order for a State’s armed forces to qualify for combatant status, the forces must meet all four of the following conditions: “[1] commanded by a person responsible for his subordinates . . . ; [2] wear] a fixed distinctive sign recognizable at a distance . . . ; [3] carry[ ] arms openly . . . ; [and (4)] conduct[ ] their operations in accordance with the laws and customs of war.”<sup>81</sup> If a uniformed member meets these criteria and is authorized by his State to engage in warfare against an enemy combatant, then he is “not constrained by the law of war from applying the full range of lawful weapons against enemy combatants and civilians taking a direct part in hostilities.”<sup>82</sup>

*Armed Forces.* The armed forces of a party to a conflict, at least for purposes of a direct participation in hostilities analysis, include “both [the] regular armed forces and any organized armed group that belongs to a party.”<sup>83</sup> A member of an armed force may be attacked at any time, so long as they are not *hors de combat*.<sup>84</sup>

*Civilian.* Under the LOAC, a “civilian” is defined in the negative—it is anyone who is not a combatant.<sup>85</sup> “In case of doubt whether a

78. International Committee of the Red Cross [ICRC], *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 UNTS 3, sec II, art. 43(2) (June 8, 1977), available at <http://www.unhcr.org/refworld/docid/3ae6b36b4.html> [hereinafter AP I].

79. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 188 (2010); W. Hays Parks, *Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance: Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769, 778 (2010).

80. Parks, *supra* note 79, at 779.

81. ICRC, *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 75 UNTS 135, Part I, art. 4(2) (Aug. 12, 1949), available at <http://www.unhcr.org/refworld/docid/3ae6b36c8.html> [hereinafter GC III].

82. Parks, *supra* note 79, at 780.

83. Schmitt, *supra* note 29, at 16.

84. *Id.*

85. *Id.* at 15.

person is a civilian, that person shall be considered to be a civilian.”<sup>86</sup> Civilians, unless they meet an exception, shall never be the targets of deliberate attack.<sup>87</sup> If captured, civilians do not receive Prisoner of War (POW) status, but they do receive protections under the Fourth Geneva Convention of 1949.

*Non-Combatant.* This is a special category of military personnel that only includes medical personnel and chaplains.<sup>88</sup> These individuals are not civilians, but neither are they combatants. They are not authorized to participate in combat (other than self-defense) and upon capture, they are considered “retained persons” rather than POWs.<sup>89</sup> They may either remain with their POW compatriots to provide their services, or they may be released or exchanged back to their State’s forces.<sup>90</sup>

*Civilians Accompanying the Force.* This category of persons on the battlefield has become ubiquitous and raises many complex and interesting legal issues. “Persons who accompany the armed forces” is a category recognized and set apart for special protection in the Third Geneva Convention,<sup>91</sup> although the protection of this category of civilian goes back to the Lieber Code.<sup>92</sup> This category of civilian includes technical representatives, civilian engineers, MWR employees, logisticians, and so on. These employees receive this status when they are authorized by the DoD to accompany the military forces into a conflict zone and are given an appropriate identification card, identifying their status under the Geneva Conventions.<sup>93</sup> If captured during an armed conflict, civilians accompanying the force are entitled to POW status.<sup>94</sup>

*Organized Armed Group.* From 2003 until 2008, the International Committee of the Red Cross (ICRC) undertook to study and articulate

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86. AP I, *supra* note 78, art. 50(1).

87. Solis, *supra* note 79, at 232; *see also* AP I, *supra* note 78, art. 51 (“The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.”).

88. Solis, *supra* note 79, at 191.

89. *Id.*

90. *Id.*

91. GC III, *supra* note 81, art. 4(A)(4).

92. *See* W. Hays Parks, *Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces, delivered at the International Committee of the Red Cross’s Third Expert Meeting on the Notion of Direct Participation in Hostilities*, 4 (Oct. 2005) available at <http://www.icrc.org/eng/assets/files/other/2005-07-expert-paper-icrc.pdf> (comparing civilians accompanying the force with private civilians, i.e. those not authorized to accompany DoD forces and not given a Geneva identification card; the latter would not have POW status according to Mr. Parks).

93. U.S. DEP’T OF DEFENSE, INSTRUCTION 3020.41, OPERATIONAL CONTRACT SUPPORT, encl. 2, ¶ 1(a)(1) (Dec. 20, 2011).

94. *Id.*; *see also* GC III, *supra* note 81, art. 4(A)(4) (describing the classes of people granted POW status).

what it means for a civilian to “take a direct participation in hostilities” for purposes of Article 51(3) of AP I.<sup>95</sup> “Organized armed groups,” according to the *Interpretive Guidance*, belong to the same category as the armed forces of a party, so long as the group is organized, armed, and belongs to a party to the conflict.<sup>96</sup> These individuals are not considered to be civilians and, unlike other civilians who take a direct part in hostilities, may be attacked at any time, not just “for such a time” as they are directly participating.<sup>97</sup>

Two essential criteria for gaining the status of an organized armed group, according to the *Interpretive Guidance*, are that the group must be tied to a belligerent party and members of the group must perform a “continuous combat function” (CCF) in order to be attacked on the basis of membership alone.<sup>98</sup> The CCF may be expressed

through the carrying of uniforms, distinctive signs, or certain weapons [and] may also be identified on the basis of conclusive behaviour, for example, where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation.<sup>99</sup>

*Unprivileged Belligerent / Unprivileged Enemy Belligerent / Unlawful Combatant / Unlawful Enemy Combatant.* These are all terms used by commentators and the U.S. Government at various times and in various settings. Each is similar, but carries slightly different meanings.

First, “unprivileged belligerent” is a term historically applied to “private citizens (other than members of a *levée en masse*)<sup>100</sup> who engage in unauthorized combatant acts.”<sup>101</sup> This term has been used by the United States to describe captured members of al-Qaeda and carries with it a denial of both privileged combatant and POW statuses.<sup>102</sup> By contrast, according to at least one LOAC expert, a

95. ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, International Committee of the Red Cross, 90 INT’L REV. RED CROSS 991, 991–92 (2008) [hereinafter *Interpretive Guidance*].

96. Schmitt, *supra* note 29, at 16.

97. *Id.*; see also *Interpretive Guidance*, *supra* note 95, at 1007–09 (comparing civilians with those considered members of an organized armed group).

98. *Interpretive Guidance*, *supra* note 95, 1007–08.

99. *Id.*

100. This term has been defined by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Delalic*, No. IT-96-21-T, Judgment, ¶ 268 (Nov. 16, 1998) as “inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously took up arms to resist the invading forces, without having had time to form themselves into regular armed units, and at all times they carried arms openly and respected the laws and customs of war.”

101. Parks, *supra* note 92, at 10.

102. *Id.* at 11.

civilian accompanying the force who does take a DPH will nonetheless retain POW status upon capture.<sup>103</sup>

Second, “unprivileged enemy belligerent” is a term defined in the most recent MCA and means:

an individual (other than a privileged belligerent) who: (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under [the MCA].<sup>104</sup>

This definition broadens the prior one by adding “material support” and membership as triggers for this status.

Third, an “unlawful combatant” is defined by the ICRC as “all persons taking a direct part in hostilities without being entitled to do so.”<sup>105</sup> As with the prior categories, an unlawful combatant is denied POW status upon capture.<sup>106</sup>

Finally, “unlawful enemy combatant” is a term used in U.S. doctrine and means “persons not entitled to combatant immunity, who engaged in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict.”<sup>107</sup> The term specifically includes “an individual who is or was part of or supporting Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.”<sup>108</sup>

The prevailing view appears to hold that these terms do not represent a third category of individuals on the battlefield beyond “combatants” and “civilians.”<sup>109</sup> Instead, these categories are better viewed as descriptions used by certain States (e.g., the United States) as “shorthand expression[s] useful for describing those civilians who take up arms without being authorized to do so by international law.”<sup>110</sup> The key to understanding the importance or usefulness of

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103. *Id.*

104. 10 U.S.C. § 948A (2009).

105. Knut Dormann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 INT’L REV. OF RED CROSS 45, 46 (2003).

106. *See Solis, supra* note 79, at 207.

107. U.S. DEP’T. OF DEFENSE, DIRECTIVE 2310.01E, DoD LAW OF WAR PROGRAM, encl. 2, ¶ 1.1.2 (Sept. 5, 2006).

108. *Id.*

109. *Solis, supra* note 79, at 206–08; *see* HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Gov’t of Isr.* [2005] *IsrSC* 57(6) 285, ¶ 28 (“It does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a third category has been recognized in customary international law.”). For the opposing view, arguing that a third category has been created, *see* Mark David Maxwell, *Targeted Killing, The Law, and Terrorists: Feeling Safe?*, JOINT FORCE QUARTERLY First Quarter 2012, at 127 and Christensen, *supra* note 11, at 286 (citing *Ex parte Quirin*, 317 U.S. 1, 35 (1942)).

110. *Solis, supra* note 79, at 208 (quoting Antonio Cassese, *Expert Opinion on Whether Israel’s Targeted Killings of Palestinian Terrorists is Consonant with Interna-*

these terms is the concept of “direct participation in hostilities” and its resultant loss of protection from attack. This term will be discussed in the following sections of this paper.

## B. Key LOAC Principles

There are many LOAC principles that govern the individuals discussed herein, but three are worthy of further discussion for purposes of this paper. These are the principles of distinction (also called discrimination), necessity, and “direct participation in hostilities.”

### 1. *Distinction/Discrimination*

As noted by the International Criminal Tribunal for the former Yugoslavia, “The protection of civilians in time of armed conflict . . . is the bedrock of modern humanitarian law. . . . [I]t is now a universally recognized principle . . . that deliberate attack on civilians or civilian objects are absolutely prohibited by international humanitarian law.”<sup>111</sup> The basic rule known as distinction is found in Article 48 of AP I and 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 shall direct their operations only against military objectives.

While the United States is not a party to AP I, this provision is widely held to be representative of customary international law and as such is binding on all parties, including the United States.<sup>112</sup>

The principle of distinction does its work by placing responsibilities upon both civilians and combatants.<sup>113</sup> Combatants are obligated to refrain from directly targeting civilians, and civilians are obligated “not to use his or her protected status to engage in hostile acts.”<sup>114</sup>

### 2. *Military Necessity*

If distinction resides on one half of the scale upon which State interests are balanced with those of innocent bystanders, then the LOAC principle of “military necessity” (or just “necessity”) resides on the other half.<sup>115</sup> Military necessity has been defined as “that princi-

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*tional Humanitarian Law* (2006), available at <http://www.stoptorture.org.il/files/cassese.pdf>.

111. Prosecutor v. Kupreskic et al., No. IT-95-16-T, Judgment, ¶ 521 (Jan. 14, 2000).

112. See Solis, *supra* note 79, at 252.

113. Parks, *supra* note 79, at 772–73.

114. *Id.*

115. Schmitt, *supra* note 29, at 6 (“IHL represents a very delicate balance between two principles: military necessity and humanity.”). Similarly, the *Interpretive Guidance*, *supra* note 95, at 993, states: “The primary aim of IHL is to protect the

ple which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”<sup>116</sup> This principle is not found in the Geneva Conventions or their Additional Protocols, but rather is found in the 1907 Hague Regulation IV, Article 23(g) and is considered part of the customary international law of war.<sup>117</sup>

### 3. *Direct Participation in Hostilities*

Central to the question of when and whether a civilian is, by his or her actions, in violation of the LOAC or, at minimum, undermining the United State’s legal theory on the targeting of terrorists, is the question of when a civilian is taking a “direct part in hostilities.”<sup>118</sup> According to Article 51(3) of AP I, “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”

As seen from Part II, a greater number of civilians share the battle space in modern conflict, and more importantly, a frequent belligerent in the War on Terror is a non-uniformed actor. It is evident, then, that the work undertaken by the ICRC in producing the *Interpretive Guidance* on what “direct participation in hostilities” means is an important undertaking. The ICRC’s work is the culmination of six years of study and deliberation, but it is not binding on States, is not customary international law, and is not universally accepted as the correct interpretation of the LOAC.<sup>119</sup> The *Interpretive Guidance* set out to answer three key legal questions: (1) “Who is considered a civilian for the purposes of the principle of distinction?”; (2) “What conduct amounts to direct participation in hostilities?”; and (3) “What modalities govern the loss of protection against direct attack?”<sup>120</sup>

As to the first question, the ICRC found that for purposes of international armed conflict, “all persons who are neither members of the armed forces of a party to the conflict nor participants of a *levée en masse* are civilians” and thus entitled to protection.<sup>121</sup> For non-international armed conflict, “all persons who are not members of State armed forces or organized armed groups of a party to the conflict are

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victims of armed conflict and to regulate the conduct of hostilities based on a balance between military necessity and humanity.”

116. U.S. DEP’T OF ARMY FIELD MANUAL 27-10, The Law of Land Warfare ¶ 3(a) (July 18, 1956) [hereinafter FM 27-10].

117. Solis, *supra* note 79, at 258.

118. AP I, *supra* note 78, art. 51(3).

119. See *Interpretative Guidance*, *supra* note 95, at 991; Parks, *supra* note 79; see also Schmitt, *supra* note 29 (analyzing the enforceability and breadth of the *Interpretative Guidance* published by the ICRC).

120. *Interpretive Guidance*, *supra* note 95, at 994.

121. *Id.* at 995.

civilians.”<sup>122</sup> While relatively non-controversial and straightforward, these definitions do become more complex when one asks who is a member of an “organized armed group.” The ICRC defines this latter category as “the armed or military wing of a non-State party.”<sup>123</sup> The key criterion for membership in such a group, the ICRC asserts, is “whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.”<sup>124</sup> These are individuals “whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation”<sup>125</sup> and are distinct from those who may have joined the group or received some training, but after some period of active participation, “leave the armed group and re-integrate into civilian life.”<sup>126</sup> Those in this latter sub-group are civilians until such time as they return to active participation.<sup>127</sup> The ICRC also notes that civilian employees and contractors that accompany the force are subject to this same concept—if they are given a continuous combat function by their assigned or performed duties, they too become *de facto* members of the armed force or organized armed group.<sup>128</sup>

For its part, the United States has not, to date, issued a formal and comprehensive response to the ICRC’s *Interpretive Guidance*, but certain officials have on a few occasions made comments which elucidate the U.S. Government’s position on certain issues discussed in the *Interpretive Guidance*. For instance, in a speech to the American Society of International Law in March of 2010, the Department of State Legal Advisor, Harold Koh, remarked that

we have based our authority to detain [members of al-Qaeda and associated terrorists] not on conclusory labels, like “enemy combatant,” but on whether the factual record in the particular case meets the legal standard. This includes, but is not limited to, whether an individual joined with or became part of al-Qaeda or Taliban forces or associated forces, which can be demonstrated by relevant evidence of formal or functional membership, which may include an oath of loyalty, training with al-Qaeda, or taking positions with enemy forces.<sup>129</sup>

Mr. Koh noted that the United States disagrees with the ICRC “on some of the particulars” of the *Interpretive Guidance*, but states that the United States’ approach is “consistent with” the *Interpretive Gui-*

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122. *Id.*

123. *Id.* at 1006.

124. *Id.* at 1007.

125. *Id.*

126. *Id.* at 1008.

127. *Id.* Also included in the group of those who are not performing a continuous combat function are “recruiters, trainers, financiers and propagandists.” *Id.*

128. *Id.*

129. Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, Address before the American Society of International Law (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/l/releases/remarks/139119.htm>).

*dance*.<sup>130</sup> Regarding the lethal targeting of terrorists, Mr. Koh stated that “individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law.”<sup>131</sup> It would seem, then, that the United States perhaps adopts the analytical framework for membership in an armed group as articulated by the ICRC, but takes a more expansive view of what specific actions constitute a CCF. Based on the United States’ history regarding detention, prosecution, and even targeting of those providing “material support,” it would seem that the United States specifically disagrees with the ICRC on whether one has to actually engage in the physical fight to be performing a CCF.<sup>132</sup> Professor Schmitt supports this view when he argues “the only viable approach to membership in the direct participation context is one that characterizes all members of an organized armed group as members of the armed forces (or as civilians continuously directly participating).”<sup>133</sup> A requirement that members actually perform a combat function, he argues, “precludes attack on members of an organized armed group even in the face of absolute certainty as to membership.”<sup>134</sup> If the available evidence persuasively suggests that a person is an active member of the armed group actively planning harm against the United States, the argument goes, then the member’s specific role should not determine whether the member is targetable under the LOAC.<sup>135</sup>

Next, the ICRC turned to the constitutive elements of DPH.<sup>136</sup> According to the ICRC, in order to be DPH, an act must meet all three of the following criteria:

1. the act must be likely to adversely affect the military operations or military capacity of a party . . . or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (*threshold of harm*);
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (*direct causation*); [and]

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130. *Id.*

131. *Id.*

132. See, e.g., the apparent targeting of the cleric al-Alawki by the United States. For a representative news account reporting how al-Awlaki was a recruiter rather than a combatant in the traditional sense, see *Born in US, Al-Awlaki was his birth nation's sworn enemy*, MSNBC.COM, Sept. 30, 2011, available at [http://today.msnbc.msn.com/id/44730882/ns/world\\_news-mideast\\_n\\_africa/#.T1ojnXmyVSt](http://today.msnbc.msn.com/id/44730882/ns/world_news-mideast_n_africa/#.T1ojnXmyVSt).

133. Schmitt, *supra* note 29, at 24.

134. *Id.* at 23.

135. *Id.* at 23–24.

136. Just as in the *Interpretive Guidance*, *supra* note 95, at 994 n.4, this Article uses the terms “direct participation in hostilities,” “taking a direct part in hostilities,” and “directly participating in hostilities” synonymously.

3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).<sup>137</sup>

Any assessment of these factors will be done, by necessity, on a case-by-case basis.<sup>138</sup>

The threshold of harm element can be met in two ways. First, the harm may be an act of a military nature and directed against enemy forces.<sup>139</sup> Alternatively, the harm may consist of the infliction of death, injury, or destruction on protected (i.e. “civilian”) persons or objects.<sup>140</sup> In either case, the harm need not actually happen—it just must be *likely* to result in an adverse effect.<sup>141</sup>

The second element, direct causation, requires that the harm be brought about in one causal step. Capacity-building activities are indirect and thus do not meet this element.<sup>142</sup> Examples of non-qualifying indirect activities include imposition of “economic sanctions, conducting scientific research and design, producing weapons, recruiting forces, and providing general logistics support.”<sup>143</sup> This list of indirect activities specifically includes assembly and storage of improvised explosive devices (IEDs), which, given their ubiquitous and destructive use on the battlefields of Iraq and Afghanistan, proved controversial.<sup>144</sup>

Finally, the belligerent nexus requires that an act be “specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.”<sup>145</sup> This element appears aimed at distinguishing between the criminal who, for instance, steals military goods to sell them for profit, as compared to the insurgent who steals military property to use it against the enemy. To meet this element, the act must be “in support of a party to the conflict and to the detriment of another.”<sup>146</sup>

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137. *Interpretive Guidance*, *supra* note 95, at 995–96 (emphasis added).

138. *See, e.g.*, the U.S. DEP’T OF THE NAVY, COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, § 8.2.2 (2007) (“direct participation in hostilities must be judged on a case-by-case basis . . . based on the person’s behavior, location, and attire, and other information”); *see also* Prosecutor v. Du, No. IT-94-1-T, Opinion and Judgment, ¶ 616 (May 7, 1997) (noting the need to examine the facts of each case to see if the person was actively involved in hostilities).

139. *Interpretive Guidance*, *supra* note 95, at 1016.

140. *Id.*

141. *Id.* at 1017; *see also* Schmitt, *supra* note 29, at 27 (“The threshold of harm element requires only that the act in question be likely to result in the adverse effect in question; it need not eventuate.”).

142. *Interpretive Guidance*, *supra* note 95, at 1021.

143. Schmitt, *supra* note 29, at 30.

144. *Id.*; *see also* *Interpretive Guidance*, *supra* note 95, at 1022 (noting that the assembly and storage of an IED may be connected with the resulting harm through an uninterrupted chain of events, but does not directly cause the harm).

145. *Interpretive Guidance*, *supra* note 95, at 1025.

146. *Id.*

In addition to the constitutive elements of DPH, the ICRC's *Interpretive Guidance* also discusses the temporal aspect of DPH, which is rooted in the "for such a time as" language of Article 51(3) of AP I. According to the *Interpretive Guidance*, "[m]easures preparatory to the execution" of a specific act of DPH, as well as "deployment to and return from" the act, constitute an integral part of the act and are thus within the meaning of DPH.<sup>147</sup> Thus, DPH encompasses more than the immediate execution of the act but does not include "preparatory measures aiming to establish the general capacity to carry out unspecified hostile acts."<sup>148</sup> The key appears to be the specificity of the intended act, rather than acts preparatory to actions in general. For instance, loading bombs onto a plane for a specific bombing mission qualifies, but transporting bombs to an airfield for unspecified future bombing runs does not.<sup>149</sup> Similarly, if aimed at a specific act, actions such as the transport and positioning of weapons or gathering of intelligence may qualify as DPH under the temporal analysis, but if *not* aimed at a specific, identifiable act, they do not qualify.<sup>150</sup>

Next, in the "[m]odalities governing the loss of protection" section of the *Interpretive Guidance*, the ICRC opines, "the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances."<sup>151</sup> Under this controversial aspect of the *Interpretive Guidance*, military necessity requires not only that the target be lawful (i.e. its destruction is indispensable for securing the complete submission of the enemy as soon as possible<sup>152</sup>), but also that the force used not "exceed what is actually necessary." The ICRC suggests that this means one may not kill an otherwise legitimate target "where there manifestly is no necessity for the use of lethal force."<sup>153</sup> In other words, one must first try and capture the enemy. Professor Schmitt argues, "[No] state practice exists to support the assertion that the principle of military necessity applies as a separate restriction that constitutes an additional hurdle over which an attacker must pass before mounting an attack."<sup>154</sup> Needless to say, this portion of the *Interpretive Guidance* is particularly controversial.

Prior to the issuance of the *Interpretive Guidance*, and prior to the attacks of 9/11, the United States offered the following definition of DPH:

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147. *Id.* at 1031.

148. *Id.* at 1032.

149. *Id.*

150. *Id.*

151. *Id.* at 1040.

152. FM 27-10, *supra* note 116, ¶ 3(a).

153. *Interpretive Guidance*, *supra* note 95, at 1043-44.

154. Schmitt, *supra* note 29, at 41.

[I]mmediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct and causal relationship between the activity engaged in and the harm done to the enemy. The phrase “direct participation in hostilities” does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions and other supplies, or forward deployment.<sup>155</sup>

Later, in 2006, the U.S. DoD Law of War Working Group examined when and whether a civilian accompanying the force would lose immunity from intentional attack and wrote that such a person would lose protection if there is “(1) geographic proximity of service provided to units in contact with the enemy, (2) proximity of relationship between services provided and harm resulting to enemy, and (3) temporal relation of support to enemy contact or harm resulting to enemy.”<sup>156</sup>

An additional source of U.S. doctrine with regard to DPH can be found in *The Commander’s Handbook on the Law of Naval Operations*.<sup>157</sup> This policy document says DPH must be “judged on a case-by-case basis” and that “civilians serving as lookouts or guards, or intelligence agents for military forces may be considered to be directly participating on hostilities.”<sup>158</sup>

Though not without dissent, experts say that a civilian taking a DPH is not a per se violation of the LOAC.<sup>159</sup> The DPH causes the civilian in question to lose protection from deliberate attack, but unless the civilian’s actions that constitute the DPH also constitute a war crime in the classic sense (e.g., deliberate targeting of civilians, as many terrorists do), then the civilian is not subject to prosecution as a war criminal for having committed a grave breach. Of course, because the civilian is not a privileged combatant, he or she may be subject to prosecution under the host jurisdiction’s criminal laws against homicide.

The Obama Administration has stopped using the term “unlawful enemy combatant,” but has retained much of the same authority to target and detain terrorists as that used by the prior Administra-

155. Christensen, *supra* note 11, at 296–97 (quoting MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING TWO OPTIONAL PROTOCOLS TO THE CONVENTION ON THE RIGHTS OF THE CHILD, S. TREATY DOC. NO. 106–37, at VII (2000)).

156. Cdr. Albert S. Janin, Judge Advocate General’s Corps, U.S. Navy, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, 2007 ARMY LAW. 82, 89 (2007) (quoting U.S. ARMY, INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY INT’L & OPERATIONAL LAW VOL. II, I-10 (Sept. 2006) (Civilian Protections in Armed Conflict)).

157. U.S. DEP’T OF THE NAVY, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M (July 2007).

158. *Id.* § 8.2.2.

159. See, e.g., Solis, *supra* note 79, at 211; Parks’ Address, *supra* note 8. For an opposing viewpoint, see, e.g., OPLAW Handbook, *supra* note 27 (noting that Contingency Contracting Personnel who engage in hostilities risk being treated as “unprivileged belligerents” and thus as war criminals).

tion.<sup>160</sup> The current Administration's position suggests a membership approach to DPH, but the limits of membership remain unclear.<sup>161</sup>

### C. DoD Doctrine and Regulations Regarding Civilians

In addition to the LOAC provisions that apply to U.S. civilian employees and contractors, there are a number of DoD regulations that also pertain. These regulations are indicative of the United States' policy with regard to use of civilians, but do not necessarily reflect a U.S. reaction to or interpretation of the latest ICRC's *Interpretive Guidance* on DPH.

One of the primary ways U.S. regulations limit the type of work that can be performed by contractors is through the concept of "inherent governmental function." According to Army policy, only employees of the United States (and in the case of combat situations, employees of DoD, either civilian or military) may perform "[f]unctions inherent to, or necessary for the sustainment of combat operations, that are performed under combat conditions or in otherwise uncontrolled situations, and that require direct control by the military command structure and military training for their proper execution."<sup>162</sup> These functions also include those "performed exclusively by military (active and reserve) who are trained for combat and the use of deadly force, where performance by a contractor or civilian would violate their non-combatant status under the Geneva Conventions."<sup>163</sup>

Similarly, DoD regulations say that military tasks such as "command," "operational control," and "combat operations" are all inherently governmental and may only be performed by military personnel.<sup>164</sup> Likewise, "if the planned use of destructive combat capabilities is part of the mission assigned," a military member must perform the mission.<sup>165</sup> Decisions to "offensively respond to hostile acts or demonstrated hostile intentions"<sup>166</sup> as well as operation of a weapon system against an enemy are inherently governmental, whereas "technical advice on the operation of weapon systems or other support of a non-discretionary nature performed in direct support of combat operations" is not.<sup>167</sup>

Contractors hired by the United States to support military operations are also similarly restricted. For instance, contractors may not

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160. Christensen, *supra* note 11, at 292.

161. *Id.*

162. U.S. DEP'T OF ARMY, REGULATION 715-9, CONTRACTORS ACCOMPANYING THE FORCE 21 (glossary of terms) (Oct. 29, 1999).

163. *Id.*

164. U.S. DEP'T OF DEFENSE, INSTRUCTION 1100.22, *supra* note 37.

165. *Id.* at encl. 4, ¶ 1(c)(2).

166. *Id.* at encl. 4, ¶ (d)(1)(d).

167. *Id.*

“take an active role in hostilities but [do] retain their inherent right to self-defense.”<sup>168</sup> Contractors may, however, perform “security services for other than uniquely military functions.”<sup>169</sup> Whether a particular act by a contractor is permissible is “dependent on the facts and requires legal analysis.”<sup>170</sup> These vague standards, of course, do not do much work in shaping the fine contours of appropriate and permissible work by contractors.

The rule for U.S. contractors is summarized well by Hays Parks when he states:

[A] civilian contractor may not engage in an action that is “inherently governmental”, [sic] that is, a decision involving discretion on behalf of the government. Thus while a civilian contractor may operate a military unmanned aerial vehicle in flight, he or she is not authorized to launch any ordnance from it. Only a member of the armed forces may take this act.<sup>171</sup>

#### D. Legal Authority for CIA “Direct Participation”

As a matter of domestic law, civilian employees of non-DoD departments and agencies, such as the CIA, are authorized to perform functions that, arguably, are military in nature and, in any event, involve taking lethal action against our nation’s enemies. Professor Robert Chesney has studied the involvement of non-DoD members in paramilitary action generally and in the War on Terror in particular. He notes that there is “an ongoing process of convergence among military and intelligence activities, institutions, and authorities” and this “trend has accelerated considerably over the past decade [since 9/11].”<sup>172</sup>

CIA authority to engage in para-military activity can be traced to the 1947 National Security Act where the CIA was assigned a number of functions, one of which has been colloquially called the “fifth function” (because it was number five in the list). This fifth function allows CIA operatives “to perform such other functions and duties . . . as the National Security Council may from time to time direct.”<sup>173</sup> In 1974, the Hughes–Ryan Amendment added two key requirements before the CIA performs any covert activity (including para-military activity): the presidential finding and notification to congressional committees.<sup>174</sup> In 1981, President Reagan issued Executive Order 12,333, which requires all agencies engaged in covert activities to com-

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168. U.S. DEP’T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD, ¶ 6-3 (2003) [hereinafter FM 3-100.21].

169. U.S. DEP’T OF DEFENSE, INSTRUCTION 3020.41, *supra* note 93.

170. U.S. DEP’T OF DEFENSE, INSTRUCTION 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES, ¶ 6.3.5 (Oct. 3, 2005).

171. Parks’ Address, *supra* note 8, at 13.

172. Chesney, *supra* note 58, at 539–40.

173. National Security Act of 1947, Pub. L. No. 80-253, § 102(d), 61 Stat. 495 (1947).

174. Chesney, *supra* note 58, at 588–89.

ply with the Hughes–Ryan Amendment,<sup>175</sup> and in 1990, Congress defined “covert action.” According to U.S. law, “covert action” includes any activity that meets three conditions: “(1) it must be conducted by an element of the U.S. government; (2) it must be meant to ‘influence political, economic, or military conditions abroad’; and (3) the ‘role of the United States Government’ in sponsoring the activity must not be intended ‘to be apparent or acknowledged publicly.’”<sup>176</sup>

The Executive has interpreted these vague phrases to allow for overt overseas action against enemy forces by the CIA. Over time, through both acquiescence and legislation, Congress has agreed and has put in place the conditions and restrictions mentioned *supra*.<sup>177</sup> While Title 50 may provide the domestic statutory authority for covert action conducted by the CIA, it does not, nor does it claim to, provide the constitutional or international law basis for use of this power in any particular situation. Professor Chesney accurately observes, “Title 50 authority does not provide carte blanche to act in violation of international law,”<sup>178</sup> nor does it provide “justification for disregard of the laws of war.”<sup>179</sup>

#### IV. ANALYSIS

Having examined the trend of “civilianization” and the various roles for civilians that have resulted from this trend, the legal categories of individuals present on the battlefield, and the LOAC principles that apply, this Article now turns to the legal issues and concerns raised by these facts. First, criticisms, weaknesses, and alternative approaches to the ICRC’s *Interpretive Guidance* on DPH will be discussed. Second, the legal issues raised by the convergence of military and intelligence functions will be examined. Third, the implications of the U.S. law governing military commissions will be explored. Finally, accountability and the role for military judge advocates will be discussed.

##### A. Criticism of and Alternatives to the ICRC’s *Interpretive Guidance*

In the War on Terror, the question of when civilians are taking a DPH for purposes of the LOAC is a critical one. Accordingly, the ICRC’s *Interpretive Guidance* is a very useful document. However, it

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175. *Id.* at 591–92.

176. *Id.* at 593 (quoting S. 2834, 100th Cong. § 503 (1999)). The current definition of “covert action” and the rules regarding its use are codified at 50 U.S.C. § 413b.

177. *Id.* at 587.

178. *Id.* at 617.

179. *Id.* at 618.

is one NGO's opinion<sup>180</sup> and it has its critics. To date, the United States has not issued a formal response to the *Interpretive Guidance*.<sup>181</sup> However, a tribunal has addressed the concept of DPH and other experts have commented on the ICRC's work. A discussion of some of the critiques and alternative approaches follows.

### 1. *Israeli Supreme Court Approach*

One of the only tribunals to have taken up the issue of civilians taking a DPH is the Israeli Supreme Court. In 2005, the court issued its opinion in *Public Committee Against Torture in Israel v. Government of Israel*.<sup>182</sup> In that case, which pre-dates the *Interpretive Guidance*, the Court grappled with how to define DPH. As to the "hostilities" element of DPH, the court found that it should include acts that are intended to damage both military and civilian objects. Regarding the "direct part" element, the court quotes with approval the following passage: "to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad."<sup>183</sup> In order to discourage civilians from participation, the court favored a broad interpretation of "direct," but rather than outlining a strict test for DPH, the court said it must be evaluated on a case-by-case basis.<sup>184</sup>

In discussing representative examples of civilians taking a DPH, the court did opine that DPH would include those who gather intelligence on the enemy, transport combatants to the place of hostilities, operate the weapons used by unlawful combatants (including supervising their operation, or even servicing the weapons), and drive ammunition to the place of hostilities.<sup>185</sup> The list would further include those who planned an attack by unlawful combatants, and those who decided upon or authorized the attack.<sup>186</sup>

Finally, as to the "for such a time as" aspect of DPH, the court observed the lack of international consensus on how to interpret the phrase, but noted that for "a civilian who has joined a terrorist organi-

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180. While the ICRC is but one NGO's opinion, it is nevertheless an important NGO, and the ICRC is certainly recognized for its expertise in interpreting and applying the LOAC.

181. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW OF WAR DESKBOOK 109 (2011).

182. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2005] IsrSC 57(6) 285, ¶ 33.

183. *Id.* ¶ 34 (quoting INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS 516 (1987)).

184. *Id.*; see also Christensen, *supra* note 11, at 302 ("When trying to find the proper middle ground, the court favored a broad interpretation of 'direct' in order to encourage civilians to remain detached from hostilities.").

185. HCJ 769/02, IsrSC57(6) 285, ¶ 35.

186. *Id.* ¶ 37.

zation . . . the rest between hostilities is nothing other than preparation for the next hostility.”<sup>187</sup> Thus, without stating it expressly, the court articulates something akin to the “continuous combat function” discussed by the ICRC and suggests that membership in a terrorist organization is enough for DPH.

While the United States would seemingly concur with the court’s temporal analysis by considering members of terrorist organizations to be taking a DPH, the United States would likely find the court’s definition of “taking a direct part” to be overbroad in that it would include many of the functions currently performed by U.S. civilians, be they DoD employees, CIA officers, or civilian contractors.

## 2. *Scholarly Criticism and Alternative Approaches to DPH*

One of the most compelling criticisms of the *Interpretive Guidance* is espoused by Professor Schmitt when he argues that it skews the balance between military necessity and humanity too far toward humanity, thus undermining its usefulness and credibility.<sup>188</sup> Professor Schmitt was one of the experts who participated in the ICRC’s preparatory expert panel discussions that led to the drafting of the *Interpretive Guidance*, but due to strong disagreement with portions of the document, he removed his name from the list of contributors.<sup>189</sup>

Professor Schmitt has a number of objections, but his three primary objections will be discussed here. First, by differentiating between members of an organized armed group that perform a CCF and those who do not, Schmitt argues that the *Interpretive Guidance* provides certain “non-state actors, who enjoy no combatant privilege, . . . greater protection than [that enjoyed by] their opponents in the regular armed forces.”<sup>190</sup> Moreover, the legitimate military combatant will have a difficult time distinguishing between those who are performing the CCF and those who are not. The requirement of a CCF, Schmitt argues, “precludes attack on members of an organized armed group even in the face of absolute certainty as to membership.”<sup>191</sup> The better approach, according to Professor Schmitt, is to consider all members of the organized armed group as members of the armed forces and place the burden on the member to affirmatively “opt out” or distinguish himself from the group to attain civilian protection.<sup>192</sup>

Schmitt’s second objection is the so-called “revolving door” problem, based on the argument that the approach taken by the ICRC re-

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187. *Id.* ¶ 39.

188. *See* Schmitt, *supra* note 29, at 6.

189. *Id.*

190. *Id.* at 44.

191. *Id.* at 23.

192. *See id.* at 24.

sults in “individuals who directly participate on a recurring basis enjoy[ing] greater protection than lawful combatants.”<sup>193</sup> The example cited is the “farmer by day, insurgent by night,” where the farmer is protected from attack when in farmer mode, but is subject to attack while acting as an insurgent.<sup>194</sup> This approach proves untenable in the modern insurgent context where the weapon of choice is often an IED emplaced well outside of the proximal or temporal presence of enemy soldiers. The insurgent is only legally exposed to attack while emplacing the IED, or traveling to or from the emplacement site.<sup>195</sup> However, because, by design, the insurgent is generally not trying to make actual contact with his target, the person is rarely subject to attack during his period of DPH. The approach that best honors the principle of military necessity and does not cause an imbalance between necessity and distinction is to consider the civilian who directly participates in hostilities as one who “remains a valid military objective until he or she unambiguously opts out of hostilities through extended non-participation or an affirmative act of withdrawal.”<sup>196</sup> The participant, Schmitt argues, “should bear the risk associated with misunderstanding as to status and not combatants who have been previously attacked.”<sup>197</sup>

Finally, Professor Schmitt voices significant concern about the restraints the *Interpretive Guidance* places on the use of force.<sup>198</sup> The *Interpretive Guidance* says “the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary.”<sup>199</sup> The *Interpretive Guidance* seeks to use the LOAC principle of military necessity as a two-part test—first, during target *selection*, the target must be militarily necessary, and second, during target *prosecution*, the means used to attack the target must be necessary.<sup>200</sup> This is translated by the ICRC as a requirement that, if possible, an individual be captured rather than killed even where the person is a legitimate military target. Professor Schmitt notes that no state practice supports the notion that military necessity imposes this second restriction.<sup>201</sup> Instead, Schmitt argues that the “crucial issue is not whether the individual in question can feasibly be captured but instead whether he or she has clearly expressed his or her intention to surrender.”<sup>202</sup>

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193. *Id.* at 44.

194. *Id.* at 37.

195. *Id.*

196. *Id.* at 38.

197. *Id.*

198. *Id.* at 40.

199. *Id.* (quoting *Interpretive Guidance*, *supra* note 95, at 77).

200. *Id.* at 40–41.

201. *Id.* at 41.

202. *Id.* at 42.

Colonel W. Hays Parks, USMC (Ret.), is the former Senior Associate Deputy General Counsel in the International Affairs Division of the DoD's Office of General Counsel. He is widely regarded as one of the pre-eminent experts on the LOAC. Colonel Parks participated in many of the expert discussions that led to the creation of the *Interpretive Guidance* and, as such, is well placed to critique the final product. Parks argues that the ICRC's *Interpretive Guidance*, and in particular Section IX of the report, got it wrong when it imported Pictet's "continuum of force" principles and made them a part of the equation for individual soldiers.<sup>203</sup> Like Professor Schmitt, Parks is concerned that the ICRC is attempting to create an additional burden on States that did not previously exist and is not supported by decades of modern state practice. The ICRC, Parks argues, uses the Israeli Supreme Court decision as a basis for first assuming there is a gap in the LOAC that must be filled by human rights law, and second, fills that gap with a principle that was in many ways unique to the Israeli conflict.<sup>204</sup> The requirement to capture rather than kill (if possible) imposed by the Israeli Court stems from the unique circumstances of the continuous terrorist activity in the occupied territories and has its basis in domestic Israeli law.<sup>205</sup>

Military necessity, as a core principle of the LOAC, is a concept applicable to States as they choose appropriate military targets and objectives. It is not a principle applicable to the tactics used by individual combatants.<sup>206</sup> The burden is on senior military and civilian leadership to choose strategic and operational military objectives consistent with the principle of military necessity, but there is no similar burden on the individual soldier to decide whether the tactic used to subdue the enemy is in compliance with military necessity.<sup>207</sup> Instead, the individual soldier must be concerned with distinction and proportionality. In other words, the soldier must make sure that his target is not a protected civilian and must ensure that when prosecuting valid military targets, the anticipated collateral harm done to civilians is not excessive in relation to the military advantage gained.<sup>208</sup> The soldier is not, Parks argues, obligated to use the law enforcement use of force approach.<sup>209</sup>

Professor Geoffrey Corn also takes issue with the ICRC approach to DPH. Although his critique was published prior to the final publi-

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203. See Parks, *supra* note 79, at 793.

204. *Id.*

205. *Id.* at 792–93.

206. *Id.* at 803.

207. *Id.*

208. *Id.*; see also Solis, *supra* note 79, at 250 (explaining that battlefield events can be examined in terms of distinction, military necessity, unnecessary suffering, and proportionality).

209. Parks, *supra* note 79, at 807.

cation of the *Interpretive Guidance*, Professor Corn's criticism is based on interim reports regarding DPH published by the ICRC. DPH as a concept or legal principle, Corn argues, must be limited to that which it really is—a targeting rule.<sup>210</sup> The DPH concept is not meant to serve as a guideline for what civilians may properly do on the battlefield. This approach, in some ways, is consistent with the assertion that a civilian taking a DPH, by itself, does not constitute a war crime.<sup>211</sup>

To determine what functions a civilian augmentee may properly perform, one should ask, “[W]ill the exercise of discretion associated with this function implicate LOAC compliance?”<sup>212</sup> “If the answer is yes,” Corn argues, then “the function must be reserved to members of the armed forces.”<sup>213</sup> To utilize this test, the State party seeking to use a civilian must determine whether a particular function falls into one of the categories regulated by the LOAC: (1) “[s]election of and employment of methods and means of warfare”; (2) “[t]reatment of captured and detained personnel”; (3) “[c]ollection of and care for the enemy wounded”; and (4) “[p]rotection of civilians from the harmful effects of war.”<sup>214</sup> If a function falls into one of these categories, then there is a presumption that the function should not be civilianized.<sup>215</sup> If, however, “there [is] no reasonable probability of LOAC violation from an abuse of [civilian] discretion, the presumption [will] be rebutted and civilianization of the function permitted.”<sup>216</sup>

A third approach to DPH is that proposed by Major Michael Guillory. Major Guillory suggests that the test for civilian DPH ought to be:

[C]ivilians may support and participate in military activities as long as they are not integrated into combat operations. In this context, integration is becoming an uninterrupted, indispensable part of an activity such that the activity cannot function without that person's presence and combat operations are any military activities that are intended to disrupt enemy operations or destroy enemy forces or installations.<sup>217</sup>

While this test was articulated prior to the ICRC's *Interpretive Guidance*, it is still useful in that it seeks to better define the temporal “for such a time as” language of AP I and argues that the timeframe is less important than the causal connection. By contrast, the ICRC approach is to cut off liability (and thus susceptibility to attack under

210. Geoffrey S. Corn, *Unarmed but How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions*, 2 J. NAT'L SECURITY L. & POL'Y 257, 282 (2008).

211. See, e.g., Solis, *supra* note 79, at 211.

212. Corn, *supra* note 210, at 287.

213. *Id.*

214. *Id.* at 288.

215. *Id.*

216. *Id.* at 288–89.

217. Guillory, *supra* note 17, at 134.

the concept of DPH) at one step removed from the attack in the chain of causation.

In order to adopt the test proposed by Major Guillory, the United States would likely need to dramatically scale back the use of civilians for front-line battlefield support functions such as intelligence analysis, technical weapon maintenance and support, and certain advisory functions. Given the well-entrenched use of civilians over the past ten years, it is unlikely the United States would be willing to retreat that far from current practice, so this test is unlikely to gain much support.

## B. Legal Consequences of Convergence

As discussed at length *supra*, there has been and continues to be a convergence between the military and intelligence community, especially in the area of direct action against terrorists in the form of targeted killings via UAV strikes. Professor Chesney makes a compelling case that “[t]he convergence trend has a disruptive impact on the complex legal architecture that governs U.S. intelligence and military activities.”<sup>218</sup> One primary area of concern is the application, or lack thereof, of the LOAC to CIA activities. This author does not mean to suggest, nor does Professor Chesney, that the CIA violates the LOAC principles of military necessity or distinction in its targeting of terrorists.<sup>219</sup> Harold Koh, the DoS Legal Advisor, has stated, “it is the considered view of this Administration . . . that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.”<sup>220</sup> While it is undoubtedly true that innocent civilians have been killed as a result of CIA-led airstrikes, these incidents are best viewed as unfortunate examples of allowable collateral damage. Instead, the LOAC concern arises from the use of CIA civilians in direct action UAV strikes against terrorists, not in the manner in which they conduct the direct action.

The LOAC binds the State, not just the military forces of the State.<sup>221</sup> Accordingly, to the extent that the LOAC allows or encourages military combatants to engage in armed conflict, and disallows or discourages civilians to do the same, use of CIA civilians runs counter to key principles within the LOAC. Professor Chesney states:

[T]here is no basis for setting IHL [international humanitarian law] aside merely because of the identity or nature of the particular organization or entity through which the party is acting. Indeed, the United States could hardly

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218. Chesney, *supra* note 58, at 583.

219. *Id.* at 619–20 (“[T]here is considerable reason to believe that the CIA does follow the DoD practice of applying IHL concepts of necessity, distinction, and proportionality in all settings—even those that might not amount to armed conflict.”).

220. Koh, *supra* note 129.

221. Chesney, *supra* note 58, at 618.

argue otherwise in the post-9/11 era, given the consistency with which it has advanced the position that non-military actors, such as al Qaeda members, are bound by IHL and may be prosecuted for war crimes for their IHL violations.<sup>222</sup>

Indeed, the United States has recently taken the position that “the AUMF [authorizing strikes against al-Qaeda] is best read to implicitly condition its grant of authority upon compliance with applicable IHL rules.”<sup>223</sup> Moreover, nothing in Title 50 suggests that Congress intended that the CIA or anyone else within the U.S. Government be exempt from LOAC compliance.<sup>224</sup>

As a matter of policy, regardless of how a particular armed conflict is characterized, the DoD applies the LOAC to all of its actions.<sup>225</sup> The CIA does not have such a policy, at least not acknowledged publicly.<sup>226</sup> Therefore, the CIA appears to have (and take) more latitude with regard to how its civilian employees are utilized in the War on Terror.

The decision by the U.S. Government to use CIA assets to conduct covert actions and UAV strikes against terrorists seems to, at least in part, rest on the desire or need to operate in locations where the United States does not have host-nation consent, even though consent is not necessary if acting in self-defense. Additionally, the military is constrained by the precise limitations outlined in the particular Execute Orders (EXORDs) issued by the Secretary of Defense.<sup>227</sup>

The CIA, by contrast, is not so constrained, at least overtly. It would appear that the CIA has, or at least had, the consent of Pakistan to operate drones in their State, including the use of the drones for lethal missile strikes.<sup>228</sup> It is also possible that the CIA is, or has been, involved in missions without the consent of the host-state, or at least is not as constrained if host-state permission is withdrawn, particularly in situations where the host-state is unable or unwilling to eliminate the threat to the United States.<sup>229</sup>

222. *Id.*

223. *Id.* at 619 (citing Brief for Respondents, *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009) (No. 05-0763)).

224. *Id.*

225. U.S. DEP'T OF DEFENSE DIRECTIVE, 2311.01E, DoD LAW OF WAR PROGRAM (May 9, 2006).

226. Chesney, *supra* note 58, at 619.

227. It is beyond the scope of this paper to discuss the details of the applicable EXORDs in the war on terror. In any event, much of the relevant information in the EXORDs is classified and thus not available to the public.

228. See, e.g., Eric Schmitt, *3 Killed as Drone Strikes Resume in Pakistan*, NYTIMES.COM, Jan. 10, 2012, available at <http://www.nytimes.com/2012/01/11/world/asia/cia-drone-strikes-resume-in-pakistan.html>.

229. See Chesney, *supra* note 58, at 623–25; see also Eric Holder, U.S. Attorney Gen., Address at Northwestern University School of Law (Mar. 5, 2012) (transcript available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>) [hereinafter Holder's Address] (“[T]he use of force in foreign territory would

So, while there are apparent advantages to using CIA operatives to conduct lethal action against terrorists in States outside of Iraq or Afghanistan, there is legal risk as well. The underlying self-defense basis for the lethal action itself is, in this author's view, solid. Additionally, there is no suggestion that the CIA does not follow the LOAC targeting principles in a manner similar to DoD. However, the mere fact that CIA officers—unprivileged non-combatants by definition—are engaged in lethal action against an enemy is inconsistent with the LOAC and thus, problematic.

Critics of the use of drone strikes by CIA operatives, such as Mary Ellen O'Connell, argue, "only lawful combatants have the right to use force during an armed conflict. Lawful combatants are the members of a State's regular armed forces. CIA operatives are not members of the U.S. armed forces."<sup>230</sup> Others, such as John Murphy, argue that the LOAC does not prohibit civilians, including CIA operatives, from participating in hostilities.<sup>231</sup> If they do so, they are not POWs, may be attacked as a civilian who takes a DPH, and do not enjoy combatant's immunity. Additionally, such a participant must, in the manner of their actions, observe the LOAC.

Notably, at least as to international armed conflict, a number of scholars conclude, "only military aircraft, including [unmanned combat aerial vehicles], are entitled to engage in attacks."<sup>232</sup> This suggests that a CIA drone attack, at least in an international armed conflict, is a violation of the LOAC. This may be somewhat irrelevant as most agree that the United States' conflict with al-Qaeda is now non-international in character, even if global.

In any event, whether or not the CIA operatives' actions are a *per se* violation of the LOAC, it is widely held that by taking a part in the war against al-Qaeda, CIA operatives open themselves up to attack.<sup>233</sup> In this author's opinion, because the United States has at its disposal a capable military force ready and able to perform the task of armed attack against enemy belligerents, that task should be performed by uniformed combatants and not CIA officers—not because

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be consistent with these international legal principles if conducted, for example, with the consent of the nation involved—or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.”).

230. Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009* 7 (Notre Dame Law School Legal Studies Research Paper No. 09-43, 2010), available at <http://ssrn.com/abstract=1501144>.

231. John E. Murphy, *Mission Impossible? International Law and the Changing Character of War*, 87 INT'L LAW STUDIES 13, 14 (2011).

232. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *MANUAL ON INTERNATIONAL LAWS APPLICABLE TO AIR AND MISSILE WARFARE*, 11, Rule 17(a) (2009), available at <http://ihlresearch.org/amw/HPCR%20Manual.pdf>.

233. See Raul A. "Pete" Pedrozo, *Use of Unmanned Systems to Combat Terrorism*, 87 INT'L LAW STUDIES 217, 252 (2011).

the CIA operatives violate the LOAC, but because we consider the objects of attack to be civilians taking a DPH and subject to attack. Because the United States rightly applies a LOAC paradigm to describe the enemy and neutralize the threat, we ought to use uniformed combatants to apply force.<sup>234</sup>

### C. 2009 MCA

No analysis of the United States' use of civilians on the battlefield would be complete without an analysis of the way the United States subjects terrorists to criminal jurisdiction under the 2009 MCA.<sup>235</sup> The MCA says that "any alien unprivileged enemy belligerent" is subject to the jurisdiction of a military commission when he or she commits an act forbidden by the statute.<sup>236</sup> One of the acts specifically covered by the MCA is "murder of protected persons."<sup>237</sup> This provision subjects any unprivileged enemy belligerent "who intentionally kills one or more protected persons"<sup>238</sup> or "who intentionally causes serious bodily injury to one or more persons, including privileged belligerents" to the MCA.<sup>239</sup> These provisions of U.S. law were used to prosecute Omar Khadr, the so-called "child soldier" who was captured in Afghanistan after he took part in a firefight between terrorist insurgents and U.S. military personnel. Khadr pleaded guilty to taking up arms and fighting U.S. military forces. In his stipulation of fact in support of his guilty plea, Khadr admitted that he was an unprivileged enemy belligerent and that he knew he was fighting a U.S. service member.<sup>240</sup>

By defining Khadr's actions as a crime and prosecuting him under the MCA, the United States has taken the position that a civilian who takes a DPH and in so doing, kills or wounds a privileged combatant, has committed a crime, and arguably a war crime. This position would seem to place in legal jeopardy those U.S. civilians who, also lacking a privileged combatant status, take similar actions against others, including those terrorists we consider to be unlawful enemy belligerents. For instance, if other States were to adopt a similar stat-

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234. I would recommend either having the CIA task the USAF or other military Service with the actual strike or detailing military members to the CIA in their Title 10 capacity to perform the strike mission. While the provision of intelligence to DoD may also implicate the DPH regime, at least civilian intelligence is a well-entrenched and widely accepted practice by numerous States.

235. 10 U.S.C. § 948a-950v (2009).

236. 10 U.S.C. § 948d.

237. 10 U.S.C. § 950T.

238. *Id.*

239. *Id.*

240. Stipulation of Facts, *United States v. Omar Khadr*, No. 07-001 (C.M.C.R. Oct. 10, 2010), available at <http://media.thestar.topscms.com/acrobat/58/bf/c615afaa4bc7b36425db6ed2f488.pdf>.

ute, a CIA officer who directs a drone strike on an al-Qaeda operative would have violated the law.

Professor Gary Solis and others argue that a civilian taking a DPH is not, in and of itself, a war crime.<sup>241</sup> Instead, it is the specific action taken by the civilian, and against whom, that determines whether a grave breach of the LOAC has occurred.<sup>242</sup> By using the military commissions process—a process generally believed to be reserved for prosecution of war crimes—to prosecute civilians who attack privileged combatants, the United States is undermining its position that its own civilians' role in the targeting of legitimate targets is legally unproblematic.

#### D. Role of Judge Advocates

As an active-duty judge advocate, this author knows from personal experience how heavily involved military judge advocates are in how the United States trains for and engages in warfare. Judge advocates are trained in the LOAC and are expected to, and do, transmit their expertise to the direct war fighters through training and through on-scene, real-time advice.

Professor Laura Dickinson observes that the U.S. military has “a tradition of inculcating international humanitarian law norms throughout its ranks.”<sup>243</sup> This tradition is fostered through a “culture of obedience, loyalty, and honor”<sup>244</sup> that comes from a distinct hierarchical structure. This structure, Dickinson argues, “ensures that internal sanctions have a good deal of force, because those lower down the chain of the command constantly seek the approval of those higher up the chain and must submit to their authority.”<sup>245</sup> While a strict hierarchy may sometimes stifle useful dissent, “it is designed to enhance compliance with the norms that are widely accepted throughout the chain of command.”<sup>246</sup>

Military lawyers play a part in fostering this culture of conformity to LOAC norms because they are integrated and earn the trust of soldiers and commanders.<sup>247</sup> In short, “the lawyers sit in the room’ when the combat decisions are made.”<sup>248</sup> In addition to the inherent hierarchy of the military and the integration of military lawyers, the judge advocate also promotes compliance with international law because he or she, generally speaking, possesses “strong commitments to

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241. Solis, *supra* note 79, at 211.

242. *Id.*

243. Dickinson, *supra* note 4, at 209.

244. *Id.* at 208.

245. *Id.* at 209.

246. *Id.*

247. Dickinson, *supra* note 16, at 364.

248. *Id.*

core values” and “can invoke an internal sanctions regime.”<sup>249</sup> Because judge advocates are both owners and operators of the military disciplinary system of judicial and non-judicial punishment, they can help commanders bring appropriate and effective pressure to bear, thus helping ensure LOAC compliance.

By contrast, Dickinson notes that civilian contractors “largely fall outside this organizational accountability framework.”<sup>250</sup> Many contractors are former military, and as such, have some knowledge of and perhaps some internalization of the culture of conformity to LOAC norms, but their current operating structure only shares this culture and structure tangentially. In any event, the civilian is, by and large, governed by the terms of their contract and is under the supervision of a contracting officer, which is vastly different than being a member of the military and directly subject to its disciplinary system and hierarchy.<sup>251</sup>

To best deal with the civilianization of modern U.S. military operations, Professor Dickinson suggests that judge advocates play a greater role in the training and advising of civilians.<sup>252</sup> Alternatively, Dickinson argues that contracting firms should “institute processes that would help establish the organizational or professional culture necessary to protect public values . . . [and] create internal organizational structures to enhance compliance with [LOAC] norms.”<sup>253</sup>

Whether the judge advocate continues to focus his or her practice on advising military commanders only, or whether a broader role is mandated that allows for greater influence on the actions of contractors, the military judge advocate must continue to not only know the LOAC and be able to translate and transmit its principles effectively, he or she must also understand the value that the norms carry and effectively communicate that value to decision makers.

## E. Recommendations

Based on the foregoing, the United States would be well served by adopting the following four recommendations. In so doing, the United States will not only continue to be a world leader in terms of respect for human life and honorable behavior on the battlefield, but will also maintain a logically consistent approach to status and susceptibility to attack. It seems beyond doubt that international law struggles to keep pace with the ever-changing nature of technology and warfare, so to the extent that the United States and other nations actively in-

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249. Dickinson, *supra* note 19, at 534 .

250. Dickinson, *supra* note 247, at 373.

251. *See generally id.* at 374–87.

252. Dickinson, *supra* note 19, at 527.

253. Dickinson, *supra* note 247, at 387.

volved in combating terrorism create state practice that will lead to customary international law, it is critical that we get it right.

### 1. *Respond to the ICRC's Interpretive Guidance*

First, the United States should make clear its position on the various principles and theories set forth in the ICRC's *Interpretive Guidance*. Although the *Interpretive Guidance* notes that it is not representative of customary international law, the well-earned reputation of the ICRC, combined with adoption or assent of many States over time, could easily turn the *Interpretive Guidance* into just that. By going "on the record" as disagreeing with certain portions of the *Interpretive Guidance* on certain points, the United States will make its views clear and will bolster its contemporaneous state practice.

### 2. *Membership Approach to DPH*

Next, the United States should adopt, articulate as policy, and implement the approach to targeting espoused by Professor Schmitt. In particular, the United States should consider all members of an organized armed group to be members of the armed force of that party, or in the case of those deemed through reliable intelligence to be active members of al-Qaeda, consider them to be performing a continuous combat function and thus, directly participating in hostilities at all times. In so doing, the United States would consider such members to be valid targets, even if unlawful belligerents, until such time as they unambiguously opt out.

This approach more fairly balances the competing principles of distinction and military necessity that are skewed too heavily toward distinction by the ICRC. This approach also limits the untenable requirement to capture if feasible, a principle that has never been a part of the LOAC.

### 3. *Functional Discretion Test for U.S. Civilians*

Third, the United States should apply Professor Corn's "functional discretion test" when assigning roles to the various types of civilians that work on or near the modern battlefield, including those who may operate UAVs from the United States. If the function assigned to the civilian will require a discretionary decision that has the potential to implicate a fundamental LOAC principle, then a traditional, lawful combatant—a uniformed member of the military—should perform the function. While this approach may require a scaling back of the civilianization trend, it is nonetheless worth it if it allows America to maintain the moral high ground in terms of how we engage in warfare.

On a related note, the United States must strongly consider how its treatment of captured terrorists under the MCA might undermine this approach. It appears inconsistent for the United States to, on the one hand, take criminal jurisdiction over and prosecute a civilian for attacking a privileged combatant like a U.S. soldier, while on the other hand, allow our civilians to take direct lethal action against enemy belligerents. It is one thing to hold terrorists criminally liable for their attacks that violate the LOAC, but quite another to charge them with killing a soldier. If they are unprivileged noncombatants, then clearly our CIA officers and contractors are unprivileged noncombatants, and if the mere DPH is not a war crime for U.S. civilians, then neither should it be for members of al-Qaeda.

#### 4. *Legal Advice for Civilians*

Finally, the United States should promote better accountability of its civilians accompanying the force by encouraging contractors to either create a legal advisor structure functionally similar to the Armed Services' judge advocate general's corps, or require more utilization of judge advocate services by contractors. Professor Dickinson notes that the U.S. military has "distinctive institutional cultures that can impose strong internal sanctions for wrongdoing"<sup>254</sup> and a "hierarchical structure . . . designed to enhance compliance with the norms that are widely accepted throughout the chain of command."<sup>255</sup> Judge advocates, she argues, are a key component as they are not only steeped and conversant in the language and culture of the military, but also operate in close proximity to those who make LOAC-implicating decisions on the battlefield.<sup>256</sup> As a result, to the extent possible, the same approach should be taken with regard to the many civilians that now operate on the battlefield. By working to infuse their sub-culture with the same values, processes, and access to informed legal advice, we may be better able to ensure LOAC compliance by civilians accompanying the force or making LOAC-implicating decisions (if, in fact, we continue to allow this).

### V. CONCLUSION

At the outset of this Article, the questions were posed whether the use of civilians by the United States violates the LOAC or, at minimum, undermines the United States' position with regard to its categorization and treatment of al-Qaeda terrorists. Because of the real and meaningful differences between how al-Qaeda conducts hostilities and how the United States does so, the answer to the first question is

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254. Dickinson, *supra* note 4, at 207.

255. *Id.* at 209.

256. Dickinson, *supra* note 16, at 364.

“no.” The United States does not violate the LOAC by how it employs civilian employees and contractors on the battlefield. Instead, the United States fastidiously goes to great lengths to honor and comply with the LOAC.

However, as to the second question, U.S. practices do run the risk of blurring certain lines and undermining the credibility of the United States in terms of maintaining the important distinction between civilian and combatant. Indeed, many of the uses of civilians described herein do, in fact, result in the loss of protection from targeting of those civilians under the LOAC. Whether the United States uses the definitions proffered by the ICRC, or adopts one or more of the alternative approaches suggested by the LOAC scholars, it is clear that some U.S. civilian activities are going to cross the line into DPH.

The ICRC's *Interpretive Guidance* is an important step toward modernizing the LOAC for the twenty-first century. Without doubt, the methods and means of modern warfare have changed dramatically since the 1940s when many of the LOAC principles were codified in treaty. The *Interpretive Guidance* attempts to balance the key LOAC principles of necessity and distinction, but as Professor Schmitt and others persuasively argue, the effort falls short in some respects. No sovereign nation, and in particular the United States, is going to agree to or follow principles that, in its view, unnecessarily hamper its ability to defend its populace. The ICRC's *Interpretive Guidance* tips the scales too far in the direction of distinction by narrowly defining who is taking a DPH and thus, unnecessarily hampers the ability of victim-states, like the United States, to counter imminent threats of terrorist attack.

The United States will likely continue its state practice of using a more broad definition of those eligible for capture or attack under international law. However, as other authors have noted, there is a risk of taking inherently contradictory positions. For instance, the United States might, on the one hand, wish to adopt a narrow definition of DPH in order to protect its own civilians accompanying the force, but at the same time utilize a broad definition of DPH when attacking or prosecuting enemy belligerents.<sup>257</sup>

Similarly, the prosecution of enemy belligerents by military commission for, among other things, using lethal force against an enemy uniformed combatant, runs the risk of creating a mixed message. Specifically, the United States asserts it is per se unlawful for an enemy

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257. See discussion of the 2009 MCA *supra* section IV.C; Christensen, *supra* note 11, at 298 (“[The United States] has incentives to pursue two seemingly contradictory interpretations of DPH. On the one hand, the United States could pursue a narrow interpretation to protect the military’s civilian employees and contractors. On the other hand, the United States could pursue a broad interpretation in order to attack terrorists.”).

civilian to take up arms against a lawful combatant, but it is not unlawful for a U.S. civilian to take up arms against an enemy belligerent.<sup>258</sup> There remains a very important *moral* distinction: the United States deliberately targets those who, either through current action, or through membership in al-Qaeda, pose a direct threat to the United States, whereas the enemy deliberately targets innocent civilians. Nonetheless, we are a nation bound by the rule of law, and therefore legal distinctions matter. So long as we are able to successfully defend ourselves, we should do all that is within our power to preserve the rule of law and maintain a consistent position or message with regard to who may, or may not, properly engage in warfare.

The United States should draw and maintain clear distinctions between its service member combatants and its civilian support personnel. Using the broad definitions of DPH as discussed *supra*, the United States should honor those definitions by ensuring that its civilian employees and contractors do not, themselves, directly participate in hostilities. While instances of DPH on the part of civilians by the United States are not per se LOAC violations, they nonetheless weaken the necessary LOAC wall between civilian and combatant and provide critics with support for the argument that the United States exhibits a limited respect for international law.

The use of CIA operatives in the War on Terror is not likely to abate. As numerous U.S. government officials have stated, we are “at war” with terrorists and the United States will continue to use every means at its disposal in the prosecution of this war.<sup>259</sup> In this author’s view, however, there is a better path. The United States can still bring to bear all of the vast resources of the U.S. Government, including the CIA, but can insist that only military members apply the ultimate application of lethal force.<sup>260</sup> DPH is clearly more broad than simply “pulling the trigger,” so this proposal does not necessarily obviate the risk that *other* activities engaged in by the CIA or other civilians are, themselves, also DPH. However, reserving the distinct act of applying lethal force to uniformed members of the military will serve the important purpose of showing that the United States reserves the most extreme, overt form of direct participation to those in uniform. Some may say this is form over substance, but appearance matters, particularly when the United States is often setting the tone in the conduct of modern warfare, and the world is watching.

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258. *See, e.g.*, Maxwell, *supra* note 74, at 24–25 (“[T]he U.S. is willing to intentionally violate the principle of distinction (its use of CIA paramilitary operatives in military operations), yet concurrently, complain bitterly when another state violates this same principle . . . . [T]he presumption of status for many civilians accompanying U.S. forces under international law might be negated, if not reversed, by the intentional violation by the U.S. of the principle of distinction.”).

259. Holder’s Address, *supra* note 229.

260. *Id.*

One of the defining and most beneficial aspects of modern democracies is their state monopoly on the use of lethal force. Generally speaking, the United States, like other industrialized democracies, limits the official, sanctioned use of deadly force to the judicial system, law enforcement, and the military. This state monopoly on the use of lethal force does not eliminate murder, but murder is investigated and punished and there does not exist widespread use of vigilante justice or extra-judicial killings. The United States does not rely on tribal justice or gang warfare to mete out justice or control the population. Because of this feature of our democracy, we can employ lethal force in ways and at times of our choosing, all according to the rule of law.

Accordingly, to more fully and perfectly respect the LOAC built up over the past 150 years, the United States should insist that in the “war” on terror, where the use of deadly force is concerned, uniformed service members should apply the force. While some may label this as overly idealistic, idealism is precisely the point. The rule of law, and in particular, the LOAC, is all about ideals. These ideals, and especially the ideal of distinguishing between combatants and civilians, have dramatically reduced the suffering and carnage imposed on civilian populations over the last 150 years. War is still horrific and inevitably leads to death, but limiting the application of this force by and against combatants helps to minimize the carnage and make war arguably more humane.

*We now return to the opening hypothetical . . .* Applying Professor Corn’s functional discretion test, the UAV technician would not exercise discretion that implicates LOAC principles, nor would the MWR employee. However, the intelligence analyst that provides targeting advice to the commander, even if through a military member, may in fact be making decisions that directly implicate the LOAC principles of distinction and proportionality. Therefore, the intelligence analyst is taking a DPH. Similarly, if the drone strike is a CIA operation, the CIA officers would certainly be exercising discretionary functions that directly implicate the LOAC. Additionally, if the enemy were to apply a MCA-type legal regime to U.S. civilian actions, then the CIA officers, the UAV technical support contractor, and the intelligence analyst would likely all be guilty of taking a direct part in the killing of either a protected person or a privileged combatant, all while acting as an unprivileged belligerent.

By changing how it employs civilians in the War on Terror, the United States can continue to comply with and remain a leading champion of the LOAC, while at the same time maintain a more consistent approach to civilian participation in war, regardless of whose side they are on. As a world leader, we owe nothing less.